
Deposing & Examining Employment Witnesses

Tod F. Schleier



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About the Author

Tod F. Schleier is a partner in the law firm of Schleier Law Offices, P.C. (www.schleierlaw.com) in Phoenix, Arizona. He has practiced as a plaintiff's employment lawyer for thirty-five years.

Mr. Schleier graduated from Brown University, *magna cum laude*, Phi Beta Kappa and with honors in 1973, with a B.A. in Political Science and Religion. He then graduated from Arizona State University Law School in 1976 and was a member of the Arizona State University Law Journal.

Mr. Schleier has litigated virtually every type of employment case against private employers and public entities in the state and federal courts of Arizona. He has handled: wrongful discharge, whistleblowing and statutory retaliation claims; Title VII claims for sexual, racial, and ethnic harassment and constructive discharge; gender, religion, age and disability discrimination claims; First Amendment free speech and due process claims; and disputes concerning non-competition covenants, trade secrets, wages and executive employment contracts. Mr. Schleier has fifteen years' experience as a mediator and arbitrator in employment disputes and is listed on the American Arbitration Association's mediator/arbitrator panels.

Mr. Schleier obtained one of the largest employment jury verdicts in Arizona on a sexual harassment claim, in December 1991, for \$2,385,000, in *Schallock v. Heinze et. al*, which was televised on Court TV. He handled the landmark case of *State of Arizona v. Schallock*, 189 Ariz. 250, 941 P.2d 1275 (1997), which established legal principles for vicarious liability of employers in sexual harassment and employment cases. In May 1999, Mr. Schleier obtained a jury verdict against Best Western International, Inc. in a whistleblower claim, for \$1,750,000; the verdict was upheld in *Murcott v. Best Western International*, 198 Ariz. 349, 9 P.3d 1088 (App.2000), which clarified legal principles for whistleblowing in Arizona.

Best Lawyers, the oldest and most respected peer review publication in the legal profession, has named Mr. Schleier as the "Phoenix *Best Lawyers* Employment Law—Individuals, Lawyer of the Year" for 2012. Mr. Schleier was also named "Phoenix *Best Lawyers*' Labor and Employment Lawyer of the Year" for 2010 by *Best Lawyers in America*, has been recognized by Chambers as one of the top employment lawyers in Arizona, has an AV rating in *Martindale Hubbell*, and was ranked as one of Arizona's Top 50 Super Lawyers in 2009. In 2001, he was inducted as a Fellow in The College of Labor and Employment Lawyers for his career-long achievements as an employment lawyer.

Mr. Schleier is a frequent presenter at seminars and conferences on topics of wrongful discharge, sexual harassment, and retaliation claims to public entities, human resources organizations, bar associations (including the American Bar Association Mid-Winter Employment and Civil Rights Conference 2002) for the past fifteen years. He is a member of several labor and employment law organizations including the National Employment Lawyers Association and the Arizona Employment Lawyers Association. Mr. Schleier has been licensed to practice in all Arizona state and federal courts since 1976, as well as the Ninth Circuit Court of Appeals and the United States Supreme Court. He was the first Chairman of the State Bar of Arizona Sub-Committee for Employment Law Jury Instructions.

He lives in Phoenix with his wife Lisa and two dogs, and is an avid sports fan and marine aquarium hobbyist.



Dedication

Franz Kafka wrote that writing is utter solitude, the descent into the cold abyss of oneself. In my case, however, during my descent I had several guiding lights to show me the path. My late parents, Stanley and Lila, taught me the value of hard work, education, perseverance, and a job well done. My late sister, Madeleine, taught me about human courage while she valiantly faced insurmountable obstacles during her two battles with breast cancer. Brad, my brother and law partner, provided constant encouragement, and his wit ensured that I did not take myself too seriously during the task. Finally, Lisa, my best friend, wife and soul mate for now 35 years, encouraged me to write this book, sacrificed countless weekends while I toiled away and shared her extraordinary intellect, perspective, sense of humor and love each day during this journey. So although Kafka was correct about writing being solitude, I have been blessed because during this descent I have never been truly alone.

Acknowledgments

My first acknowledgment is to my editor, Lisa Dunne, who first suggested that I write this book and who provided superb editing, encouragement, positive reinforcement, and constructive criticism during the past two years. Her contribution was incalculable. This book's Editorial Advisory Board deserves the next acknowledgment—their contributed time and accumulated knowledge of employment law from the employee and management sides provided excellent perspective and suggestions for each chapter.

Looking back at thirty years of practice, it would be impossible to acknowledge each of my colleagues and peers who have provided insight, feedback and perspective on what makes a successful trial attorney, but a few deserve specific mention. Ronald Rubin, Melvin Sternberg and Sheldon Sternberg took a chance and hired me to work at their law firm when I was just a first year law student in 1974. Ron Rubin was my first mentor and taught me the invaluable lesson that a trial lawyer cannot over-prepare—a lesson I meticulously practice to this day. Melvin and Sheldon Sternberg taught me the practical and business side of practicing law, which unfortunately is not taught in law school. The unselfish tutelage and guidance these attorneys gave in my formative years provided priceless insights into what it is to be a trial lawyer.

I have learned much from the following plaintiff and management-side attorneys over the years, sometimes the hard way: Hon. Lawrence Anderson, Charles Chester, Richard Cohen, Amy Gittler, David Gomez, Douglas Grimwood, William Hayden, Kelly Hocker, James Jellison, Lawrence Katz, Amy Langerman, Kraig Marton and Bradley Schleier.

And I thank my paralegals of two decades, Cindy J. Anderson and Mary H. Portillo. Finally, I want to acknowledge my clients, especially Colleen Schallock who had the courage to do the right thing.

Preface

“The only real lawyers are trial lawyers, and trial lawyers try cases to juries.” Clarence Darrow

I tell my clients that trying cases to a jury is very similar to rolling the dice at a Las Vegas craps table. In Vegas, blind chance determines whether you or the house wins. In the courtroom, six or eight total strangers determine which side wins. In both cases, certainty of outcome is never guaranteed.

The pages that follow contain the lessons, knowledge and experience I have acquired over thirty years of being a trial lawyer. Some of the lessons were learned from cases I was certain I would win, but lost, and cases I should have lost, but won. The lessons, techniques and random ruminations come from decades of learning in the School of Hard Knocks.

This book is designed to be a practical day-to-day resource for employment litigation and trial strategy. I am proud to be a plaintiff’s employment lawyer; the book, however, attempts to provide practical suggestions for both the plaintiff and management side. Although the pages that follow are black and white, the techniques clearly are not. They are suggestions and ideas which each practitioner can think about, experiment with, accept or reject. Trying cases is an art, not a science.

August 2007

Tod F. Schleier

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- §3:108 Procedure; Burdens of Proof
- §3:109 Case Examples: “Unique Personal Knowledge”
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- §3:110 Guiding Principles: Primacy, Recency
- §3:111 Call Employer’s Key Witnesses in Plaintiff’s Case-in-Chief

B. Plaintiff’s Supervisor**1. Cross-Examination**

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- §3:115 Model Cross-Examination
 - §3:115.1 Establish Basic Facts; Set Scene
 - §3:115.2 Establish Employer’s Stated Reason for Termination
 - §3:115.3 No Reasonable Business Justification for Elimination of Plaintiff’s Position
 - §3:115.4 After Plaintiff’s Position Was “Eliminated,” Employer Offered Plaintiff’s Position to Younger (Former) Employee
 - §3:115.5 Supervisor Made Derogatory Age-Related Statements
 - §3:115.6 Plaintiff’s Performance Record Did Not Justify Termination
 - §3:115.7 Supervisor Felt Personal Animosity Toward Plaintiff
 - §3:115.8 Supervisor Has History of Terminating Employees
 - §3:115.9 Supervisor Made Numerous Age-Related Derogatory Remarks and Engaged in Pattern of Firing Older (Over Age 40) Employees

2. Direct Examination

- §3:116 Strategy
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C. Plaintiff’s Co-Employee**1. Cross-Examination**

- §3:120 Key Facts
- §3:121 Strategy
- §3:122 Angles of Attack
- §3:123 Model Cross-Examination
 - §3:123.1 Introduce Witness; Establish Relationship to Parties
 - §3:123.2 Employer’s Actions Undermine Stated Business Justification for Adverse Action
 - §3:123.3 Plaintiff Suffered Consequences of Supervisor’s Actions
 - §3:123.4 Supervisor Made Derogatory Age-Related Comments and Fired Numerous Older Employees
 - §3:123.5 Decision to Eliminate Plaintiff’s Position Defied Common Sense
 - §3:123.6 Supervisor Offered Plaintiff’s “Eliminated” Position to a Younger Individual
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	§3:133.3	H.R. Conducted Inadequate Investigation
	§3:133.4	Supervisor Smith Gave False Information to H.R.
	§3:133.5	H.R. Did Not Fully Investigate Whether Other Individuals Were Offered Plaintiff's Former Position
	§3:133.6	No Independent Investigation of Alleged Financial Problems at Phoenix Branch
	§3:133.7	Company Documents Directly Contradict Employer's Alleged Business Justification for Plaintiff's Termination
	§3:133.8	Employer Changed Its Official Position After EEOC Indicated "Cause" Finding Was Forthcoming
	§3:133.9	Plaintiff's Position Was Not Eliminated When He Was Terminated
	§3:133.10	H.R. Was Aware of Troubled Relationship Between Plaintiff and Supervisor Who Fired Plaintiff
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- §3:150 Plaintiff's Supervisor
- §3:151 Employer's H.R. Director
- §3:152 Plaintiff's Co-Worker
- §3:153 Plaintiff's Friends, Family, Neighbors

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- 3-A Trial Memorandum—Defendant's Use of Leading Questions of Defendant's Witnesses in Plaintiff's Case-in-Chief
- 3-B Plaintiff's Response to Defendant's Motion in Limine to Exclude Anecdotal Evidence of Other Firings
- 3-C Voir Dire in Age Discrimination Case
- 3-D Response to Motion for Summary Judgment in ADA Case
- 3-E Sample Letters for Preservation of Electronically Stored Information
- 3-F Motion for Default or Partial Summary Judgment and Sanctions for XYZ's Willful Destruction of Evidence
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- 3-1 EEOC Guidance: Questions to Ask as Part of Employer's Prompt Investigation
- 3-2 Enforcement Guidance: Effective Policy Against Sexual Harassment

Chapter 4 Deposing & Examining the Human Resources Expert**I. Basic Principles****A. Court Rulings Varied and Unpredictable**

- §4:01 Different Standards, Approaches to Admissibility
- §4:02 Early Recognition of H.R. Expert Testimony in *Crenshaw* Case
- §4:03 Survey: Cases Allowing H.R. Expert Testimony
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B. Sexual Harassment Cases

- §4:06 To Prove *Ellerth/Faragher* Affirmative Defense
- §4:07 Decisions Limiting Expert's Testimony
- §4:08 In Practice: Is Expert Testimony Required?

C. Gender Stereotyping

- §4:09 Governing Law
- §4:10 Cases Admitting Expert Testimony
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D. Disability Discrimination

- §4:12 Discrimination in Hiring – Direct and Cross-Examination at Trial

II. *Daubert* Provides Analytical Framework for Expert Testimony**A. Governing Principles**

- §4:13 Trial Courts as Gatekeepers
- §4:14 *Daubert* Analysis Applies to All Expert Testimony
- §4:15 Trial Court Has Wide Discretion to Admit or Exclude Expert Testimony

B. Applying *Daubert*: Attacking and Defending H.R. Expert Testimony**1. Basic Points & Procedures**

- §4:16 Grounds for Challenge—Overview
- §4:17 When, How to Challenge Admissibility
- [§§4:18 – 4:19 Reserved]

2. **Is Expert Qualified?**
 - §4:20 Specialized Knowledge, Skill, Experience, Training or Education?
 - §4:21 In Practice: Qualifying an H.R. Expert
 - §4:22 In Practice: Challenging H.R. Expert's Qualifications
 - [§§4:23 – 4:24 Reserved]
3. **Does Testimony Address Matters Within Jurors' Knowledge**
 - a. **Grounds for Excluding H.R. Testimony**
 - §4:25 "Human Resources" Is Not Science
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 - b. **Arguments for Admitting H.R. Expert Testimony**
 - §4:30 Expert's Testimony Expands Jurors' Understanding
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 - §4:35 Jurors Place High Value on Expert Testimony
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 - [§§4:37 – 4:39 Reserved]

III. Deposition Outline

- A. **Questions Common to All Cases**
 - §4:40 Education, Background, H.R. Training
 - §4:41 Past Employment
 - §4:42 Current Employment
 - §4:43 Publications
 - §4:44 Experience as Expert Witness
 - §4:45 Retention in This Case
 - §4:46 Nature of Assignment in This Case
 - §4:47 Expert's Opinions
 - §4:48 Wrap Up
- B. **Sexual Harassment and Stereotyping**
 - §4:49 Sexual Harassment
 - §4:50 Sexual Stereotyping
- C. **Failure to Promote and Gender Stereotyping**
 - §4:51 Overview
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 - [§§4:53 – 4:54 Reserved]

IV. Trial Examinations

- A. **Direct Examination—Sex Harassment Case**
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 - §4:56 Strategy
 - §4:57 Checklist
 - §4:58 Model Direct Examination
 - §4:58.1 Establish Expert's Credentials
 - §4:58.2 Establish Scope of Assignment and Documents Reviewed

- §4:58.3 Educate Jury as to Purpose and Benefits of Written Policy
 - §4:58.4 Bolster Credibility by Praising Employer's Written Anti-Harassment Policies
 - §4:58.5 Explain Key Components of Proper Sexual Harassment Investigation
 - §4:58.6 Expert's Opinion: Employer Did Not Conduct Reasonable Investigation
 - §4:58.7 Expert's Opinion: Poor Investigation Lead Employer to Wrong Conclusion re: Harassment
 - §4:58.8 Undermine *Ellerth/Faragher* Defense
- [§4:59 Reserved]

B. Cross-Examination—Sex Harassment Case

- §4:60 Key Facts
 - §4:61 Strategy
 - §4:62 Angles of Attack
 - §4:63 Model Cross-Examination
 - §4:63.1 Cast Doubt on Expert's Credentials
 - §4:63.2 Challenge Source of Expert's Information
 - §4:63.3 Challenge Opinion as Based on Incomplete Information
 - §4:63.4 Expert Did Not Write First Draft of His Report
 - §4:63.5 Expert Did Not Keep Complete Record of His Work
 - §4:63.6 Point Out Errors in Expert's Report
 - §4:63.7 Obtain Concessions: Employer's Investigation Meets All Criteria Expert Established for a "Reasonable" Investigation
 - §4:63.8 Expert's Other Criticisms of Investigation Not Valid
 - §4:63.9 Failure to Explore Alleged Harasser's Conduct at Prior Employer Not Fatal to Investigation
 - §4:63.10 Expert Ignored Evidence and Boxed Himself in With "Limited" Assignment
 - §4:63.11 Obtain Concession: Underlying Facts May Not Rise to Level of Sexual Harassment
 - §4:63.12 Obtain Concession: Alleged Harassment May Not Have Been Unwelcome or Offensive Conduct to Plaintiff
 - §4:63.13 Repeat Favorable Testimony From Direct: Employer Had Exceptional Anti-Harassment Policy
 - §4:63.14 Human Resources Is a "Soft" Science
- [§4:64 Reserved]

V. Summary Checklist

- §4:65 Summary Checklist—Human Resources Expert

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- 4-A Motion to Exclude Human Resources Expert Testimony at Summary Judgment
- 4-B Response to Motion to Exclude Human Resources Expert Testimony at Summary Judgment
- 4-C Reply to Response to Motion to Exclude Human Resources Expert Testimony at Summary Judgment
- 4-D Motion *in Limine* to Disqualify Expert Witnesses in ADA Failure to Hire Case (Diabetes) Based on Lack of Experience and Scientific Knowledge

Chapter 5 Deposing & Examining the Mental Health Expert

I. Governing Principles

A. Compensatory Damages Available Under Statute

- §5:01 Civil Rights Act of 1991
- §5:02 Damages Caps

	§5:03	Evidence of Damages vs. Proof of Liability
B.	Proving Emotional Distress Damages	
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C.	Proving Compensatory Damages	
	§5:06	Is Expert Testimony Necessary?
	§5:07	Plaintiff's Testimony as Sole Proof of Distress
	§5:08	In Practice: Should Your Plaintiff Testify?
	§5:09	Better Option: Friends, Family Testify
D.	Treating, Consulting Psychologists as Experts	
	§5:10	Select Your Expert Early in Case
	§5:11	Advantages
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E.	Rule 35 Examination	
	§5:13	"In Controversy" Requirement
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II.	Understanding Psychological Tests	
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	§5:21	How Does It Work?
	§5:22	Limitations of DSM in Litigation
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B.	Minnesota Multiphasic Personality Inventory (MMPI)	
	§5:25	Early Development
	§5:26	Format, Administration, Analysis of Test
	§5:27	Criticisms; Grounds for Cross-Examination
	§5:28	The MMPI-2-Restructured Form (MMPI-2-RF)
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C.	Millon Clinical Multiaxial Inventory (MCMI)	
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D.	Personality Assessment Inventory (PAI)	
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	§5:42	Retention of Expert and Bias
	§5:43	Expert's Work on Case
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- §5:46 Pre-Existing Conditions
- §5:47 Malingering
- §5:48 Post-Traumatic Stress Disorder
- §5:49 Patient-Therapist Relationship
- §5:50 Therapeutic Bias
- §5:51 Complete Report
- [§§5:52 – 5:54 Reserved]

IV. Mental Health Experts at Trial

A. Direct Trial Examination of Treating Psychologist

- §5:55 Key Facts
- §5:56 Strategy
- §5:57 Checklist
- §5:58 Model Direct Examination
 - §5:58.1 Establish Treating Doctor's Credentials
 - §5:58.2 Plaintiff Was Referred by a Doctor, for Medical Reasons
 - §5:58.3 Doctor Has Spent Significant Time Treating Plaintiff
 - §5:58.4 Doctor Took Detailed History From Plaintiff
 - §5:58.5 Diagnosis Is Based Upon DSM-IV Criteria
 - §5:58.6 Expert Can Identify Facts Supporting Each DSM-IV Criterion for PTSD in Plaintiff
 - §5:58.7 Expert's Opinion: Plaintiff Suffers From PTSD Caused by Sexual Assault
 - §5:58.8 Expert's Opinion: Plaintiff Suffers From Rape Trauma Syndrome ("RTS")
 - §5:58.9 Expert's Opinion: RTS Resulted in Delayed Reporting of Assault and Filing of Suit
 - §5:58.10 Defendant's Conduct Caused Permanent Injury
 - §5:58.11 Establish Floor for Damages

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B. Cross-Examination of Defense Psychologist

- §5:60 Key Facts
- §5:61 Strategy
- §5:62 Angles of Attack
- §5:63 Pattern Cross-Examination
 - §5:63.1 Expert's Credentials Pale in Comparison to Plaintiff's Expert's
 - §5:63.2 Expert Is a "Hired Gun" Who Spent a Few Hours With Plaintiff, Solely for Purpose of Litigation
 - §5:63.3 Expert's Diagnosis Is Not Incompatible With Plaintiff's Expert's Diagnosis
 - §5:63.4 Plaintiff's Expert's Diagnosis Is Reliable
 - §5:63.5 Plaintiff Was Open, Honest and Cooperative During Meeting With Defense Expert
 - §5:63.6 Plaintiff's Workplace Environment Was Sexually Hostile
 - §5:63.7 Challenge Expert's Testing Methods (MMPI) and Resulting Diagnosis
 - §5:63.8 Challenge Expert's Diagnosis With His Own Test Results (Millon Test)
 - §5:63.9 Scholarly Articles on Which Expert Relied Support Plaintiff's Theory of Case
 - §5:63.10 Expert Believes Plaintiff's Version of the Facts; Concedes Plaintiff Not Malingering

[§5:64 Reserved]

V. Summary Checklist: Cross-Examination Mental Health Expert

§5:65 Summary Checklist

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- 5-A Opposition to Defendant's Rule 35 Motion and Psychological Testing
- 5-B Motion for Protective Order
- 5-C Defendant's Memorandum of Law in Opposition to Motion in Limine to Exclude MMPI-2 Results and Testimony
- 5-D Defendant's Motion to Compel Plaintiffs' Attendance at a Physical Examination by Defendant's Medical Expert Without the Presence of her Attorney, and Without the Examination Being Audiotaped or Recorded in Any Way
- 5-E Proposed Protective Order
- 5-F Joint Stipulation for Entry of Protective Order

Chapter 6 Deposing & Examining the Expert Economist

I. Economic Damages Available Under Federal Discrimination Statutes

A. Overview

- §6:01 Title VII & ADA Cases
- §6:02 ADEA Cases
- §6:03 Civil Rights Cases [§§1981, 1983]
- [§6:04 Reserved]

B. Back Pay

1. Back Pay Basics

- §6:05 "Make Whole" Remedy
- §6:06 Computation Basics
- §6:07 Recovery Period
- §6:08 Components of Back Pay
- §6:09 Prejudgment Interest

2. Mitigation of Damages

- §6:10 Plaintiff Must Seek Substantially Equivalent Employment
- §6:11 Burden of Proof on Defendant

3. Terminating Back Pay Period

- §6:12 Basic Principles
- §6:13 Refusal of Unconditional Offer of Reinstatement
- §6:14 After-Acquired Evidence
- §6:15 Employer-Caused Disability: Damages Cutoff?
- [§§6:16 – 6:19 Reserved]

C. Front Pay

1. Basic Principles

- §6:20 Make-Whole Remedy
- §6:21 Alternative to Reinstatement
- §6:22 Court or Jury Issue?
- §6:23 Length of Award; Speculative Damages
- §6:24 Factors Considered in Awarding Front Pay
- §6:25 Hybrid Awards

2. Limits

- §6:26 Mitigation Required
- §6:27 Do Damages Caps Apply?

-
- 3. **Discounting to Present Day Value**
 - §6:28 Goal: Basic Concepts
 - §6:29 Burden of Proof on Plaintiff
 - §6:30 Determining the Rate
 - [§§6:31 – 6:34 Reserved]
 - D. **Offsets**
 - §6:35 Availability of Offsets Rests With Court's Discretion
 - §6:36 Application of Collateral Source Rule
 - §6:37 Employer-Funded Benefits
 - E. **Adverse Tax Consequences**
 - §6:38 Basic Principles
 - §6:39 Cases Supporting "Gross Up"
 - §6:40 Cases Refusing to Allow "Gross Up"
 - §6:41 Compare: Attorneys' Fees
 - §6:42 In Practice: Support Request for Gross Up With Expert Testimony
 - [§§6:43 – 6:49 Reserved]
- II. Use of Experts to Prove Economic Losses**
- A. **By the Plaintiff**
 - §6:50 Why Hire an Expert?
 - §6:51 When to Hire
 - B. **By the Defense**
 - §6:52 Why Hire an Expert?
 - §6:53 When to Hire
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- III. Deposing the Expert Economist**
- A. **Goals**
 - §6:55 Cast Doubt
 - §6:56 Determine & Attack Underlying Assumptions
 - B. **Deposition Checklist – All Cases**
 - §6:57 Background Information
 - §6:58 Document Retention Policy
 - §6:59 Experience as Expert Witness; Bias
 - §6:60 Retention in This Case
 - §6:61 Assignment and Assumptions
 - §6:62 "Present Value"
 - §6:63 Mitigation of Damages
 - §6:64 Wage Growth
 - §6:65 Fringe Benefits
 - §6:66 Discount Rate [Interest Rate]
 - §6:67 Work-Life Expectancy
 - §6:68 Compare Experts' Reports and Conclusions
 - §6:69 Completed Work
 - C. **Deposition Checklist – Misappropriation of Trade Secret Case**
 - §6:70 Qualifications and Experience
 - §6:71 Assignment and Information Relied Upon
 - §6:72 Attack Causation
 - §6:73 Attack Assumptions and Conclusions
 - [§6:74 Reserved]

IV. Expert Economist at Trial**A. Direct Trial Examination of Plaintiff's Expert Economist**

- §6:75 Key Facts
- §6:76 Strategy
- §6:77 Checklist
- §6:78 Model Direct Examination
 - §6:78.1 Witness Is Qualified to Testify as an Expert in Economic Damages
 - §6:78.2 Expert Used Standard Methodology to Calculate Lost Earnings
 - §6:78.3 Calculation of "but for" Earnings: Step One—Determine Historic Earnings
 - §6:78.4 Step Two: Determine Growth Rate
 - §6:78.5 Step Three: Determine Projected Earnings Total Over One Million Dollars
 - §6:78.6 Plaintiff's "but for" Earnings Total Over One Million Dollars
 - §6:78.7 Determine Actual Earnings and Lost Earnings
 - §6:78.8 Lost Earnings Must Be Discounted to Present Value
 - §6:78.9 Expert Calculated "Lost Stock" Damages
 - §6:78.10 Final Damages Analysis Includes Value of Lost Wages and Lost Stock
- [§6:79 Reserved]

B. Cross-Examination of Plaintiff's Economic Expert

- §6:80 Key Facts
- §6:81 Strategy
- §6:82 Angles of Attack
- §6:83 Model Cross-Examination
 - §6:83.1 Expert Is a Hired Gun Who Has Testified Repeatedly for Employees Represented by Plaintiff's Counsel
 - §6:83.2 Expert Conducted No Independent Research to Support His Opinions
 - §6:83.3 Witness Is Not an Expert on Liability
 - §6:83.4 "But for" Earnings Calculation Includes More Than Just Wages
 - §6:83.5 Plaintiff Earns More in Salary at His New Job Than He Did at ABC, Inc.
 - §6:83.6 Expert Failed to Quantify Benefits Provided by Dr. Jones' New Employment
 - §6:83.7 Expert Did Not Calculate Cost of Dr. Jones' Commute to ABC, Inc.
 - §6:83.8 Expert Does Not Know What Benefits Dr. Jones's New Employer Provides
 - §6:83.9 Expert Used Two Different Retirement Dates, Resulting in Higher Estimated Damages
 - §6:83.10 Expert Did Not Consider Alternative Work-Life Scenarios

V. Summary Checklist

- §6:84 Summary Checklist – Expert Economist

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- 6-A Memorandum of Law re Negative Tax Consequences of Damages Award
- 6-B Response to Motion for Protective Order From ABC's Subpoena to Plaintiff's Current and Former Employers
- 6-C Motion in Limine Concerning Indemnification Among Defendants and Potential Recovery of Attorneys' Fees
- 6-D Motion in Limine Concerning Preclusion of Collateral Source Benefits Evidence
- 6-E Motion for Partial Summary Judgment re Mitigation of Damages Defense
- 6-F Response to Motion to Strike Expert Witness

Chapter 7 Deposing & Examining the Expert Statistician**I. Statistical Evidence in Discrimination Litigation**

- §7:01 To Prove Disparate Impact
- §7:02 To Prove Disparate Treatment
- [§§7:03 – 7:04 Reserved]

II. Survey of Supreme Court Decisions

- §7:05 Basic Statistical Methodology Condoned—*Castaneda*
- §7:06 Standard Deviation Analysis Applied in *Hazelwood*
- §7:07 Use of Statistics to Establish or Defeat Liability: *Teamsters*
- §7:08 Appropriate Comparison Pool—*Wards Cove*
- §7:09 Reliable Methodology—*Daubert*
- [§7:10 Reserved]

III. Basic Statistical Concepts as Applied by Courts**A. Multiple Regression Analysis**

- §7:11 Basic Principles
- §7:12 *Bazemore*: Analysis Need Not Consider Every Variable
- §7:13 Omission of Major Factors May Render Analysis Inadmissible
- §7:14 Application in Disparate Treatment Cases
- [§7:15 Reserved]

B. Statistical Significance

- §7:16 Basic Principles
- §7:17 “.05 Level” of Statistical Significance
- §7:18 Standard Deviation
- [§7:19 Reserved]

C. Sample Size, Aggregation, Disaggregation

- §7:20 Sample Size
- §7:21 Basic Principles of Aggregation, Disaggregation
- §7:22 When Aggregated Data Is More Probative
- §7:23 Reduction-in-Force Cases
- [§7:24 Reserved]

IV. In Practice: Working With Expert Statistician

- §7:25 Retain Expert Statistician Early
- §7:26 Identify Discriminatory Employment Practice
- §7:27 Determine Proper Sample Size
- §7:28 To Help Formulate Discovery Requests
- §7:29 During Trial
- [§§7:30 – 7:34 Reserved]

V. Deposition Checklist

- §7:35 Background Information
- §7:36 Publication History
- §7:37 Experience as Expert Witness
- §7:38 Retention of Expert and Bias
- §7:39 Sources of Information on This Case
- §7:40 Scope of Assignment
- §7:41 Methodology
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§7:43	“Statistical Significance”
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