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The Big Problems With Mini-Openings

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Many states now encourage, or even require, mini-opening statements. From the judiciary's point of view, these statements are intended to increase the efficiency of the juror selection process by disclosing facts which spark the interest of potential jurors and promote their willingness to serve. In reality, however, mini-opening statements can be manipulated to increase the inefficiency of the juror selection process by amplifying a juror's feelings on case-specific subjects to the point of creating more challenges for cause.

In contrast to a traditional Opening Statement that is designed to convince jurors of the strength of a party's case, mini-opening statements often purposefully omit the party's best facts and disclose the worst facts in order to promote negative opinions about the case. The expression of those negative opinions serves as a means of identifying and eliminating potential jurors who are critical of the weaknesses of a party's case.

Additionally, mini-opening statements are often used by plaintiffs' counsel to introduce the damages being sought. Potential jurors' reactions to the types and amounts of damages sought are the greatest indicator of whether they will be pro-plaintiff or pro-defense in a civil case. And, introducing large amounts can cause strong reactions. For example, this is an asbestos plaintiffs' attorney's proposed mini-opening statement in a wrongful death case:

Good morning ladies and gentlemen, my name is [Plaintiffs' Counsel] and I am an attorney with [Plaintiffs' Law Firm]. We represent the people bringing the lawsuit in this case.

Our clients' father was diagnosed with a cancer called mesothelioma in 2019, and died of mesothelioma shortly after his diagnosis. Our clients' father worked as a child in the Los Angeles area in the family business, with his father and brothers, maintaining and renovating two hundred apartments, using materials that included joint compounds, to seal up and smooth joints between sheets of drywall that make up walls. Our clients' grandfather was thrifty so he would purchase whatever the cheapest joint compounds were for sale. Because of this, the boys worked with six different joint compounds. One of the brands of Joint Compound was made by [ ], the Defendant in this case. These joint compounds and other building materials they worked with contained asbestos.

Mesothelioma is a cancer, and is caused by exposure to asbestos. Asbestos is a naturally occurring mineral that was added to construction products. The evidence will be that the father's exposures to all these asbestos-containing materials, taken together, caused his deadly cancer.

Prior to his diagnosis, our clients' father worked in Northern California as a chiropractor. ***He was sixty-seven years old when he passed. Prior to his death he had various medical issues such as being severely obese and having two heart attacks****. These medical conditions were being treated by his doctors.*

At the end of the case the jury will be asked to provide money for the losses caused by [the Defendant]. There are two types of damages in a case like this. One type is called economic damages and is to pay for such things like lost wages and medical expenses. Those economic damages are not in dispute in this case. The other type is to pay for non-economic or nontangible damages. This would be for the loss of [the Plaintiff's] love, his companionship, his comfort, his care, his assistance, his protection, his affection, his society, and his moral support. Essentially, the loss of everything that makes us human and what makes us enjoy life. ***We are going to ask you to be open to the possibility that these non-tangible damages are worth over 34 million dollars.***

Wennerholm vs. DAP Products, Inc., JCCP 4674, Los Angeles Superior Court, Case No. 19STCV15874 (1/31/23), emphasis added.

The first problem with presenting exorbitant numbers, such as $34 million in the example above, is that it directly violates the law which requires that jurors "must use [their] judgment to decide a **reasonable amount** based on the evidence and [their] common sense". CACI No. 3921 (emphasis added). Thee second problem is that the numbers are intended to offend people who do have common sense and drive them off of the jury. The third problem is that research has shown that when attorneys throw out large amounts, they drive up a potential verdict by desensitizing the prospective jurors to huge numbers and suggesting those huge numbers are "reasonable" amounts for a verdict. (*See, e.g.*, J. Campbell et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. (2016); *see also* Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: Anchoring Effects in Personal Injury Damage Awards*, 6 J. EXPERIMENTAL PSYCHOL. APPLIED 91, 91–103 (2000); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519 (1996); Verlin B. Hinsz & Kristin E. Indahl, *Assimilating to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991 (1995); John Malouff & Nicola A. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989); Edward (Ted) L. Sanders, et al., *Reptiles, Picassos, and Stealth Bombers: Combating Inflated Non-Economic Tort Damages*, MUNICIPAL LAWYER: THE JOURNAL OF LOCAL GOVERNMENT LAW, pp. 19-23 (Vol. 60, No. 6, Nov./Dec. 2019).) Anchoring by counsel is inherently unfair and prejudicial during all phases of trial, especially during voir dire when no evidence has been presented yet and the jurors' only information is plaintiffs' counsel's argumentative suggestion regarding the proper order of magnitude of damages.

Indeed, various federal circuits have noted that suggestions by counsel of a specific dollar amount, including during summations, is problematic because such suggestions

tend to "anchor the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence." (*Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1016 (2d Cir. 1995) (judgment vacated on other grounds by *Consorti v. Owens-Corning Fiberglas Corp.* (1996) 518 U.S. 1031); see also Waldorf Shuta (3d Cir. 1990) 896 F.2d 723, 744 (holding that lawyers may not "request a specific dollar amount for pain and suffering in [their] closing remarks"). *Cf. Sandidge v. Salen Offshore Drilling Co.* (5th Cir. 1985) 764 F.2d 252, 258 . ("The principle distinguishing proper from improper inquiry on voir dire is that examination cannot search the result of a case in advance.").)

Seeking to Preclude "Anchoring" in California

Unfortunately, unlike federal jurisprudence, California case law evinces a lack of understanding (or willful ignorance) of the dangers of anchoring, as shown by *Fernandez v. Jimenez* (2019) 40 Cal.App.5th 482, which is often cited by plaintiffs for the proposition that informing jurors of the damages a plaintiff seeks (hundreds of millions of dollars in *Fernandez*) is not improper preconditioning. Thus, any motion *in limine* or trial brief by defense counsel seeking to preclude reference to "tens of millions" or "hundreds of millions" of dollars during *voir dire* (and beyond) will have to contend with *Fernandez*.

Several potential lines of argument for distinguishing *Fernandez* are as follows:

- *Fernandez* came before the appellate court after the trial court denied a motion for new trial on the ground that the damages were excessive. Given this procedural posture, the appellate court noted that "[t]he amount of damages to be awarded is a question of fact committed, first to the discretion of the trier of fact, and then to the discretion of the trial court on a motion for new trial," and, accordingly, "[a]n appellate court gives great weight to the determinations of the jury and the trial court." (*Id.* at p. 490 (internal citations omitted).) By contrast, at the trial court level, the court is fully vested with the discretion to determine the scope of proper *voir dire* and need not defer to any other court.
- In *Fernandez*, the plaintiffs' counsel did not introduce the figure of $200 million to the jury, but rather a juror asked if they could award "$200 million-plus."
- The *Fernandez* court found that "**even if** informing prospective jurors that plaintiffs were seeking hundreds of millions of dollars . . . was error, **it was not prejudicial**" (emphasis added). Of course, at the trial court level, the court is not determining whether an error is prejudicial, but rather is seeking to avoid such errors as allowing an attorney to precondition the jury.
- Ultimately, in *Fernandez*, the jury awarded less than a total of $200 million, "suggesting the plaintiffs' demand for $200 million did not inflame the jury's passions." (*Id.* at pp. 493-494 (emphasis added).) Whether an improper comment by a plaintiff's attorney will "inflame the jury's passions" by the end of the case is not a risk that defendants can take; instead, the trial court should foreclose any such possibility at the *voir dire* stage rather than permitting a case to go to verdict with a tainted jury.

If plaintiffs' true aim is to seat an unbiased jury, they can ascertain jurors' opinions regarding the measure of damages in a non-prejudicial way by asking questions like the following: "Is there a certain dollar amount that you feel would be too high to award in this case even if the plaintiffs prove their case?" Questions like the foregoing avoid preconditioning jurors to specific dollar amounts by eliciting the jurors' own views regarding damages rather than injecting plaintiffs' counsel's opinion regarding the potential verdict before any evidence has been presented. If plaintiffs instead insist on presenting specific (and excessive) dollar amounts to the jury, their aim is clear: to "anchor" the jurors' expectations of what a "reasonable" award is, and to continue to drive up verdict amounts. Given the big problems presented by mini-openings, defense counsel needs to raise the issues presented in their case with the judge as soon as possible and before any potential jurors are called to serve.

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