

THE AM LAW LITIGATION DAILY

Strategy #2 for Dealing With 'Outsized' Damages Awards: Rethink Jury Selection

By Ross Todd
August 31, 2023

A couple of days ago we set the table: **Bill Lee** of **Wilmer Cutler Picker Hale and Dorr** and **Jamie Laird** of **Laird Trial Consulting LLC** have developed three strategies to address the post-pandemic uptick in “outsized” damages awards of more than \$10 million.

Yesterday we spotlighted their first suggestion: Get courts to be more consistent in dealing with challenges to damages demands that are disconnected from the facts in dispute.

Today we'll focus on their second suggestion: Rethink your jury selection approach to do a better job of identifying potential jurors who might be open to requests for big damages.

“Outsized verdicts are awarded by jurors who are comfortable with high damages numbers,” Laird said. “We need to identify who these jurors are.”

Since yesterday's *Daubert*-centric suggestion was heavy on the law, Lee took the lead. But with the second suggestion centering on jurors—Laird's bailiwick—we'll hear much more from her today.



Courtesy photo

Jamie Laird of Laird Trial Consulting LLC.

Laird pointed out that the recent uptick in \$10 million-plus damages awards is actually the second such spike in the past decade-and-a-half. The first came in the wake of the mortgage-fueled financial crisis of 2008, a time when the word “billions” started getting thrown around with greater regularity.

Laird said there was a perception at the time that things were unfair and that large corporations were the beneficiaries. “People felt that the big companies were getting bailed out, whereas the individuals were getting laid off,” she said. The perception, she said, became that corporate

defendants—especially when pitted against individuals or smaller companies—could afford to pay larger damages awards.

“From the juror’s point of view, the default is, ‘Well, if I make a mistake, but I find against the defendant they can afford it. If I make a mistake in a fight against an individual plaintiff or a small company, it might cause ruin for that person or small company. So if I’m going to err on the side of caution, I’ll just have the defendant pay because this will be a rounding error, they can afford it,’” Laird said.

Laird said the goal for corporate defendants should be to identify the jurors who are most likely to feel this way and use peremptory challenges to strike them. She said some factors to consider in trying to suss out those attitudes are the juror’s socio-economic status, age, experience with corporations, and familiarity with large damages awards.

How do you get that sort of information?

“In some courts, you’re able to get questionnaires ahead of time and a jury list ahead of time,” Laird said. In those venues, she said you can do things like look up jurors’ property values through public databases or their voter registration to search for political affiliations. She said in some instances you can also look to social media to decipher jurors’ political views or to gauge their general satisfaction or dissatisfaction with life.

Of course, in some venues this kind of pre-voir dire background research is off-limits. So Laird said to be clear on what the rules are in the par-

ticular court where your case sits. (Indeed, Lee had this aside about voir dire in his home state Massachusetts. “Generally, jury selection goes this way: ‘Do you see anybody in the room you know? No? Okay. You’re on the jury. ... That’s basically it.’”)

In those venues where you can do some pre-voir dire work, Laird said getting a gauge on the jurors’ general life satisfaction is key. In general, dissatisfied people tend to be more open to calls for big damages, she said. She said if you’re looking at social media belonging to a generally satisfied person, you’ll see birthday parties, celebrations, happy family photos and the like. With the dissatisfied, you’ll see more grievances aired—even things such as negative restaurant reviews.

“It could just be this feeling of: ‘This is the time I can finally be heard. This is my chance,’” said Laird of the dissatisfied potential jurors. She said these attitudes can come from “a very well-meaning, well-intentioned” place. The court’s typical admonition about the importance of jury service can have a compounding effect. She summarized the sort of attitude you’re seeking to uncover like this: “I don’t feel like I’m making a difference. I don’t feel like things are going my way. And this is my one opportunity. I’m going to do my civic duty. I got picked. I got selected.”

So how can you unearth these attitudes once you have the jurors in the courtroom?

Laird laid out three sample questions that come at the issue directly:

- What are your impressions of big companies in the U.S. today?
- How likely are you to root for the little guy?
- How many of you would feel it may be too difficult to send the plaintiff home without any money?

But she also shared three sample questions that come at the issues indirectly:

The first: “What jobs have you held in the last 3 years?”

While that seems like a pretty standard, innocuous question, Laird said it can be illuminating. “You can start to see if someone has changed jobs frequently, has periods of unemployment or underemployment, or seems generally dissatisfied because they’re going from job to job,” she said. She said it can be a particularly useful question now, in the wake of the pandemic because it can identify people who went through periods of instability or financial hardship over the past three years. “You can also see the people who’ve had the same job for the last 20, 25 years. Maybe they work at a big company. They’re satisfied. Those are the people that are less likely to have this anger and want and desire to punish companies with large damage awards,” she said.

Her second indirect question: Have you ever had a serious dispute with a company?

Again, she said this question gets at the jurors’ general satisfaction or dissatisfaction with life. Everyone, she said, might have had some sort of dispute with a company. (I’d say! Pretty much

everybody has to deal with banks and insurers, after all.) “Those who want to answer this question—those who want to air their grievance in a public space such as jury selection—it tells you a little bit about where they are and where they stand,” Laird said.

Her final indirect question: When personal morals and law conflict, which do you think should be followed?

Laird said this question gets at issues related to “the spirit of the law, versus the letter of the law.” People who might use their jury service to make a statement will often tell you as much when asked this question, she said. “Those are the people that are more likely to want a large damage award to make a statement about how the individual is feeling about large corporations,” she said.

At this point, Lee noted that a number of the questions that Laird put forward were phrased in terms of how jurors feel. He said that mirrors something that **Doug Cawley** of **McKool Smith**—“a really terrific trial lawyer” who he’s up against in patent cases—has told him. “He often says that what you’re trying to figure out is not so much what they think but how they feel,” Lee said. “I think that Jamie has taught me over the years that the type of questions that she is telling us to ask are ones that really cater to how people feel because that’s going to drive the end result.”

Said Lee, “Intuition may be more important than analytical discipline.”