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How to think about, discuss, and present money damages in voir dire and opening statement

THE IMPORTANCE OF ASKING FOR SPECIFIC DOLLARS, AND HOW TO CONVINCING THE JUDGE THAT IT'S NOT PRECONDITIONING

The most important part of a trial is jury selection. If we don't get a fair and impartial jury, the trial is pointless and an injustice from the very beginning.

This article addresses how to appropriately think and talk about specific dollar amounts of money justice in jury selection and why it is essential and appropriate to tell the jurors what the verdict should be or to give the range of an appropriate verdict in every opening statement.

Discussing each category of money damages and testing the waters with dollar amounts or ranges of dollar amounts is absolutely essential if the court and attorneys in a civil money damages case truly care about getting a fair and impartial jury.

The best judges, those who are not biased or prejudiced, do this themselves and thoroughly discuss different dollar amounts with the jury during their voir dire to see if any jurors have bias or

prejudice. It's not preconditioning if it's done correctly; rather it's testing the waters.

Retired Los Angeles County Superior Court Judge Peter Meeka did, on multiple occasions, the best job I have ever seen. Judge Meeka's money damages voir dire is something I listened to and is the foundation for the way I conduct voir dire on money damages. To this day, every judge who has allowed

See Rowley, Next Page

me to discuss money and specific dollar figures with jurors and see how it all comes together in the end has no objection to my method and technique.

I will go through how I discuss money in voir dire as inspired by Judge Meeka. The catch to all of this, especially in jury selection, is that the lawyers who address specific dollar amounts of money damages must do it appropriately and not in a way that is argumentative or designed to precondition or anchor jurors. Also, it is inappropriate to ask jurors to commit to a certain outcome before they have heard any evidence.

My hope is that judges who are averse, guarded, or don't have the experience, read this piece, open their minds, and change their ways as we move forward.

It's essential in opening statement

Telling jurors how much of a money verdict, or the range of a verdict, which will be justified by the evidence and law is essential in opening statement. Consider this: if a defense lawyer believes the evidence and law will justify a low verdict or a zero dollar verdict in any category of damages, she or he should certainly tell the jury that in opening statement. It would be an abuse of discretion to prevent a defense lawyer from doing so and giving the jury a specific dollar amount of zero. Why then would any fair, unbiased judge preclude a plaintiff's lawyer from telling the jury in opening statement what the evidence will justify? There is no good reason. I have heard of a few judges who will allow lawyers to tell the jury the amount of economic damages that the evidence will justify but not non-economic damages. That demonstrates a bias against non-economic damages and disparate treatment towards non-economic damages claims, and therefore is an abuse of discretion.

Jurors have different opinions, biases, beliefs and prejudice when it comes to awarding money in civil cases. Money damages as civil justice usually break up into three different categories depending on the case, and which court retains jurisdiction:

Economic damages
 Non-economic damages
 Punitive damages

Some jurors might have a bias against economic damages because of a belief that health, disability, or life insurance compensated the plaintiffs and that the civil case is double dipping. Other jurors might be set against money for non-economic damages. Many jurors are averse to punitive damages, especially when a plaintiff has been fully compensated for economic and non-economic damages. The only way to find out which potential jurors should be excused for cause, or who an intelligently exercised peremptory challenge should be used on, is a liberal and probing examination on the issue of money. Specifically, testing the waters with dollar figures, which is in essence exposing potential jurors to stimuli.

An analogy might be this: If you want to find the sharks who are biased/prejudiced and who will give one side an advantage over the other, test the waters by dropping some blood in the water! I believe this is the very reason why mini-opening statements are mandatory now in all civil cases; to drop some blood in the water and give prospective jurors a flavor for the case and what they will be asked to do; allowing them to search within themselves and answer questions about whether they can be jurors who will judge the case neutrally and not view the evidence through a lens or hear evidence through a filter that gives one side a better chance of winning over the other.

Your right to discuss specific dollar amounts in voir dire

Defense lawyers who are going to advocate for a defense verdict will appropriately test the waters in the pool of prospective jurors by discussing the specific dollar amount of zero. Civil defense lawyers ask questions of the pool which cause prospective jurors to envision sending sympathetic injured persons home with *zero* in order to decide whether they are capable of doing that if that is what the evidence and law calls for.

If a juror envisioning that scenario states this would be difficult or impossible, that juror should be removed for cause or at the very least has provided information for a peremptory challenge. Of course, the defense of that case might not be based on damages, it could be immunity or assumption of the risk or pointing the finger at an empty chair.

If jurors have sympathy or compassion for plaintiffs that will cause them to view the case through a lens or hear evidence through a filter that makes them a better juror for the plaintiff, then those jurors have to go if our goal is a fair trial for all parties. If prospective jurors say a zero-dollar verdict is something they are averse to from the start without having heard any evidence, those jurors favor the plaintiff and don't belong on the jury.

And, if jurors hear a dollar amount like ten million dollars for non-economic damages in the mini-opening statement or voir dire and are upset, turned off and averse to a case when that is exactly what they will hear in closing argument, it would be an abuse of discretion to muzzle a lawyer until closing argument.

Asking jurors if they have a cap, without mentioning specific dollar figures is absolutely inadequate. Imagine a case that is worth tens of millions of dollars in non-economic damages and the first time the jury hears any dollar amount is in closing argument, and some jurors are shocked because they would have never agreed from the get go to be a "fair and impartial juror" on a case where that amount of money was being sought. If we don't voir dire on specific dollar amounts and test the waters with the words "tens of millions of dollars" in voir dire, we will never be able to discover who those jurors are.

Jurors appreciate it

During voir dire, in countless trials, I have had more jurors clearly state that they were appreciative to hear specific dollar amounts in mini opening or voir dire because it allowed them to realize that there was no way that they could ever

See Rowley, Next Page

be fair and impartial because of their bias against claims for millions or tens of millions of dollars. These jurors were able to identify their bias and prejudice that favored the defense before they took an oath to do something they would have otherwise been incapable of. Had the judges in those trials precluded me from conducting voir dire using specific dollar amounts or ranges of dollar amounts to test the waters, those jurors would have ended up on the jury and injustice would have occurred.

If we were conducting jury selection in a criminal case in a state where the death penalty was being sought, the specific verdict sought “death” would be dropped into the pool in order to test the water and find out which jurors are dead set against the death penalty. If we were dealing with a rape or sexual assault case, we would be able to test the condition of the jury by dropping the specific issue into the water.

The point is that letting potential jurors know that many millions of dollars are being sought for non-economic damages, or a verdict of more than \$10,000,000 for non-economic damages and asking the court to read the non-economic damages instruction to the jury, is the only way to test the waters and identify jurors who are against us or who will otherwise give the defense an unfair advantage. When this is done properly it is not anchoring or pre-conditioning (as the transcripts of two of my trials reflect).

Addressing specific dollar amounts without improperly preconditioning

If our goal is to precondition and anchor a jury to a specific dollar figure, we are in the wrong and if we are not shut down, chances are what we are attempting to improperly do will backfire. Jurors know when lawyers are being manipulative, and losing credibility with the judge is not worth it. Therefore, we must begin by understanding what we are doing and why, and make sure that we are talking about money properly and for the right reason.

Asking jurors if they are averse to a money damages verdict that is “substantial” is not only inadequate but

confusing and misleading based on the law. California judges who tell lawyers they can only use the phrase “substantial amounts of money” or “substantial damages” are doing something harmful and contradictory based on the law. The words “substantial” or “substantial damages” are horrible words to use when talking about money in a civil case in California because of the law’s very definition of “substantial.” Think about it. “Substantial” is a word that is defined by CACI 430, in the causation context as a factor that is “more than remote or trivial.” That is the only place it’s defined. A verdict that is “something more than remote or trivial” is not a great verdict for most plaintiffs.

Recently, a judge who was a little biased at the beginning against non-economic damages and who did not have a lot of civil experience, granted a defense motion to preclude me from discussing dollar figures with the jury during voir dire. It was a hard blow, but rather than getting upset, I convinced the judge to open his mind and give me a chance. The insurance-defense bar knows very well that if you don’t get to talk about specific dollar figures, the jurors who have bias and prejudice against multi-million dollar verdicts won’t be discovered. Here is a summary of how it all went down; how the judge went from first precluding voir dire on “millions of dollars” to deciding that he was going to be the one to explore the issue during his voir dire, to finally allowing me to do it. It took a lot of work, respect, and patience, but I convinced the judge that the defense motion should be denied. I then demonstrated how to do voir dire using a specific range of money appropriately; over 15 cause challenges ended up being granted because of jurors’ self-disclosed bias. Had I been precluded from discussing money the way that I did, an injustice would have occurred:

The Court (after having read my further briefing and argument on the necessity of testing the condition of jurors by discussing specific dollar amounts): My feeling is that the court is going to conduct its own examination on the

issue of damages and allow counsel to supplement my examination during voir dire, allowing counsel to inquire of the jury whether they would have a bias one way or another, or perhaps it can be framed a little differently.

During voir dire I intend to read the CACI instruction that defines pain and suffering, because that is always it seems to me an issue that can engender some confusion during voir dire.

The court will advise the jury that damages in a personal injury case can range from zero, a small amount, or a very large amount that could be a million or in the multiples of millions. I would ask the jury is there any person who personally feels that they cannot accept that responsibility. I would say and end my inquiry by again asking them if there is any person who feels that you cannot award an amount that would be appropriate with the evidence that they hear and in accordance with the law that I instruct and charge them with, and be completely fair and open to a decision that can range from zero to a very low amount to a very high amount or an amount in the millions. That way they are hearing the word “millions.” It addresses the concern that is raised in some of the out-of-California authority that jurors without having heard a specific dollar amount may not recognize their own bias.

Mr. Rowley: I think that is really thoughtful and a lot better than where we were. I appreciate you taking the time to do it. If the court asks a question, we should be able to follow up on it, when it comes to money for pain and suffering, and you heard the amounts that the court talked about, is there any part of you that has hesitancy or any bias against awarding money against a school district if the amount might end up being many millions of dollars.

The Court: What the court is concerned with is asking jurors to commit to a specific dollar amount.

Mr. Rowley: I don’t do that. The way you phrased it, your honor, is really similar to the way I do it. And, in terms of a judge doing it, Judge Anthony Mohr in downtown Los Angeles, I’ve tried a

See Rowley, Next Page

number of cases in front of him, he does a great voir dire using dollar amounts and allows lawyers to do their own voir dire. I have talked about tens of millions of dollars. The defense sometimes will say zero dollars. What I've heard judges do is make sure jurors are equally able to return a verdict of tens of millions and zero if that is what the evidence calls for. I heard Judge Mooney do voir dire and we both discussed dollar amounts with the jury. The way I learned how to do it was listening to retired Los Angeles Superior Court Judge Peter Meeka, who I started trying cases in front of a long time ago. Judge Meeka would do a thorough voir dire using the dollar amount of millions of dollars and zero. He would excuse jurors who had bias or prejudice. It was specific dollar amounts which triggered jurors into discovering and disclosing their inability to be fair and impartial.

The Court: Okay. I do think that's okay to mention the word "millions," but in a way to uncover bias but as to not precondition the jury. I will revise my ruling. I will also read the jury instruction on non-economic damages.

How it actually went with the jury

Mr. Rowley: In civil cases, a case might be worth zero, hundreds of thousands of dollars, or many millions of dollars. Is there anyone with a mindset against jury verdicts for millions of dollars for pain and suffering or loss of enjoyment of life? Not money for medical bills or lost wages, those are economic damages, but jury verdicts for millions of dollars for non-economic damages, pain-suffering-loss of enjoyment of life. Is this statement true for any of you – *"I am not a person you would ever want to have on a jury if you are talking about that kind of money for pain and suffering. I would not be a fair, impartial, neutral juror if I hear talk about millions of dollars for pain and suffering and loss of enjoyment of life."*

Prospective juror: Yeah, especially considering where the money is coming from, a school district?

The Court: I'm going to instruct the jury later on the issue of compensation, money – you focus on the person who is making the claim. You would never

focus on the defendant or defendant's resources, the person who is being sued. The focus is always on what is reasonable compensation for the plaintiff.

Mr. Rowley: So the jury listens to everything, comes up with a decision, and that decision – imagine the damages are one dollar or hundreds of thousands of dollars or millions of dollars. It's one of those three. The defendant could be a sweet old lady who is 100% at fault for causing injuries and damages, but if we were to switch her out and make the defendant a big corporation or Donald Trump or maybe Hillary Clinton, depending on who you dislike the most, or in this case the defendant is a school district, the damages are the damages, the verdict is the verdict, whatever the damages are worth. The dollar amounts of the verdict do not change based on who the defendant is. Brutal honesty – would any of you limit the amount of a money damages verdict based on who the defendant is?

Prospective juror: Yeah, I would.

Mr. Rowley: Raise your hand if you would limit the amount of a money damages verdict based on who the defendant is even if the judge instructed you that isn't appropriate. Raise your hand if the fact that the defendant in this case is a school district is going to limit your ability to be fair and impartial on the amount of money.

Mr. Rowley: We have juror No. 1, Juror No. 7, Juror No. 11, and you sir.

Mr. Rowley: Juror No. 1, would it be fair to say that you can't be that fair and impartial juror we need on the question of money damages because you would favor the defendants, a school district, who we're are suing for millions of dollars?

Prospective juror: Yes. I don't like it.

Mr. Rowley: Okay, Juror No. 7, you also raised your hand.

Prospective juror: Same goes for me.

Mr. Rowley: You served our country in Armed Forces, thank you. Please tell us why the same goes for you.

Prospective juror: The way I see it is, you know, you have veterans who served, all they are asking for is medical. And, you know, I just, to be brutally honest, this is sickening. I haven't heard any

evidence yet, but I have my own opinion, and if this is a case for millions of dollars, you don't want me on the jury, I know that some people cheat the system.

Mr. Rowley: So, would it be right to tell the judge our veteran cannot be fair and impartial on the amount of money because he is biased against claims for millions of dollars for non-economic damages like pain and suffering?

Prospective juror: Yes, I am biased.

Mr. Rowley: Okay. All right. Thank you. Who else have I not heard from? Who here, if you read in the newspaper, multi-million dollar jury verdict for pain and suffering, without knowing what the case was about, who would be rubbed the wrong way?

Prospective juror: Often it's not deserving, and it's like they don't need that much money to begin with. They're awarded money nobody needs. So here they have all this money. It isn't fair.

Mr. Rowley: Brutal honesty, in terms of being fair and impartial, would it be true to say you are not fair and impartial because the defense would be starting off in a better position than us with you on the jury? Does the defense have an unfair advantage if you are a juror in this case, brutal honesty?

Prospective juror: Yes. I agree with what you said. I open up the newspaper and read something about a multi-million dollar award for pain and suffering and I am disgusted.

We also discovered jurors who were opposed to low-dollar jury verdicts based on their own experience, who told the defense lawyer that his proposition that the case is worth tens of thousands or a large amount of hundreds of thousands was cheap. A few jurors, without hearing any evidence, were clearly turned off and reacted adversely to defense counsel talking about specific dollar amounts that were low. Those jurors were appropriately excused for cause with my stipulation because I believe all parties to a case deserve jurors who have an open mind, are neutral and will not give one side any advantage over the other when it comes to a specific dollar figure.

See Rowley, Next Page

Specific dollar amounts: the legal authority

It has long been a courtroom practice of attorneys in this state to tell the jury the total amount of damages the plaintiff seeks, and no questioning of the technique has come to our attention. Moreover, an attorney may and frequently does read the complaint, including the prayer, to the jury.

(*Beagle v. Vasold* (1966) 65 Cal.2d 166, 172-73.)

In *Lafrenz v. Stoddard* (1942) 50 Cal.App.2d 1, California's leading case on what is permissible in an opening statement, the Court of Appeal directed that great latitude be given to the litigants.

In *People v. Williams* (1981) 29 Cal.3d 392, 405, the California Supreme Court held that counsel is permitted to inquire during voir dire into any subject "the population at large is commonly known to harbor strong feelings that may... significantly skew deliberations in fact." The ability to deliver a high damages award for a specific dollar amount – if the lawyer has a good faith belief that the evidence will support that award – qualifies as something jurors might harbor strong decision-skewing feelings about.

No cases preclude specific dollars

Importantly, not a single case exists in California that precludes lawyers from discussing or stating specific dollar amounts in opening statements or voir dire.

Code of Civil Procedure section 222.5 provides that courts are required to permit "liberal and probing examination calculated to discover bias or prejudice with regard to the particular circumstances of the case."

California case authority interpreting this statute is clear that counsel may inquire into any matter that would be ground for a challenge for cause. (*People v. Williams*, 29 Cal.3d at p. 405.). If a juror has a bias against a jury verdict over \$50,000,000 despite the evidence in a

case where such an amount will be sought at trial, that juror should be dismissed for cause. At the very least a lawyer should have the opportunity to exercise a peremptory challenge, having uncovered the bias.

Prominent California and national practice guides are clear that the amount of damages is a topic that is appropriate to discuss in opening statements and voir dire. As American Jurisprudence Trials explains, virtually all jurisdictions allow plaintiffs' counsel in personal injury cases to read to the jury the specific amounts of damages sought at trial:

In a negligence case the opening statement should deal with damages at some length. Since the purpose of the suit is to obtain a monetary recovery, statements regarding damages should not be shortened as it may result in a minimum instead of a fair award. The size of the damages should be made clear in order that the jury will realize the importance of the matter with which it will be dealing. An approach which reminds jurors and judges of the importance of their function is also, of course, in the best interest of the administration of justice.

Most jurisdictions allow counsel to mention the amount of damages sought. Others do not permit such reference but allow counsel to state the amount of damages expected to be proven. It is doubtful whether the distinction is a practical one at the level of lay communication.... (5 Am. Jur. Trials § 285; emphasis supplied.)

A prominent practice guide expressly recommends that inquiring about specific dollar amounts is an important part of voir dire:

Plaintiff's attorneys are usually permitted to question prospective jurors as to their ability to return a large verdict. (Some individuals may be incapable of rendering a \$1 million verdict under any circumstances.)

For example, in a case involving a \$1 million damage claim, plaintiffs' counsel may ask:

- "Assuming liability is established in this case, would you be able to return a verdict for \$1 million?"

- "Would you require a higher standard of proof on liability in order to return such a verdict?"

(Wegner, Cal. Prac. Guide – Civ. Trials & Evidence (Rutter Group 2019) § 5:312; emphasis added.)

Many courts in other jurisdictions have held that plaintiffs' counsel can properly reference the specific amount of damages being sought in voir dire and in opening statement. (See, e.g., *Eichstadt v. Underwood* (Ky 1960) 337 S.W.2d 684, 688; *Yount v. Seager* (1967) 181 Neb. 665, 667-68, 150 N.W.2d 245, 248-49; *Campbell v. Menze Const. Co.* (1968) 15 Mich. App. 407, 408-09, 166 N.W.2d 624, 625-26; *4-Cty. Elec. Power Ass'n v. Clardy* (1954) 221 Miss. 403, 429; *Bunda v. Hardwick* (1965) 376 Mich 640; *Murphy v. Lindahl* (1960) 24 Ill App 2d 461; *Rice v. Ragan* (1910) 61 Tex Civ App 429.

Conclusion

As long as it's done appropriately and not for the purpose of pre-conditioning or asking jurors to commit to a certain outcome, all parties in civil cases should be allowed to discuss specific dollar figures, ranges of dollar figures, the potential for a zero verdict/defense verdict, and also to tell jurors during opening statement that the evidence and law in the case will justify a certain verdict for each category of damages.

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