FROM MY SIDE OF THE BENCH

Do You Suggest a Number?

BY HON. RANDY WILSON

IN VIRTUALLY EVERY CASE THAT IS TRIED, THE PLAINTIFF is faced with the dilemma of whether to suggest a verdict number to the jury. The plaintiff's lawyer would like to suggest as high of number as possible and yet any plaintiff's lawyer fears the backlash of appearing greedy. Most plaintiff lawyers err on the side of appearing reasonable and suggest damage figures in the reasonable and moderate range. Many, however, suggest no number and simply say, "I'll leave it in your good hands." The defense attorney is in no less of a quandary. To suggest zero damages might appear callous and yet to suggest anything might be perceived as a concession of liability.

In the past, I too have advocated the traditional view that the plaintiff should suggest numbers without appearing to overreach. However, I recently attended a fascinating presentation by Professor Jeffrey J. Rachlinski of Cornell Law School who is a lawyer with a Ph.D. in psychology. Using social studies, he persuasively argues that plaintiffs should put high numbers in front of juries to get the jury thinking in terms of big numbers. The studies he cited were intriguing.

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The concept is called anchoring. Many studies have proven that when a number is placed before a decision maker, even a number that all know is arbitrary, that number will affect the decision. The classic study on anchoring asked people to guess the percentage of African nations which are members of the U.N. When asked "Was it more or less than 10%?" respondents guessed lower values (25% on average). However, when asked if it was more or less than 65%, respondents guessed a much higher number (45% on average).[1]

It makes no difference if the decision maker knows that the number is purely arbitrary. For example, in one study, MIT MBA students were asked to jot down the last two digits of their social security numbers, put a dollar sign ($) next to that number, and then were asked if they would pay more or less than that number for various items. Remarkably, those students with higher social security numbers would pay more than those with lower numbers.[2]

Many other laboratory studies have similarly concluded that attorney suggestions of monetary awards influence awards.[3] Mock jurors presented with identical evidence but with different recommendations by lawyers yield different results, both for pain and suffering[4] and for punitive damages.[5]

Even judges appear to be influenced by anchors. In one study, 82 administrative law judges were given a detailed fact scenario in a hypothetical employment discrimination case and were asked to award damages. However, half the judges were also told that the plaintiff mentioned that she saw some unknown claimant in a court television show had received an award of $415,300. Despite the fact that the ALJs in the "anchor" group knew absolutely nothing about that TV case, the mere mention of that damage award affected their decision. The control group awarded an average of $35,488, while the anchor group awarded $58,775 on average.[6]

Some jurisdictions are so concerned about damage suggestions that they prohibit them entirely. New Jersey characterized an attorney's suggestion of a dollar amount for unliquidated damages as "sheer speculation" that could "instill in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence."[7] The Pennsylvania Supreme Court held that "any suggestion to the jury of an arbitrary amount is highly improper."[8]

Psychology laboratory studies, however, cannot replicate a real trial with real cross examination. Nor can such studies account for real world jury deliberations where a group of jurors can discuss and evaluate attorney suggestions. The recent Arizona Jury Project, however, provides a fascinating glimpse into actual jury deliberations and the effect of attorney recommendations of unliquidated damages.

The Arizona Jury Project, under the encouragement of the Arizona Supreme Court, videotaped 50 jury trials and deliberations.[9] Plaintiffs received a damage award in 31 of the 50 trials.[10] Researchers then analyzed juror comments and the extent to which lawyer damage suggestions or anchors were discussed or utilized. The conclusion was that anchors were frequently discussed and often utilized as a starting point in jury discussions.

- Attorney recommendations were commented upon by 86% of the jurors;
- In 49.2% of the juror comments, the jurors were recounting or attempting to recall the attorney recommendations;
- 9.8% of the juror comments were outright endorsements of the lawyers' recommendations;
- In 21.2% of the comments, the juror used the lawyer's recommendation as a starting point for discussion;
- 19.8% of the comments were rejections of the attorneys' suggestions, broken out as (a) the plaintiff's recommendation was too high (16.2%); (b) the defense recommendation was too low (1.7%); and (c) the defense recommendation was not low enough (1.9%).[11]

The researchers in Arizona concluded that "jurors do attend to what lawyers say about potential damage awards and that their attention is often a starting point for discussions about appropriate damage levels." However, while lawyer recommendations were vigorously discussed, they were never completely awarded. The median jury awarded only 22% of the total amount plaintiffs requested.

My conclusion from all this data? Both sides should absolutely suggest damage figures. Anchoring is real. However, you must not lose credibility by being exorbitant, but it is imperative that you give numbers to the jury as a starting point for their deliberations.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective. ✯

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1 Tversky, A. & Kahneman, D., *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124-1130 (1974).

2 Dan Ariely, PREDICTABLY IRRATIONAL, THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010).

3 Shari Diamond, et al., *Damage Anchors on Real Juries*, SOCIAL SCIENCE RESEARCH NETWORK (July 2011), at http://ssrn.com/abstract=1883861

4 Mollie Marti & Roselle Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damage Awards*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 91 (2000).

5 Reid Hastie et al., *Juror Judgment in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999).

6 Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *The Hidden Judiciary: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1504 (2009).

7 Botta v. Brunner, 138 A.2d 713, 722 (N.J. 1958).

8 Joyce v. Smith, 112 A. 549, 551 (Pa. 1951).

9 Jurors were promised that their deliberations would only be viewed by researchers and were given the opportunity to opt out if they wished. Ninety-five percent of the jurors participated.

10 These 31 consisted of 20 motor vehicle cases, one medical malpractice case, 9 other tort cases and one contract case.

11 Diamond, *supra*.