

Federal Court Precludes Anchoring in Voir Dire and Opening Statements

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HarrisMartin published our article, "The Big Problems With Mini-Openings" in the April 2023 edition of *COLUMNS-Asbestos*. The article focused on the problems presented by mini-opening statements and included an example where asbestos plaintiffs' counsel sought to ask potential jurors in *voir dire* if they were open to awarding non-economic damages of "over 34 million dollars" to the adult heirs of a sixty-seven-year-old man who "had various medical issues such as being severely obese and having two heart attacks" prior to his death. (*Wennerholm v DAP Products Inc*, JCCP4674, Los Angeles Superior Court, Case No. 19STCV15874 [1/31/23].)

In response, counsel for plaintiffs in the *Wennerholm* case defended their claimed right to mention particular dollar amounts in *voir dire* in a Commentary entitled "The Right to Liberal and Probing Examination of Jurors for Bias Against Large Verdicts," which was published in the June 2023 edition of *COLUMNS-Asbestos*. In turn, HarrisMartin published our reply, "*Voir Dire* for Dollars," in the July 2023 edition of *COLUMNS-Asbestos* where we pointed out that:

Plaintiffs' counsel's Commentary failed to address any of the numerous studies regarding the psychological effects of anchoring on jurors¹. Instead, they renamed anchoring "preconditioning" and attempted to sweep the associated science under the rug.

"The psychological effects of anchoring are real and prejudicial, and counsel must be proactive in precluding such tactics."

With the competing Commentaries complete, the debate moved into reality as fate paired opposing counsel against each other in *Patrick W. Dennis v. Air and Liquid Systems Corporation, et.al.*, Case No. 2:19-cv-09343-GW-KS, United States District Court for the Central District of California. On behalf of defendant, we filed various Motions *In Limine*, including #10, TO PRECLUDE REFERENCE TO TENS OF MILLIONS (OR MORE) OR SPECIFIED DAMAGES AMOUNTS. As supporting exhibits, we attached our articles, "*The Big Problem With Mini-Openings*" and "*Voir Dire for Dollars*," as well as the mistrial motion in *Wennerholm*. On September 15, 2023, the Court issued the following tentative ruling:

Initially, as to *voir dire*, the Court agrees that referencing that "tens of millions of dollars" are potentially at stake risks prejudicing the jury by anchoring them to such sums. Likewise, as an opening statement is simply to orient the jury as to what the expected evidence will be, a reference to tens of millions of dollars is argumentative and will not be permitted. The Court is therefore inclined to grant Defendants' request as to the *voir dire* and opening statement.²

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That tentative ruling became the order of the court after oral argument on September 18, 2023³

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ABOUT THE AUTHOR

Edward R. Hugo is a trial attorney, appellate lawyer, litigator and litigation manager for cases involving products and premises liability, toxic torts, environmental claims, construction defect, personal injury, wrongful death, insurance, professional negligence, sexual molestation and criminal law. He has also been retained as an expert witness and testified in trial, arbitration and deposition regarding: the duties of defense counsel, the effectiveness of defense strategies, the reasonableness of settlement values and defense costs, and insurance coverage issues.

Bina Ghanaat is a Partner with experience in toxic torts, insurance coverage, bad faith, habitability, and personal injury cases. She manages her cases from inception to resolution, handling discovery, depositions, law and motion, and trial preparation in state and federal courts. Ms. Ghanaat has defended a wide range of clients, including manufacturers, suppliers, contractors, insurance carriers, building owners, and trucking companies. She has drafted numerous motions for summary judgment that have resulted in dismissals of her clients or significantly reduced demands. She has also drafted and argued successful motions for summary adjudication as to punitive damages and various causes of action in asbestos matters venued in San Francisco and Alameda. For those cases in which a dispositive motion has not been viable, Ms. Ghanaat has prepared them for trial in an efficient manner with an emphasis on achieving optimal results for her clients. In Fall 2020, Ms. Ghanaat was co-counsel in one of the first “virtual” trials in Alameda County.

Endnotes

¹See, 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).

² Tentative Rulings on Motions in Limine, *Patrick W. Dennis et al. v. Air and Liquid Systems Corporation et al*, Case No. 2:19-cv-09343-GW-(KSx), United States District Court for the Central District of California, Sept. 15, 2023 (ECF No. 462).

³ Civil Minutes – General, Proceedings: Pretrial Conference, *Patrick W. Dennis et al. v. Air and Liquid Systems Corporation et al*, Case No. 2:19-cv-09343-GW-(KSx), United States District Court for the Central District of California, Sept. 18, 2023 (ECF No. 463).

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