

TOP VERDICTS

Best way to get a large verdict? Ask for it.

By Robert Tyson

It is a tactic that most defendants resist, and something defense attorneys rarely do. Give a number, always. Give your number to the jury early, give it often, and of course, it must never go up. While this strategy is rarely employed by the defense, it is critical for a successful jury verdict.

Initially, this strategy may seem to make 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? Surely asking for both a defense verdict and a dollar amount would be confusing to a jury?

But the psychology behind this tactic is fairly simple. Jurors are conditioned by arguments and evidence repeated throughout trial, and over time they grow comfortable with a number — no matter how outrageous it may seem when first introduced. Plaintiffs' counsel is very familiar with this concept. The most skilled among them will repeat their large numbers over the course of multi-week or months-long trials — a tactic called priming, used to influence attention and memory.

The best way to get a large jury verdict? Ask for it!

Most jurors never walk into a

courtroom thinking anything is worth \$20 million or more. But the very best plaintiffs' counsel in the country know that asking for a large verdict from the beginning of trial can get them big results — \$25 million, \$50 million, or even over \$100 million. It is almost unheard of for a jury to award a large, "runaway" verdict without hearing a proposed dollar amount from plaintiff's counsel. After hearing the plaintiff's attorney talking about a huge number in voir dire, and then for the next few weeks through closing argument, it does not seem so outrageous to jurors by the time deliberation begins.

This psychology is not just for plaintiff's attorneys, it is for everyone. Giving a number early and often works, no matter which side does it. Defense attorneys need to use these concepts of primacy and recency.

With all of this in mind, it is imperative the jury gets comfortable with a defense number. In the context of determining a damages award, a jury that has been primed by repeatedly hearing a plaintiff's requested verdict will be more likely to arrive at a number close to that number. It is critical to give the jury another number to consider, so jurors deliberating damages will be equally primed with the plaintiff's and the defendant's figures.

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How to give the jury a number

Offer a number to counter the plaintiff's number when you first pick a jury, then in opening and closing, and also work your number in with witnesses as well. Again, providing a number will condition the jury for what the defense believes a reasonable award should be. If the jury does not have a defense number, then they are conditioned for only one number if they find liability: the plaintiff's request.

Admittedly, giving a defense number to a jury when you really want a defense verdict, is difficult. It feels inconsistent or like you are losing credibility with the jury. Tell them what you are feeling. Tell them about your struggle. Do not shy away from this difficult aspect of trial. Instead, address it head on.

Specifically, explain that although you believe there is no reason for the jury to ever get to the point of determining damages, it is your duty to your client to address all the issues in this trial. The jury will be instructed as to the applicable law for damages and will see there are questions about damages on the special verdict form they will receive.

Make clear that, if for some reason they need to determine damages, you believe the evidence will show the fair and reasonable award is your number. The jury will understand you want a defense verdict and will not consider your addressing all of the evidence and the law in the case to be a sign of weakness.

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

- Tell potential jurors you will be asking for a defense verdict or to award much less money than the plaintiff is demanding.
- Ask the jurors, "If the evidence

shows that our client was not responsible for the plaintiff's damages, would you be able to give little or no money or award a defense verdict?"

- Ask jurors, "If the plaintiff is asking for more than \$1 million in damages, but you believe the evidence supports an award of only \$100,000 or less, would you be able to put aside sympathy for plaintiff and award \$100,000 or less?"

- Ask, "Does anyone believe just because there was an accident and plaintiff has filed this lawsuit, we should pay her whatever she asks?"

Conclusion

Giving a number early and often works. It works for plaintiff's counsel, it works for the defense. You will eliminate the potential for a "nuclear" verdict if you can articulate a reasonable and defensible number early in your trial. Despite what defense lawyers claim — it is not a sign of weakness. But, if you wait until closing arguments to give a number for the first time, a good plaintiff's lawyer will rightfully attack your credibility in rebuttal.

Give it during jury selection and opening. Explain how you believe the jury will never even have to deliberate damages, but you have a duty to address all of the evidence and law they will consider. Get the plaintiff's witnesses — and yours — to talk about your number when they are on the stand. And after you have fought liability for days and weeks, and after you speak your final words to the jury, there will be no doubt in their minds what you want: a defense verdict.

As a recently retired Los Angeles superstar said, "There is beauty in the struggle." If you address this issue head on, the beauty in your struggle will be a defense verdict.

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