DOAR

Implications for Litigating Employment Cases in a #MeToo World

A STUDY BY THE DOAR RESEARCH CENTER

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Introduction

The #MeToo movement emerged during a profound time of social crisis.

In the fall of 2017, a series of tweets and other social media posts using the hashtag #MeToo "went viral," launching an unprecedented, grassroots outpouring against sexual misconduct from women worldwide. Victims of rape, sexual assault, child abuse, human trafficking, workplace gender discrimination, and sexual harassment gave voice to their experiences – many for the very first time – revealing not only the abuse they suffered but the systemic power imbalances in our society that enable and protect those in power. These posts ushered drastic changes into American workplaces and triggered an onslaught of litigation.

The #MeToo movement emerged during a profound time of social crisis. The professional demise of famous media moguls, television and radio personalities, financiers, athletes, and other not-so-famous businesspeople coincided with increasing polarization between political parties (particularly Trump supporters and those who oppose him). A rise in religious and racial hate crimes exposed other systemic biases. At dinner tables across America, the nation debated immigration policy, the criminal justice system's treatment of minorities, and the media's role in embittering our sociopolitical discourse.

Social inequality, intergroup differences, and disparate treatment may play a role in jurors' evaluations of discrimination and harassment claims.

As a firm specializing in expert witness, jury research, and trial consulting services for complex, high-profile civil and criminal matters, clients flooded DOAR with requests for assistance in all phases of discrimination and harassment litigation. DOAR's expert witnesses played an integral part in assisting counsel in developing discovery strategies, while its jury consultants pinpointed key themes for trial strategies. Concurrently, the DOAR Research Center studied jurors' attitudes toward the #MeToo movement and the likelihood that social inequality, intergroup differences, and disparate treatment may play a role in their evaluations of claims of discrimination and harassment during deliberations. Indeed, DOAR learned that the backdrop from which these sensitive cases emerge, and the national attention paid to hot-button issues, as well as personal life experiences, play a critical role in jurors' evaluation.

The Survey Research

In 2020, we explore attitudes toward discrimination and harassment and the #MeToo movement compared to perceptions from two years prior.

DOAR'S 2018 Survey

In 2018, DOAR undertook a study to identify what beliefs and experiences jurors were likely to bring to cases involving allegations of discrimination or harassment. We surveyed 1,000 registered voters from the New York and Los Angeles metropolitan areas. The survey, administered online, asked about demographics, personal experience with harassment and/ or discrimination, attitudes about immigration and the #MeToo movement, and, at the core of the survey, beliefs about the prevalence of harassment and discrimination in the American workplace.

The 2018 findings suggested that discrimination and harassment in the workplace were highly personal and relevant issues for the American juror. Fifty-seven percent of respondents either had personal experience with these issues or were close to someone who did; moreover, these experiences were associated with stronger beliefs that discrimination and harassment are common in the American workplace. Further, some groups were more sensitized to discrimination and harassment than others. For example, women tended to think these experiences were both more common and more underreported than men. Younger people believed harassment was more widespread than older people, and Democrats and Republicans differed dramatically, with the former seeing all forms of discrimination and harassment as more common than the latter.

Two years later, the national debate about these issues has not died down. The first survey was administered in the shadow of Bill Cosby's trial for sexual assault, and the second survey was carried out against the backdrop of the Harvey Weinstein trial, also for sexual assault. The present study explores where the American public is two years after the first survey with respect to perceptions of discrimination and harassment and the #MeToo movement that set the context for so much of our national debate.

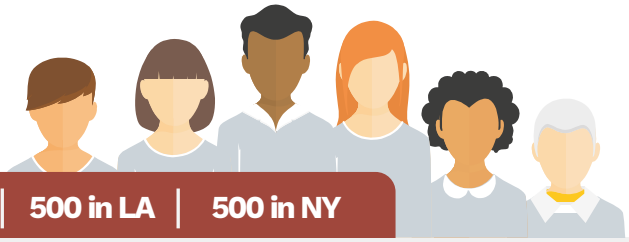
DOAR's 2020 Survey

The survey was administered in January 2020 to a sample of registered voters from the New York and Los Angeles metropolitan areas.[1] The sample was obtained through a survey panel house, and the survey was completed online. It included questions about demographics, experience with harassment and discrimination at work, political affiliation, and beliefs about the prevalence of discrimination and harassment based on race, gender, and age, as well as employee reporting of these experiences and employer responses.

Most of the survey questions replicated the 2018 survey, including key questions about prevalence, "How common do you think each of these forms of discrimination/harassment is?" and reporting rates, "What percent of those who experience this report it?" In the 2020 survey, we added questions to obtain, as well, more objective estimates of prevalence. For each form of discrimination and harassment, we asked respondents, "What percent of Americans *do you think have experienced workplace discrimination/ harassment based on [race, gender, age]*?" This question allowed for more precise analyses of varying prevalence rates among respondents.

Finally, the survey measured attitudes about the #MeToo movement.

[1]The N.Y. area included the five counties of New York City as well as Nassau, Rockland, Suffolk, and Westchester Counties. The L.A. area included Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura Counties.



The Participants: 18-99 | 500 in LA | 500 in NY

The Sample

Of the 1,000 people surveyed (half from the L.A. metro area and half from the N.Y. metro area), respondents were evenly split by gender, by whether they were 45 and under or over 45, and by whether or not they were college graduates. They ranged in age from 18 to 99, with a mean age of 47 (Standard Deviation = 17.20) and a median age of 45. Sixty-two percent of the sample identified as White, 13% as Black, 12% as Asian, and 13% as Mixed or Other. In a separate question, 22% reported they were of Hispanic origin. The vast majority (88%) had been born in the US.

Most participants had workplace experience: 51% were employed fulltime, 12% worked part-time, and 19% were retired. The rest were unemployed (7%), students (4%), homemakers/ stay-at-home parents (4%) or disabled (3%).

Of the 868 with workplace experience, 43% held a management position/supervised other staff at the time of the survey, and 31% more said they had done so in the past. Just under a quarter of respondents (23%) were members of a labor union.

Finally, 46% of the sample reported self-identified as Democrats, 26% as Republicans, 21% as Independents, and the remaining 7% affiliated with another party or had no party affiliation.

Key Findings

Fifty-one percent of respondents had personally experienced harassment and discrimination at work, and an additional 10% had no personal experience but were close to someone who did.

Discrimination and Harassment Remain Highly Relevant To The American Public

Voir dire in employment cases often includes questions about personal experiences with discrimination and/or harassment; yet, concerns remain about the quality of the information obtained. Are jurors always willing to be forthcoming? If the Court is doing the questioning, are the questions phrased to include the broadest range of experiences, and to induce jurors to self-disclose?

Recent studies suggest that if jurors do self-disclose discrimination and harassment, they will have a lot to say. A Pew study of over 6,000 adults conducted in 2018 found that 59% of women had experienced unwanted sexual advances or sexual harassment, and 69% of these women reported experiencing this at their workplaces – a figure that translates to about 42% of all women surveyed. A study by the US Equal Employment and Opportunity Commission ("EEOC") concluded that "anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace." (The lower end of the range reflects a random sample of women responding to a question about "sexual harassment" without the term being defined in the question; the higher end reflects a convenience sample responding to questions about specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion.)

In a large-scale 2016 Gallup poll, 20% of Black respondents reported being treated unfairly at work because of their race. An AARP study in 2012 revealed that 26% of older workers reported experiencing age discrimination, and 56% of older workers looking for a job reported the same.

DOAR study's results are consistent with these findings. Discrimination and harassment were personal issues for the majority of respondents. Fifty-one percent had personally experienced them at work, and an additional 10% had no personal experience, but were close to someone who did. We consider these respondents to have "vicarious experience." These figures represent a shift from the 2018 results where 37% reported personal experience, and an additional 20% reported only vicarious experience. It is impossible to tell whether this reflects an actual increase in the prevalence of unequal treatment or a greater willingness by respondents to label and report their experiences as such. In either case, though, the 2020 respondents' experiences hit even closer to home than we saw in 2018.

Our finding that a sample diverse in gender, race, age and education reports such a high level of personal experience has clear implications for *voir dire*: If counsel questions 16 people in a jury box – and especially if you have a demographically diverse group– a number of prospective jurors will have personal histories of being harassed and/or discriminated against.

Just as importantly, other jurors will have experience on the flip side: For every employee who reports being treated unfairly, there is an employer, and sometimes a co-worker, accused of mistreatment. He or she may also be sitting in the jury box; in fact, 21% of our sample indicated they knew someone who had been accused of harassing or discriminating against an employee. This issue hits American jurors very personally on both sides of the equation.

51% PARTICIPANTS WHO PERSONALLY **EXPERIENCED** HARASSMENT AND DISCRIMINATION AT WORK

PARTICIPANTS WHO KNEW SOMEONE **ACCUSED** OF HARASSMENT OR DISCRIMINATION BY AN EMPLOYEE **21%**

Unsurprisingly perhaps, there was a notable gender divide in those who reported experiencing discrimination or harassment personally: Within the 868 people who were or had been in the workforce, 55% of women in the sample reported facing these experiences in their workplace compared to 46% of men.

We also asked the 438 respondents with personal experience of discrimination or harassment to indicate the basis for that treatment: race, gender, and/or age (with multiple responses permitted). As in the 2018 survey, respondents most frequently cited gender as the basis (54%) followed closely by race (52%) and then, in lower numbers, age (38%).

Self-reported victims of discrimination or harassment revealed diverse reactions to the experience and whether/how their employers handled it. Of those who experienced discrimination or harassment:

- 51% reported it to their employer
- Among those who reported, in 66% of cases, the employer conducted an investigation

- Among those who reported, 66% said that they experienced retaliation after reporting
- 57% were ultimately satisfied with how the situation was resolved

When we consider these respondents along with those whose loved ones experienced unequal treatment, the conclusion that we drew in 2018 remains true today: When U.S. citizens enter a jury box to hear a case about alleged discrimination and/or harassment, they carry with them a plethora of personal and vicarious experiences that may color their perceptions of the case at hand.

Respondent Estimates: At least 1 Of Every 3 Americans Experiences Each Form Of Workplace Bias

What percent of Americans do you think have experienced workplace discrimination/harassment based on [race, gender, age]?

DOAR asked respondents to estimate the prevalence of each of three types of discrimination, followed by three types of harassment: race, gender, and age. Respondents perceived race as the most frequent basis for both discrimination (prevalence estimate = 43%) and harassment (41%), followed closely by gender (40% for both behaviors). Age-based discrimination and harassment were seen as less common (34% and 32% respectively), though respondents still estimated on average that about a third of Americans experience them.

While only the 2020 survey asked for these estimated prevalence rates, in both 2018 and 2020, DOAR asked respondents to evaluate on a 5-point scale how common each form of discrimination and harassment was in the American workplace. For all six experiences, the 2020 respondents offered higher numbers than the 2018 respondents. Thus, perceptions of "commonality" rose for every form of both discrimination and harassment.

RESPONDENTS VIEW DISCRIMINATION AND HARASSMENT THROUGH GENDER-TINTED LENSES

Gender clearly shaded how respondents viewed the prevalence of unequal treatment in the workplace. For every type of discrimination and harassment, men offered significantly lower prevalence rates on average than women. The greatest discrepancies appeared, perhaps unsurprisingly, in estimates of gender-based discrimination and harassment: For both, men estimated that 36% of Americans experienced them while women estimated that 44% did.

Male and female estimates were least discrepant with regard to the prevalence of age-based harassment (men estimated at 29% and women at 34%). Even this difference, however, was statistically significant.

YOUNGER RESPONDENTS SAW HIGHER PREVALENCE OF SOME, BUT NOT ALL, FORMS OF UNEQUAL TREATMENT

Interesting relationships emerged between respondent age and perceptions of discrimination and harassment. For race-based and gender-

Demographics

There were clear demographic factors that made some individuals assume a greater prevalence of discrimination and harassment than others.

Gender

Women estimated a higher prevalence of all forms of discrimination and harassment than men. The gap was widest for gender-based discrimination and harassment.

Race

Non-Whites estimated a higher prevalence of both race- and gender-based discrimination and harassment than did Whites.

Age

Older respondents (those over 45) estimated a higher prevalence of age-based discrimination than their counterparts (those 45 and under).

The younger the respondent, the higher the estimated prevalence of all forms of discrimination as well as race- and gender-based harassment.

based discrimination, as well as race-based harassment, there was a clear pattern: the younger the respondent, the higher their prevalence estimates. For gender-based harassment, and both discrimination and harassment based on age, respondent age did not impact prevalence estimates (as measured by presumed percent of Americans who had these experiences).

We did see these patterns change, however, when we considered a second measure of prevalence: a subjective question of "how common" these experiences are on a 5-point scale ranging from Very Uncommon (1) to Very Common (5). DOAR included this question, again, to allow comparability to the 2018 findings. On these measures, we saw the same pattern that we saw in 2018: the younger the respondent, the higher the estimate of both race- and gender-based discrimination and harassment, as well as age-based discrimination.

Race Plays A Role In Prevalence Estimates And Intersects With Gender

In this survey, non-Whites gave higher estimates of the prevalence of both race- and gender-based discrimination and harassment than did Whites. The discrepancy was particularly pronounced for perceptions of unequal treatment based on race, with nine percentage points separating non-Whites and Whites (48% v. 39% for discrimination; 46% v. 37% for harassment).

When race and gender were considered together, the discrepancy in perceptions became even more striking. Consider, for example, prevalence estimates of race-based discrimination: White men had the lowest estimate at 36%, followed by White women at 42%, non-White men at 46%, and non-White women at 50%. Estimates of race-based harassment followed a similar trend.

Estimates of gender discrimination, on the other hand, reflected a different pattern. While non-White men estimated a higher prevalence than White men (40% v. 35%), White and non-White women offered the same mean estimate of 44%. Again, we saw the same trend with regard to gender-based harassment. We might speculate that the attention drawn to issues of gender inequality in the workplace in recent years has sensitized White and non-White women equally to these issues.

"If It Happened To Me, It Probably Happened To You:" The Availability Heuristic At Work

In ways large and small, our life experiences shape the way we make sense of – and form assumptions about – the world around us. Using a mental shortcut known as the "availability heuristic," we make judgments based on the information that comes to our minds most quickly. Typically, these are events or situations related to the issue at hand, and because they come first to mind, we judge them to be more frequent or likely than they may actually be. Thus, if we have had an experience ourselves, we will probably overestimate the likelihood that others have had it, too.

Consistent with this psychological phenomenon, the results of this study suggest that those whose lives have been touched by discrimination and/or harassment are more likely to believe that it happens to others as well. The 51% of the sample that personally encountered these experiences and the 10% who had vicarious experience (i.e., were close to someone who had the experience) consistently offered higher prevalence estimates of discrimination and harassment in their various forms than those with no personal connection to the issue.

East Coast, West Coast: No Big Differences

The New York and California samples were designed to be demographically comparable with regard to gender, age, ethnicity (defined broadly), and education. They also had roughly comparable rates of personal experience with discrimination/harassment, with 51 % of the Californians and 50% of New Yorkers reporting such experiences.

The comparable demographics and experience levels probably explain the largely similar prevalence estimates that we saw across the two geographic subsamples; at most, four percentage points separated the groups' prevalence estimates for the various types of discrimination and harassment. While California and New York laws may lead jurors

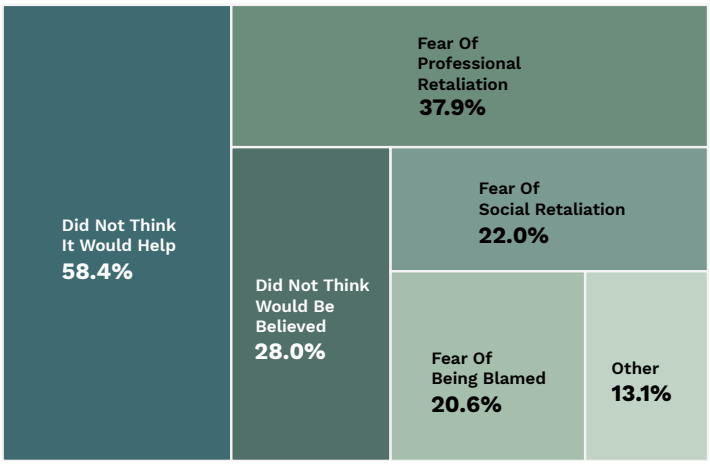
to different conclusions in employment cases, the underlying perspectives that they bring to the courtroom do not appear to differ dramatically.

Many Think Cases Are Underreported, And For Good Reason

Our data suggest that Americans see discrimination and harassment as a largely underreported problem. For each type of discrimination and harassment, DOAR asked respondents: "What percent of those who experience workplace [discrimination, harassment] based on [race, gender, age] do you think report it?" On average, respondents estimated reporting rates of 36% or lower.

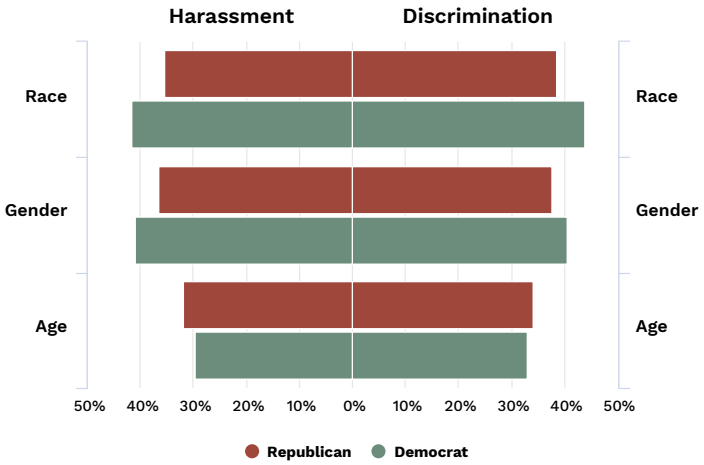
Responses to a separate question offered insight into the relatively low expected reporting rates: respondents did not have high expectations that employers would necessarily react to reports fairly or appropriately. When asked the likelihood that those who report victimization would experience some retaliation, 50% thought it was somewhat or very likely that this would happen. Only 17% thought it was somewhat or very unlikely. Similarly, less than half (45%) thought it likely that the company would conduct a thorough and appropriate investigation.

Some Did Not Report Unequal Treatment To Employer Because:



*Respondents were able to provide multiple reasons.

Low estimates of reporting rates undoubtedly reflect respondents' personal histories: Remember that two-thirds of those who reported their mistreatment indicated that they also experienced retaliation.



Additionally, those who did not report often cited fear of retaliation as a key reason for this decision to abstain.

The Role Of Political Affiliation And The #MeToo Movement

Several studies in recent years have suggested that political affiliation is the key driver of attitudes about sexual harassment today, more so than gender, age, or any other demographic. The present study explored this phenomenon and whether it extended to perceptions of other forms of discrimination and harassment. In fact, this appears to the case. Democrats offered significantly higher prevalence estimates than Republicans for both harassment and discrimination based on race, as well as for gender-based harassment.

Consistent with the last finding regarding harassment, Democrats and Republicans differed significantly in their reactions to a series of statements about the #MeToo movement; as we discuss shortly, attitudes about this movement also strongly correlated with beliefs about discrimination and harassment.

DOAR asked respondents to rate their views of the #MeToo movement on a scale from Very Negative (1) to Very Positive (5). Then, respondents indicated whether and how much they agreed or disagreed with several statements about the movement.

We explored the reactions of a range of subgroups to these statements and saw a dramatic divide between Democrats and Republicans. Democrats reported a significantly more positive view of the

#MeToo movement than Republicans and were considerably more likely than Republicans to agree that:

- The #MeToo movement has brought long-needed attention to the problem of sexual assault and harassment. (77% of Democrats v. 62% of Republicans agree)
- With the rise of the #MeToo movement and the celebrities who have been publicly called out, people are finally being held accountable for improper behavior. (72% of Democrats agree v. 61% of Republicans)
- Overall, the #MeToo movement has improved the working conditions of women. (51% of Democrats agree v. 41% of Republicans)

In contrast, Republicans were more likely than Democrats to agree that:

- The #MeToo movement has gone too far. (55% of Republicans agree v. 24% of Democrats)
- The #MeToo movement has become a witch hunt, and innocent men have been caught up in it and wrongly punished. (51% of Republicans agree v. 26% of Democrats)
- The #MeToo movement has made it harder for men to feel comfortable working one-on-one with a woman. (62% of Republicans agree v. 42% of Democrats)

Notably, the starkest differences between the parties emerged on the negative statements. Yet, members of both parties gave tepid responses to the statement suggesting that the #MeToo movement has improved the working conditions of women – even Democrats (with 51% agreement) could barely muster majority support for the statement. In a similar vein, over 40% of Democrats agreed with the idea that the movement has hurt men's ability to work comfortably in one-on-one settings with women.

Both of these statements may reflect something of a backlash to the #MeToo movement, a phenomenon seen in other research, as well. In multiple studies, a majority of Republicans, but a far smaller number of Democrats, endorsed the idea that the #MeToo movement has gone too far. More broadly, studies of employers and employment practices have revealed that concerns about potential #MeToo liabilities may influence hiring or promotion decisions in ways that hold women back. It appears that even supporters of the #MeToo movement see costs as well as benefits.

Gender And The #MeToo Movement

Like political affiliation, gender represented a dividing line on #MeToo attitudes. Women held significantly more positive views of the movement than men and were significantly more likely than men to agree with two of the three positive statements about it. In contrast, men were more likely than women to agree with all three negative statements.

In the same pattern that we saw with political party affiliation, the greatest differences between men and women emerged in response to the anti-#MeToo statements:

- The #MeToo movement has gone too far. (43% of men agree v. 26% of women)
- The #MeToo movement has become a witch hunt, and innocent men have been caught up in it and wrongly punished. (42% of men agree v. 26% of women)
- The #MeToo movement has made it harder for men to feel comfortable working one-on-one with a woman. (57% of men agree v. 37% of women)

When considering reactions to discrimination and harassment cases, attitudes toward the #MeToo movement are highly relevant; with few exceptions, attitudes strongly correlated with respondents' prevalence estimates of unequal treatment based on both race and gender. Stated differently, the more positive (or less negative) people felt about the movement, the higher their prevalence estimates of these forms of unequal treatment. Thus, these attitudes may offer insight into prospective jurors' likely reactions to a workplace discrimination or harassment case.

Strategic Implications And Recommendations

Our findings strongly indicate the usefulness of political affiliation and political beliefs as proxy variables for employment attitudes.

The data from DOAR's 2018 and 2020 studies deliver a clear message that many factors come to bear on how third parties will evaluate the themes lawyers advance on their clients' behalf. The life cycle of a dispute may be brief, never resulting in litigation, or protracted, meandering through the appellate process for years before the court ever empanels a jury. During this interim, many people may form opinions about the case and feel they have a stake in its outcome, including a corporate client's workforce, shareholders, customers, and competitors; the plaintiff's friends, family, and prospective employers; and the news media. Clients recognize that even if the case never goes to trial, they will be judged by many. And, in an era when the language used by lawyers in a pleading can trigger sensational headlines and reflect poorly on clients, many of them consider internal and external messaging about the litigation crucial to their wider business interests. Accordingly, performing surveys and jury research throughout the lifecycle of the matter can help craft litigation strategies compelling in both the court of public opinion and a court of law.

Discovery Strategies

ENGAGE SUBJECT MATTER EXPERT WITNESSES EARLY IN THE CASE TO AID IN THEME DEVELOPMENT

Outside counsel and expert witnesses report seeing an increase in the severity of the sexual harassment alleged since the #MeToo movement took off. Rather than the crude commentary and boorish behavior more likely to be reported in the early years of sexual harassment litigation, #MeToo era harassment cases frequently involve serious allegations of sexual assault and rape and, sometimes, also involve criminal charges.

Because sociopolitical attitudes play such a key role in employment disputes, developing themes that will resonate positively with third parties (such as prospective employers and colleagues for plaintiffs and other employees, vendors, and business partners for defendants), as well as manage public perception, may be an integral part of a client's litigation strategy from the very outset of a sensitive harassment or discrimination matter.

DOAR's expert witnesses – including its human resources experts, industrial psychologists, and forensic psychologists– have performed extensive research into issues such as organizational tolerance for sexual harassment ("OTSH") and its impact on human resources personnel in the performance of investigations; the connection between sexual harassment and interpersonal violence; and the link between power dynamics and sexual harassment. They often provide testimony attacking or supporting the soundness of a company's policies and procedures, the fairness and diligence of an investigation, or the criteria for selecting individuals for hiring or promotion. These experts – who have consulted and testified for both plaintiffs and defendants – work with counsel to uncover and examine nuanced root issues that help explain a case to the jury.

The sooner the conversation between experts and counsel begins, the better experts can assist with gathering information critical to the expert's specific analysis.

Informal polling of DOAR experts in various disciplines yields nearly one universal answer: "I could be so much more helpful if I were involved earlier." Often, by the time counsel engages an expert, fact discovery is wrapping up, and document production is complete. Documents and other information the expert considers necessary to render a complete analysis of the issues may not have been requested, produced, or examined in depositions, leaving the expert to form an opinion without critical data and their report vulnerable to attack by the opposing party. The sooner the conversation between experts and counsel begins, the better experts can assist with gathering information critical to the expert's specific analysis. To facilitate this, our experts say they would like to review interrogatories and document requests before counsel sends them to the other side to ensure collection of necessary documents and data. Likewise, experts also express the desire to review written discovery requests from the other party and confer with counsel in preparing and responding to Rule 30(b)(6) topics.

Experts in economic and emotional damages, as well as industry compliance standards, also shared the following thoughts:

- Retain the expert early on! The damages expert will need information that will come from deposition testimony and will need to request financial information, sometimes from the IRS and/or Social Security Administration, that will take time to obtain. The earlier we are involved in a case, the more time we have to perfect the discovery requests and, therefore, our analysis. Talk to us before you depose critical witnesses so that we can relay any questions we may have for you to ask them.
- Retain the expert before fact discovery ends. This way, the expert can convey and discuss the standards in their field so that the attorney is better equipped to ask questions that elicit responses that are most useful to the expert when they write their report.
- If necessary, use a team of experts, and allow us to communicate with each other so that we can form a unified approach. No one can be an expert in every subject. It can sometimes be beneficial for the economic damages expert to work in tandem with an industry-specific expert, vocational expert, or both. When multiple experts are involved, it is also a good idea to confer [orally] and confirm that no opinions are contradictory to each other before opinion reports are issued in writing.
- Ask us for our input regarding cross-examination of the opposing side's damages expert in our area of expertise, as well as experts that might be outside our particular expertise, but whose role in determining damages may overlap with ours. For example, the economist may have points for cross-examination for not only the opposing economist but also the vocational expert or industry expert.

Leveraging the power of expert witnesses as soon as possible can help counsel for both plaintiffs and defendants develop a framework for maximizing the client's return on investment in an expert witness.

USE SUBJECT MATTER EXPERTS TO ESTABLISH A BROAD FRAMEWORK FOR THE ENTIRE CASE

Counsel may also extrapolate broad case strategies from an expert's relatively narrow subject matter expertise. Consider, for example, the strategy used by prosecutors in the Bill Cosby and Harvey Weinstein criminal rape trials, which both ended in convictions. In each case, prosecutors engaged a forensic psychiatrist to testify regarding the behavior of rape victims. In the Weinstein case, the expert testified that it is not unusual for some victims of sexual assault to maintain communication and an ongoing relationship with their attacker. This helped the prosecution establish a context for emails, text messages, and other contact between the victims and Weinstein that explained the victims' actions long before the defense ever even introduced damaging and potentially contradictory documentary evidence. In contrast, in a recent DOAR focus group that involved similar issues but no expert testimony, mock jurors struggled with this same type of evidence, vigorously debating the reasonableness of the parties' actions and the consensual nature of sexual encounters. Ultimately, many mock jurors concluded that the alleged victims' friendly communications with the alleged attacker after the encounter completely undermined the assault claims.

Another subject matter expert recently helped counsel retool not only its general approach to the case within the expert's area of study but also the damages' expert's rebuttal report. At bottom, all the allegations in the case rested upon the presumed accuracy of the plaintiff's systems for measuring production. The subject matter expert examined these systems and found various fallibilities that undermined its reliability. The expert's report on this system provided not only a defense to the alleged facts of the case but also a solid foundation for the damages' expert's rebuttal report opposing the other party's calculations.

Trial Strategies

TEST AND EXPLORE CASE STRATEGIES THROUGH PRE-TRIAL JURY RESEARCH

DOAR regularly performs extensive research in harassment and discrimination cases through its expert jury consultants who test and explore case themes and strategies through surveys, focus groups, mock arbitrations, and mock trials. As with subject matter expert witnesses, clients sometimes do not engage DOAR to perform research until shortly before trial. Other times, clients will perform various types of research through the life cycle of the matter to test themes, witnesses, and communications strategies.

When clients perform pre-trial research with enough time left in the discovery period, mock jurors can provide feedback that:

(1) drives the retention of subject matter experts to explain certain aspects of the case;

(2) highlights the need for testimony from lay witnesses who had previously not been considered central to developing the facts; and,

(3) posits a theory of the case that makes great sense itself as the theme for trial.

BENEFITS OF PRE-TRIAL RESEARCH

1. Drives the retention of subject matter experts to explain certain aspects of the case
2. Highlights the need for testimony from lay witnesses who had previously not been considered central to developing the facts
3. Posits a theory of the case that makes great sense itself as the theme for trial

At any stage of litigation, though, pre-trial research is invaluable for the insight it can provide to the trial team. Focus groups, mock trials, and other research activities allow counsel to test case themes and assess the impact of key evidence on fact-finders and decision-makers. In light of DOAR's survey findings presented here, it is especially useful to hear in pre-trial research how people bring their personal experiences and expectations to bear on the facts of a particular case. Jurors often serve as their own "experts" in employment cases, judging the parties' actions in part by what they personally have done or believe they would have done in similar situations. The more you know about the range of opinions jurors are likely to hold – and what types of people

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are likely to espouse what opinions – the better prepared you are to encourage, pre-empt or rebut these opinions with your trial strategy. Consider, for example, the comments below that were raised by research participants in various focus groups and mock trials on employment cases:

"Technically speaking, he was harassing her -he was her supervisor, boss, mentor – once she tells him she's not interested ..." [male juror] "But she never told him that! She never said that!] [several female jurors interrupting male juror]

"They had a rule of thumb – you have to let the person who is harassing you know- you have to tell them you are uncomfortable – if you don't say something, you will continue to be harassed." [female juror]

"I am a manager of a very big chain. I just took the sexual harassment course.... Just because she didn't say it was unwanted doesn't mean it was wanted.

Under no circumstances should any supervisor at any level above you or below you be touching your lower back or kissing you or hinting at things... Unless it's consensual, it's sexual harassment, and I don't see her consenting to this, or I don't think she would have filed this." [female juror]

"If he had been accused before, I would be more on her side because there is a pattern. It's always several people. If there are no other people coming out saying this happened .... It's not just one – that's not how it happens." [female juror]

"The person in charge of investigating this should have been fired because he made no effort to protect this young lady. He made no effort." [male juror]

"[Employers] do not like bad publicity. They have a motive to keep things quiet. The employer

made an effort to keep this woman quiet." [older male juror]

"I have to hear from more than one source that the [plaintiff] was not performing his job when there were positive reviews in his file. I can't see someone going from satisfactory to horrible in that short a period of time. If he were that bad, why would he have been recommended before?" [female juror]

These quotes demonstrate the underlying assumptions about gender relations or workplace norms that powerfully shape jurors' interpretations of and reactions to case facts and evidence. The more you know about these assumptions, the less likely they will be to derail your arguments to a jury. Finally, pre-trial research can be a valuable tool in guiding settlement decisions. At every stage of litigation, empirically obtained estimates of the strength of a case (and defendants' likely exposure) help attorneys and their clients make informed decisions.

IMPLICATIONS FOR VOIR DIRE: JURORS ARE NOT BLANK SLATES

When a juror enters a courtroom for *voir dire* in an employment case, (s)he brings in a lifetime of attitudes and, especially, relevant life experiences. Questioning each juror about these experiences is especially important.

When defending employers against harassment and discrimination claims, push for inclusion of questions about personal experiences, including experiences of "people close to you." Vicarious experience matters here, and those with experience – personal or vicarious – are risky for the defense. If possible, advocate for a supplemental questionnaire to allow jurors to disclose in private what they might be more reluctant to disclose in public. If that is not possible, ask the Court to construe the experience questions as broadly as possible so that jurors can answer affirmatively without revealing the specific nature of their experience until they are at sidebar (should they wish to approach).

CONSIDER THE JUROR PROFILE IN YOUR PEREMPTORY CHALLENGES

Consider certain broad groups as more likely than others to be plaintiff jurors:

- Women
- Those 45 and older for age discrimination cases;
- Those under age 45 for harassment cases (of any type)
- Non-Whites
- Those who have personally experienced discrimination or harassment or are close to someone who did
- Democrats

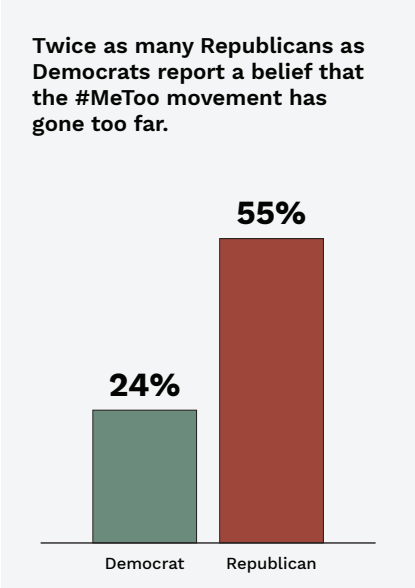
Our findings also strongly indicate the usefulness of political affiliation and political beliefs as proxy variables for employment attitudes. Whenever possible, conduct internet searches of prospective jurors. Political party affiliation can easily be found in online proprietary databases, and social media users with low privacy settings will often post about involvement in or support for key political causes. A word of caution here: When undertaking searches, counsel must educate themselves about the legal constraints of such searching (e.g., what constitutes "communication" with jurors, and how to do "clean" searches, as well as the law and ethical rules of the particular jurisdiction) or retain consultants with expertise in this area. It is disconcertingly easy to run afoul of the law in researching prospective jurors online; failing to exercise due caution could have dire consequences for the client and counsel.

FRAME ARGUMENTS WITH ATTENTION TO CONTEXT

The findings of this study suggest that for jurors, beliefs about discrimination and harassment line up with broader political orientation, but not necessarily other key issues. Plaintiffs may take advantage of this by nesting an employee's experience within a larger context of social inequality, while defendants will benefit from explicit reminders to jurors that a personal, rather than a national story, is being litigated in the courtroom. Regular reminders of the individuals and the setting can help defense counsel keep the focus narrow, while more expansive terminology can help plaintiff's counsel remind jurors of the broader social conditions in which the case is being tried.

The findings of DOAR's study also highlight a specific challenge for defense counsel: Jurors are likely to believe that companies retaliate against those who report harassment and discrimination. The survey data suggest that through this presumptive belief in the likelihood of retaliation, jurors may psychologically shift the burden to employers despite legal instructions to the contrary. These presumptions, when combined with personal

experiences of harassment and/or discrimination, may result in a relatively high level of juror sympathy for employees who testify that they did not report discrimination or harassment for fear of retaliation. Accordingly, aggressive cross-examination as to the employee's failure to report is a risky strategy.



Rather than focusing on the employee's failure to report, which can easily be understood, defense counsel may mitigate such risk by framing questions carefully to emphasize the absence of evidence that the employer knew the alleged discrimination or harassment occurred, which may be difficult for the employee to deny. Likewise, emphasizing any positive aspects of the employer's response and handling of the situation may go further to diminish jurors' presumptive beliefs about retaliation and paint the employer in a more friendly light.

CONSIDER #METOO BACKLASH

Clearly, the data indicate that among certain groups of jurors who are more likely to discount harassment and discrimination – most notably Republicans – the idea of the "#MeToo movement gone too far" can gain traction. A jury with several Republicans may be open to the subtle implication that a shifting societal pendulum allows plaintiffs to broadly claim "social injustice" when the issue at hand is actually a narrow interpersonal dispute limited by its specific facts. While the "swinging pendulum" theme may hold appeal (especially depending on the demographics of the jury or the geographic location of the trial), it nevertheless poses a risk of alienating strong jurors (likely women of all political affiliations) who may see some benefits to the #MeToo movement.

Conclusion

When women all over this country and the world united behind one hashtag to protest their treatment in society, they harnessed the power of social media and forced sweeping changes in the workplace. Years later, employers continue to litigate #MeToo cases and reshape their business cultures in response to shifting perceptions of what constitutes fair, reasonable, or appropriate conduct in professional settings. The increase in the number of DOAR survey respondents who know someone who experienced harassment or discrimination at work suggests that #MeToo provoked intense conversation about gender and other forms of harassment and discrimination that shifted broader perceptions of these issues. Online protests and media scrutiny of all forms of systemic inequality (including the impact of the Coronavirus pandemic on essential workers who are mostly women and racial minorities)[2] persist, inflaming our national passions with new debates. Undoubtedly, personal experiences with harassment and discrimination will continue to influence citizens when they enter a jury room to deliberate these issues and should be carefully considered at all stages of litigation. ■

[2] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html

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Ellen Brickman, Ph.D., is a Director at DOAR. Ellen manages teams at DOAR in conducting pre-trial research and consulting on all aspects of trial strategy. She is closely involved in theme development, jury selection, and witness preparation.

Ellen has consulted on many high-profile criminal and civil cases, including, among others, white-collar criminal matters, securities litigation, employment matters, and intellectual property cases. She is particularly skilled at designing research to answer complex strategic questions and helping attorneys interpret the research findings and their implications for trial strategy.

Prior to DOAR, Ellen conducted research in social-service settings, and has also taught courses in social psychology and in research methodology at New York University, the New School for Social Research, and Fordham University. She has also published articles on many aspects of trial strategy and has presented widely to attorneys and judges.

Ellen holds a Bachelor of Arts degree in English and psychology from Barnard College, and a Ph.D. in social psychology from Columbia University.

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As Director of Employment Litigation, Rachael Zichella leads the company's employment litigation consulting practice and is responsible for developing and implementing growth strategies related to DOAR's focus on disputes involving alleged harassment, discrimination, and retaliation; theft of trade secrets; workplace disagreements; wrongful termination; breaches of fiduciary duty; and employee malfeasance.

Rachael brings 15 years of litigation experience to DOAR. She was a partner at Taylor English Duma LLP and practiced labor and employment law and commercial litigation, representing corporations, boards of directors, and individuals nationwide in complex matters involving discrimination and harassment; the enforcement and invalidation of restrictive covenants agreements; theft of confidential information and trade secrets; computer systems protection and employee privacy issues; fiduciary and shareholder disputes; defamation; fraud; ERISA and employee benefits issues; and construction litigation.

Rachael has also worked with clients to develop data security initiatives to protect their intellectual property and other proprietary information from bad actors inside and outside the workplace, and led her firm's e-Discovery Committee, developing and implementing protocols to leverage cutting edge technology and minimize client costs.

Rachael holds a J.D., cum laude, from the University of Florida's Fredric G. Levin College of Law and a B.A., magna cum laude, from Vanderbilt University.

ABOUT DOAR

DOAR is a litigation strategy consulting company that provides legal teams with strategic clarity, expert insight, and thoughtful perspectives to win complex, high-stakes matters. By bringing together leading litigation strategy consultants and the most qualified testifying experts under one roof, we help our clients develop stronger cases that drive better outcomes.

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