



IT PAYS TO GIVE A NUMBER

Want a Defense Verdict? Go Figure

By Robert F. Tyson Jr.

Money is always an uncomfortable topic—especially in the courtroom. Yet a recent study published in the *Iowa Law Review* confirms what I have been saying (and doing!) for years: If you want a defense verdict, give a defense number!

According to the study, juries who heard the defense give its own “counter” damages number throughout a trial were

more likely to award a defense verdict than those who heard defense counsel simply ignore or attack the plaintiff’s damages demand. Let me repeat this: If the defense gives the jury a damages number, then you are more likely to get a defense verdict. Ok, you just read that twice, and maybe you are nodding your head in agreement, but you are probably still like most folks in the defense industry: You don’t believe it.

In my book “Nuclear Verdicts: Defending Justice for All,” I highlight

the basic psychology behind this tactic. Jurors are conditioned by arguments and evidence repeated throughout trial. That means, over time, they grow comfortable with a number despite how exorbitant it may have seemed when first introduced. This is especially true as skilled plaintiff’s counsel repeat their large numbers over the course of multi-week or months-long trials—a tactic called “priming,” which is used to influence attention and memory.

Plaintiffs’ attorneys know this psychology. They have changed the way they try lawsuits over the last 10 or 15 years because of it. Before this, it was rare that a plaintiff’s attorney would ask a jury for a large award. They thought it would be off-putting to a jury. They thought a jury would be offended by such a big “ask.” Not anymore. One consistent tactic found in every nuclear verdict is that the jury was specifically asked to award a huge damages amount. Therefore, the best way to get a large jury verdict is to ask for it.

How has the defense changed the way it tries cases in the last 15 years in response to this tactic? Not at all. It is time to change the way the defense tries lawsuits.

Specifically, the defense must give the jury its own number in every single jury trial, no exceptions. It is imperative that the jury gets comfortable with a defense number. Give your number early, give it often, and, of course, it must never go up. Initially, this strategy may seem like it makes no sense. If you want a defense verdict from a jury, why give them a number? How can you get a defense verdict if you are arguing damages?

COUNTERING THE PLAINTIFF’S ANCHOR

Demanding astronomically high numbers typically works for plaintiffs’ attorneys.



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Numerous studies have shown that the amount a jury awards in damages is strongly affected by the number demanded by the plaintiffs' attorney—in psychological terminology, this is known as “anchoring.”

The *Iowa Law Review* study utilized a mock trial with six different scenarios: two different plaintiff-led closing arguments and three different defense-led closing arguments, which included “ignoring,” “countering,” and “ridiculing” or “attacking” the plaintiff's demand for damages.

The study revealed that “countering”—offering a lower alternative damage figure—was the most impactful strategy for the defense. Juries who heard a defense number were more likely to award a defense verdict than those who heard the defense attack or ignore the plaintiff's number. Additionally, and contrary to conventional belief, the defendant's offer of a lower counter-anchor did not adversely impact liability determinations, challenging concerns that giving a number concedes liability.

How should the defense present a number to the jury? First, counter the plaintiff's number in voir dire, later in opening and closing statements, and weave the number in with witnesses. Explain how evidence supports the defense number.

Next, the defense should make it clear that even though it believes there is no reason to ever get to damages, it is the defense's obligation to its client and the jury to consider all of the issues and evidence in the trial. The defense should clarify that, if for some reason the jury needs to determine damages, the defense believes that the evidence will show the fair and reasonable award is its number. This enables the jury to consider a number beyond the plaintiff's demand, and they will not consider the defense addressing all of the evidence and the law to be a sign of weakness.

There are some other key ways the defense can get a number in front of a jury early, even when asking for a defense verdict:

- Tell potential jurors upfront that you will be asking for a defense verdict or to award considerably less than the plaintiff is demanding.
- If going for a defense verdict, ask, “Although we believe the evidence supports a defense verdict in this case, if you do address damages, knowing only what you have heard so far, would you have a problem awarding a number much less than plaintiff's attorney is seeking, say \$500,000 or less?”
- Ask, “It seems the plaintiff's attorney is asking for tens of millions of dollars, but if you believe the evidence supports a much lower award, say \$500,000 or less, would you be able to put aside bias or sympathy for the plaintiff and award \$500,000 or less?”
- Ask, “Does anyone believe just because there was an accident and the plaintiff filed this lawsuit, we should pay plaintiff whatever he asks?”

WHY IT WORKS

Giving the jury a defense number, even while still seeking a defense verdict, makes the defense seem

reasonable. Giving the jury a number that the defense can justify makes the defense the most reasonable person in the room. Jurors who hear the defense's number and agree with the explanation of why the number is more reasonable than the plaintiff's attorney's outrageous number will assert that the defense's liability argument is also more reasonable. Arguing damages and giving a defense number is another way for you to gain credibility with the jury and get a defense verdict.

It is unusual for a jury to award a large, “nuclear” verdict without plaintiff's counsel asking for it. After hearing the plaintiff's attorney talking about a huge number in voir dire, and then hearing that number repeated all the way through closing argument, it does not seem so outrageous to jurors. This is why it is critical to give the jury another number to consider, so jurors deliberating damages will be equally primed with the defense's figures.

So, give a number. Give it early, give it often, and never increase it. I promise, you can still get a defense verdict—it's been proven. ■



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