

The Big Ask

Giving the Jury a Dollar Amount in Voir Dire



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“A million dollars! Now you know why we’re here! Now you know why you’ve been in this courtroom for the past two weeks. Because [the plaintiff’s attorney] said, you better pay us a million dollars or we will see you in Court!”

“\$10 million! [The plaintiff’s attorney] and his team had difficulty even saying that with a straight face! They want you to award them \$10 million. Welcome to America. Welcome to the personal injury machine, the personal injury industrial complex!”

These are real quotes from real defense lawyers in real closing arguments. Both of these cases resulted in a complete defense verdict. That includes the first case, where the defendant was arrested for a DUI and Child Endangerment after he rear-ended the plaintiff’s car while taking his kids to school. In both cases, the defense lawyer used the surprise of the plaintiff’s attorney’s big ask, made for the first time in closing, against the plaintiff and her attorney.

You cannot wait until closing (or even opening) to make the big ask. It **has** to be made during jury selection to vet good or bad jurors.

The defense recognizes the power of making the big ask early. In almost every case our firm has taken to trial, the defense has filed a motion in limine to preclude us from asking for dollar amounts in voir dire. The defense argues that it is improper preconditioning to allow a plaintiff’s attorney to ask the

jury for a commitment before they hear the evidence. They argue that plaintiff’s lawyers purposely will “anchor” to an outrageously high number to condition the jurors to award a large amount at trial.

But as attorneys, we **must** be able to ask the jurors if the evidence supports a high damage award, if they would be able to award it. Some prospective jurors hold personal beliefs against large verdicts. Some jurors will refuse to award an amount above a certain threshold **even if** plaintiffs are able to prove that they are entitled to that sum. Such jurors are not able to follow the law. It’s not preconditioning to vet jurors on this issue.

You should (and actually must) be permitted to inquire as to whether a juror would be able to award a verdict amount *if* the evidence proved such damages. In most cases, the defense asserts the number (\$0) that they think the jurors should award. Why shouldn’t

we be able to do the same? Not being able to question jurors on dollar amounts will result in never being able to determine whether jurors can be fair and impartial.

First, Make Sure you Actually Want to Be Able to Assert a Specific Number

Our firm typically provides a specific number both in our mini-opening statement as well as during jury selection. We want to provide the jurors early and often with the number we are going to ask for so that it is not a surprise during trial.

However, there is a lot of merit to the argument that you should not ask for a specific number during jury selection. Every trial is uncertain. How your client presents, how the evidence comes in, how the judge rules on objections, how the experts testify, and even the order in which witnesses testify could have a substantial impact on the jurors' impression of your case.

Sometimes, it is detrimental to be married to a number. If the evidence comes in poorly, you don't want to be stuck to an offensively large number that is a turn-off for jurors. Likewise, if the evidence comes in well and the jurors are clearly enraged by the defendant's conduct, you do not want to be stuck with a number too small.

In cases where there is more uncertainty as to how the evidence is presented, you may want to stay away from a particular number. However, even in these cases, you must still warn the jurors of the potential range that you will be asking for so that you can vet the good and bad jurors. There is a benefit to having flexibility based on how the evidence comes in. Asking a jury if they could award a "multiple seven-figure amount", "many millions", or a "substantial amount", gives you the flexibility to have a wide range to ask for depending on how the evidence comes in. Yet, it still will give you the

power to fully question jurors on their willingness and ability to award large amounts in your case if the evidence supports it.

The best way to determine whether you should ask for a specific amount or provide a more generalized range is to focus group the case. If you have mock jurors awarding a very wide range of numbers, you should stay away from specific numbers in those cases.

Pursuant to *Fernandez v. Jimenez*, File a Motion in Limine to Allow you to Discuss Specific Dollar Amounts in Voir Dire

Not only do we typically aim to provide specific numbers in jury selection; we will actually file an offensive motion in limine to permit us to assert a specific number. In doing so, we rely on the relatively recent decision of *Fernandez v. Jimenez* (2019) 40 Cal.App.5th 482, 487.

In *Fernandez*, during jury selection and over an objection, the plaintiffs' attorney asked if the jury would be able to award hundreds of millions of dollars in damages for the four heirs in a wrongful death case. (*Ibid.*) A juror then brought up her thoughts of possibly awarding \$200 million, or \$50 million per heir. (*Id.* at p. 493.) Based on this voir dire, defendants moved for a mistrial, but the trial court denied the motion. (*Ibid.*) In closing argument, the plaintiffs' attorney did ask for \$200 million. (*Ibid.*) The jury issued a verdict in favor of the plaintiffs for \$45 million. (*Ibid.*)

The Court of Appeal affirmed, finding that it was proper for the trial court to allow the plaintiff to utilize numbers during voir dire. (*Ibid.*) As explained by the Court of Appeal, when the plaintiffs' attorney provided a specific number, "this was not improper conditioning." (*Id.* at p. 494.) The Court of Appeal went on to explain

that during voir dire, "[j]urors may be informed of the damages a plaintiff seeks." (*Id.* [emphasis added].) As such, the trial court properly allowed the plaintiffs' attorney to inquire about the possibility of \$200 million during jury selection. (*Ibid.*)

Likewise, the Rutter Guide also instructs that it is proper for a plaintiff's attorney to state specific amounts in voir dire:

Ability to award damages:

Plaintiff's attorneys are usually permitted to question prospective jurors as to their ability to return a large verdict if supported by the evidence. (Some individuals may be incapable of rendering a \$1 million dollar 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, et al., Cal. Prac. Guide Civ. Trials & Ev. (The Rutter Group: 2022), Ch.5-G ["Scope of Permissible Voir Dire – Proper vs. Improper Questions"] at ¶ 5:312.; see also *Beagle v. Vasold* (1966) 65 Cal.2d 166, 170 [finding it was error by trial court to preclude plaintiff's counsel from asking the jury to award plaintiff a specific sum of money].)

Also point out in your motion that determining whether or not a juror would be unable to award an amount regardless of the evidence proved is also consistent with the liberal rules on voir dire under Code of Civil Procedure section 222.5. Specifically, section 222.5(b)(1) states that "[d]uring any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination

calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court.”

Next, bring up out-of-state authority. Many other states which have considered the question have held, just as in *Fernandez*, that it is permissible for counsel to inquire as to potential jurors’ attitudes toward specific damage figures. (See, e.g., *Khoury v. Seastrand* (Nev. 2016) 377 P.3d 81, 87 [appropriate to use a specific dollar amount during voir dire “to discover a juror’s biases towards large verdicts”]; *Bunda v. Hardwick* (Mich. 1965) 138 N.W.2d 305, 314 [proper to allow counsel to question jurors as to their willingness to return a verdict in the amount requested should the evidence adduced show entitlement to said amount]; *Atlantic Zayre, Inc. v. Meeks* (Ga.Ct.App. 1990) 390 S.E.2d 398, 401 [proper to question prospective jurors whether they would hesitate to award \$600,000 should the evidence show it was warranted]; *Kinsey v. Kolber* (Ill.Ct.App. 1982) 431 N.E.2d 1316, 1325 [proper to question prospective jurors as to whether they would have any trouble in awarding in excess of \$2 million if the evidence and law so showed]; *Atkins v. Hontz* (Mo.Ct.App. W.D. 2011) 337 S.W.3d 711, 717 [proper to ask whether there was a set figure above which a prospective juror would not exceed regardless of the evidence]; *Rankin v. Blue Grass Boys Ranch, Inc.* (Ky. 1971) 469 S.W.2d 767, 772, superseded on other grounds by *Zurich American Ins. Co. v. Haile* (Ky. 1994) 882 S.W.2d 681, 686, [proper to tell prospective juror that plaintiff was asking for a quarter million in damages and whether juror would be embarrassed to bring back a verdict in that amount should the evidence warrant].)

Lastly, explain to the judge that giving a specific number is not preconditioning. That same argument was made, and rejected, by the defense in *Fernandez*.

In order to ensure that plaintiffs have a fair jury – without jurors who possess concealed beliefs precluding them from following the law – plaintiffs’ counsel must be permitted to inquire into whether prospective jurors could award a certain sum of damages if the evidence does in fact prove that sum. The court may concurrently remind the jury that such an inquiry is not evidence and that, if selected, jurors are in no way bound by counsel’s voir dire. However, were a potential juror to state that he or she could never award your client a certain sum under any circumstances, even if the evidence supported such a claim, that juror would be subject to both a challenge for cause and a peremptory challenge.

Finally, case authority is clear that any juror that cannot follow the law and award plaintiffs the damages they prove must be struck for cause. (See, e.g., *Tapia v. Barker* (1984) 160 Cal. App.3d 761, 764.)

If the Judge Still Tries to Stop You From Mentioning a Number (or Even a Range of Numbers), Try and Elicit Numbers From the Jury

If the Court disallows you from mentioning a specific number then, as discussed above, provide a range of numbers, such as: “hundreds of thousands of dollars”, “a seven-figure amount”, “multiple millions of dollars”, etc.

Unfortunately, there will be judges that will improperly prohibit you from even using a range as stated above. In such cases, ask if the jury could award a “substantial amount” of damages if the evidence supported it. A juror will naturally ask what a “substantial amount” would entail. In that case, flip the question on the juror and ask what a substantial amount would mean to them. Ask them if there was a number that they could not award or exceed even if the evidence supported it. Ask similar questions to try and get that juror to give you a number. Once that

juror gives you a number, you should, of course, be allowed to use that number in questioning that juror.

And once you are finished with that juror, ask other jurors if they felt the same way. “We heard what juror X felt would be too much to award, do you have a similar concern/number/amount?” You will still be able to obtain invaluable information by allowing the jurors to give you numbers.



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