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Anchors Away! Beating Plaintiffs at Their Own Game

By Marc Jaskolka[1] and Meg Hogan[2]

Marc Jaskolka

Meg Hogan

Throughout the United States, plaintiff's attorneys in civil suits are using anchoring as a strategy to secure higher verdicts. What is anchoring? Plaintiff's attorneys engage in anchoring when they give a value or a number to a jury, which "anchors" a reference point for the jury to begin in its assessment of noneconomic damages (pain and suffering). Often, the anchored reference point is an arbitrarily high baseline amount which nevertheless provides the jury with an unsubstantiated starting point in assessing noneconomic damages in a case often leading to excessive awards. To counter this, defense counsel not only needs to be able to identify when plaintiffs use an unreasonable anchor, but also be prepared to counter it

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WHAT'S INSIDE

IDCA President's Letter

Pat Sealey
IDCA President

WHO WANTS ONLY 7 YEARS OF ACTIVE LIFE AFTER RETIREMENT?

In my first two President's Letters I discussed how motion is medicine, and I advocated going for walks. I wish to continue to use this space to discuss taking care of yourself.

Unhealthy aging includes obesity, elevated blood pressure, inflammation, bad cholesterol, loss of muscle mass, loss of bone density, and much more. These in turn make us fragile and in need of a lot of drugs. What a horrible future!

But wait! Unhealthy aging can be combated by strength training, just like walking. Strength training increases muscle strength, endurance, improves bone density, boosts metabolism, enhances balance and coordination, helps manage obesity, reduces the risk of falls and injuries and generally improves aging and our "active life expectancy."

I am 55 years old. My life expectancy is approximately 25 more years. My "active life expectancy" is only 17 years, however. "Active life expectancy" is the number of years a person is expected to live without significant disability or the need for assistance with daily activities. In other words, if I retire at 65, I can expect just 7 years of active living. Just like life expectancy, however, "active life expectancy" can be increased by healthier living.

Healthier living is now increasingly associated with strength. I lifted weights through high school and college. I stopped because of my family and work. Also, lifting at the gym was not something I found very appealing. I had limited time and devoted the time I had to running which didn't require a gym.

My kids are now gone. I wanted to return to lifting. I am fortunate that I have space to make a gym in my house. I decided to put some money into it to prevent saying "I don't have the right stuff" and to remind myself how big of an idiot I would be if I spent all that money and didn't use it. It has worked. I lift 4 days a week for an hour at a time. I would highly encourage you to see if you too can build a home gym and put enough money into it to prevent calling yourself an idiot.

But even if you can't build a home gym, think about going to the Y or other type of gym. If, like me, that really isn't attractive to you, then there are plenty of strength things that require no financial commitment, For example, about 10 years ago, at the beginning of the year, two of my friends and I made a bet that we would outlast the others by doing one additional pushup for every day of the year. Such that on December 31st, we would have to do 365 pushups, or a total of 66,795 pushups for the year. Of course, by no later than March 1st we would be breaking it into multiple times throughout the day. Surprisingly, I had fun doing it. My point is that you can be creative in trying to figure out how to add strength training to your life.

Many of you are already living an active life. If not, there is a very good chance that almost everyone else will not be inspired by any of this. My hope is only that one of you reads these President's Letters and makes some type of change in your life. I hope all of you not only increase your life expectancy, but maybe more importantly, increase your "active life expectancy."

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and that preparation should begin early on in the case. This article will discuss both how to identify and counter the plaintiff's anchor.

WHAT IS ANCHORING?

"Jurors report being deeply challenged by the task of arriving at damage awards." John Campbell, Bernard Chao, and Christopher Robertson, *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments,* Wash. U. L. Rev, 95 (2017), *citing Beagle v. Vasold, 417 P.2d 673, 675* (Cal. 1966) (*citing* C. McCormick, McCormick on Damages § 88, pp. 318-319 (1935)). Non-economic damages are particularly difficult for jurors because they are not tied to bills, lost income, or future healthcare costs. *Id.* (*citing* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 881-84 (1998). Instead, non-economic damages are used to quantify human suffering (i.e., a plaintiff who may have no economic loss but might suffer from severe pain and suffering the rest of his or her life). *Id.*

Anchoring strategies are effective because they appeal to individuals conscious or subconscious bias when it comes to decision making. Studies show a "human tendency to cast disproportionate weight on the first piece of information [one] receives" when the subject has no background or experience with the information. *Reconsidering Fictitious Pricing*, 100 Minn. L. Rev. 921, 934 (2016). Said another way, decision makers evaluate outcomes based on initial reference points. *Id.* People estimate by starting from an initial value and adjusting until they reach their answer, but these adjustments are typically insufficient and people have a tendency to assimilate towards the value at which they started. Christopher T. Stein, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect in Criminal Sentencing* (June 23, 2017). Different starting points can therefore lead to different results. *Id.* In civil cases, especially those involving personal injury, the initial amount used in determining damage awards is typically provided by the plaintiff who requests a specific amount in damages. Nicholas Rauch, *Reversing the Tide: Counter Anchoring and Reverse Reptile,* For The Defense (January 20, 2021). *See also*, Gretchen B. Chapman, Brian H. Bornstein, *The More You Ask for, the More you Get: Anchoring in Personal Injury Verdicts*, Applied Cognitive Psychology, Vol 10, 519-540 (1996). Understanding jurors are without background and experience in valuing injury or loss, plaintiffs' counsels use a large anchor in an effort to draw a high verdict. *Id.* Plaintiffs' threshold anchor provides the jury—who typically have little to no experience in the legal field or with similar injuries or damages—a number to move up or down from. *Id.* As plaintiffs' anchor is, more often than not, set arbitrarily high, it becomes difficult for an inexperienced lay person to properly assess or provide a fair valuation of non-economic damages after first being confronted by a disproportionately arbitrary amount. *Id.*

EMPIRICAL STUDIES SHOW ANCHORING IS AN EFFECTIVE STRATEGY

Empirical research proves the effectiveness of anchoring. Mark Behrens, Cary Silverman, Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?,* American Journal of Trial Advocacy,. Volume 44.2 (2021). *See also* Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 USF. L. REV. 393, 396-97 (2018).

- In a 2016 study published in the Iowa Law Review, *Countering the Plaintiff's Anchor,* legal professors at the University of Denver and the University of Arizona performed a randomized controlled experiment in which mock jurors were presented with a medical malpractice trial, manipulated with six different sets of damages arguments in a factorial design. John Campbell, Bernard Chao, Christopher Robertson & David Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). The plaintiff demanded either $250,000 or $5 million in non-economic damages. *Id.* The study confirmed that anchoring has a powerful effect on damages; damages were 823% *higher* when the plaintiff requested $5 million as opposed to $250,000. *Id.*
- A 2017 study published in the Washington University Law Review, *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments,* had participants watch one of two medical malpractice mock trial videos. Tanya Albert Henry, *Why "Anchoring" Practices that Push up Jury Awards Must End*, Wash Univ. L. Rev. (March 3, 2021) (citing John Campbell, Bernard Chao, and Christopher Robertson, *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments,* Wash. U. L. Rev, 95 (2017)).In one video, mock jurors decided the noneconomic damage award without influence. *Id.* In the other, the plaintiff's counsel asked for $5 million in noneconomic damages. *Id.* The first group awarded an average $473,489; the second group's award averaged $1.9 million. *Id.*

ANCHORING IS LEADING TO NUCLEAR VERDICTS

Anchoring tactics are leading to nuclear verdicts across the US. Empirical evidence has demonstrated that the more you ask for, the more you get. Gretchen B. Chapman, Brian H. Bornstein, *The*

More You Ask for, the More you Get: Anchoring in Personal Injury Verdicts, Applied Cognitive Psychology, Vol 10, 519-540 (1996). Plaintiffs are well aware of this tactic and the public has become accustomed to viewing advertisements on television and social media suggesting that it is normal for plaintiffs to receive verdicts and settlements in the hundreds or millions or billions of dollars. *Nuclear Verdicts: Trends, Causes, and Solutions*, US Chamber Inst. For Legal Reform (September 2022). The publicity and advertising of nuclear verdicts is desensitizing the public to astronomical amounts. *Id.* This may lead jurors to believe that awards at these levels are normal and legally sound, when they are not. *Id.* Which, in turn, continues a cycle of unreasonable damage demands and unstainable nuclear verdicts. *Id.*

HOW TO COUNTER PLAINTIFFS' NOVEL ANCHORING STRATEGIES

HOW TO COUNTER PLAINTIFFS' ANCHORING STRATEGY PRIOR TO TRIAL

KNOW YOUR JURISDICTION

At trial, plaintiffs may set the "anchor" by quantifying noneconomic damages as a lump sum, a per diem calculation, or both. However, some states have made attempts to limit anchoring. John Campbell, Bernard Chao, Christopher Robertson & David Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). For example, following a 2017 survey, the following states allow lump sum demands *and per diem* calculations to support them: Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Mexico, North Carolina, Ohio, Oregon, Rhode Island and Vermont. *Id.* The following states prohibit per diem calculations but allow lump sum demands: Illinois, Maine, Missouri, New Hampshire, New York, North Dakota, South Carolina, Virginia, and Wisconsin. *Id.* States that allow some form of per diem, but that do not allow lump sum demands are: New Jersey and Massachusetts. *Id.* States that prohibit both lump sum and per diem are: Delaware, Pennsylvania, West Virginia, and Wyoming. *Id*. States that defy categorization are: Arizona, Arkansas, Maryland, Montana, Nebraska, Nevada, Utah, and Washington. *Id.* States without final decisions from the court of final resort include Tennessee, Texas, Oklahoma, and South Dakota. *Id.* You need to know what your state allows in order to take meaningful and effect steps early on to counter future anchoring tactics.

EXAMPLES OF PLAINTIFFS' TACTICS

Defense counsel should prepare for the pain and suffering only case by anticipating the possibility that medical bills will not be

offered and that plaintiff's counsel will attempt to utilize a new anchor. Likewise, if the subrogation or collateral source payments are not introduced or allowed at trial, the defense must work to create an alternative anchor or show that the plaintiff's anchor is not reasonable or supported by the evidence.

Large verdicts are a result of the impact made on the jury. This is accomplished by making it "personal." In the pain and suffering only case, plaintiff's counsel will not focus on the wreck or even the resulting injuries so much as they will on the many ways in which the plaintiff's life has been dramatically and negatively impacted since the wreck.

For example, Ms. Jones loved to do yard work or garden, play golf, volunteer at her church, and now she cannot do those things, or cannot do them as often, and when she tries to (and I think this is the better argument for pain and suffering only cases) she can no longer do these activities without paying a physical and mental price that results in pain, discomfort, and frustration. The goal, of course, is to illustrate that the plaintiff's overall quality and enjoyment in life's simple pleasures has been dramatically affected. A jury can relate to these things. It makes it personal for them.

In closing argument, plaintiff's counsel will argue dollar figures that seem reasonable under the circumstances but add up to a significant amount to compensate the plaintiff for pain and suffering due to her inability, or diminished capacity to participate in these activities as she used to. The plaintiff's tactic is to argue that she has pain every hour of every day, and especially when she engages in the activities that used to bring her joy. Then they ask the jury to apply a "reasonable" number to each hour—like the minimum wage. It's not hard to see how this can result in large verdicts. They will ask the jury questions like, what is it worth to not be able to garden, play golf, hike, walk around the block, and countless other simple activities that everyone does and takes for granted daily. $1,000 a day? $15, $30, $50 an hour?

Defense counsel must acknowledge that the idea that juries punish plaintiffs who overreach and ask for too big of a number is no longer true in some cases. Younger jurors especially have become desensitized to the value of the dollar. If this tactic is not countered by defense counsel, the jury is left thinking that the accident has substantially altered the plaintiff's life—by hampering and possibly outright preventing her from enjoying life through the simple activities she did pre-crash. It does not have to be physical either. The complaints can be cognitive in nature—TBI/PTSD claims. The plaintiff may testify that she can no longer play chess, board games with her family, cards, enjoy other pastimes like reading—because she has difficulty focusing, loses her train of thought, suffers headaches, anxiety, lack of sleep and overall frustration in life. None of these examples involve the wreck or even the resulting injuries. Instead, the focus is on the resulting impact on the person.

Plaintiff may testify that if she drops a fork on the kitchen floor, it's not that she can't pick it up, but rather, she must really think about how she will pick it up so as not to aggravate her pain or discomfort. Before the accident, she did not have to give that simple task any thought. If she is older, she may testify as to how her limitations have affected her marriage and quality of life in retirement and that now, she must consider how to modify her life daily to limit pain. Again, these are all things that make the "impact" of the accident more personal and all things that a jury can easily relate to.

It is not hard to see that plaintiff's counsel can easily paint a picture that her life has not only been altered, but dramatically impacted by the plaintiff's inability to engage in life's simple pleasures that we often take for granted. This is subtle and indirect but impacts the jury in a more personal way. When this tactic is employed effectively, it has a dramatic impact on the jury and juries can award very large verdicts based on pain and suffering alone.

WRITTEN DISCOVERY AND DEPOSITIONS

To counter this, we must target our discovery early in litigation to learn what the plaintiff's lawyer will focus on to attempt to create an alternative anchor. Resist form discovery and the strategy to simply "poke holes" in the plaintiff's case. Interrogatories should be targeted to discover what specific pastimes, hobbies, activities, social/community involvement the plaintiff has done in the past. Tailor specific written discovery questions and lines of questioning for depositions to get the details of each activity. Let the plaintiff know you are digging. It makes them nervous and has the potential to deter overreaching. Questions should be designed to fully flesh out how the plaintiff claims her life has been changed because of the accident. What specific kinds of experiences did the plaintiff seek out and enjoy before the incident? With whom did she engage in these activities with? How has that changed since the accident?

It is not good enough to simply ask what? We must go further and ask—what?—how often?—who with?—where?—for how long?—etc. Then ask for names of individuals and their phone numbers and contact information. Send subpoenas to third parties like social and athletic clubs, gyms, and other organizations to discover membership information and activity.

Deposition questioning should be similarly targeted and tailored to discover specific information about the plaintiff's pastimes, activities, and community involvement. If the plaintiff gardens, where does she buy her potting soil? What nursery does she

purchase her plants and flowers from? Often times, the plaintiff will not be able to answer these specific questions.

Once you have the full picture of the plaintiff's pre-accident activities, you can then attempt to identify where plaintiff's counsel will focus and begin to discover and identify evidence that may refute the plaintiff's story or at least show that the accident has not negatively impacted the plaintiff's life to the extent claimed. If that can be shown, you have now called her credibility into question which never sits well with the jury.

SURVEILLANCE

We tend to think of surveillance in an isolated moment of time wherein we catch the plaintiff in the act. That rarely happens. Instead, focus on obtaining surveillance over a longer period of time in an effort to establish a pattern of activity that may contradict the plaintiff's testimony. Have conversations with your client and your claims representative to determine if your case warrants extended surveillance and activities checks. For example, a plaintiff may testify that he used to jog and run 5Ks regularly but that he can no longer do so since the accident. Perhaps the testimony is true—that he doesn't run the races anymore, but what if surveillance establishes that he routinely jogs several times every week. While he may not be running in races, the surveillance tells the rest of the story. The video footage can give the testimony proper context by demonstrating that he still runs. This will allow you to argue at trial that you are showing the jury the real story and that the plaintiff's life was not impacted to the extent claimed. It shows the jury that your assessment of the impact that the accident has had on the plaintiff's life is accurate, reasonable, and supported by the evidence. It gives you credibility as defense counsel and takes credibility away from the plaintiff and his lawyer.

WEARABLES AND FITNESS TRACKERS

Devices contain a wealth of information about our lives, activity, health, and whereabouts. If the case warrants, consider a request to have the plaintiff's phone, Apple watch, Fitbit, etc. forensically examined. These requests, though more common, are still not made enough by the defense bar. We need to get more aggressive and send preservation letters for phones and other devices early in litigation or pre-suit. We often think of this type of discovery in the context of liability. That is, devices may prove location, distracted driving or some other information related to the accident itself and relative fault. However, the information contained on these devices in the months prior to the accident and in the months after, may end up being the most important evidence in the case if it can be used to show a pattern of activity that has not changed post-accident.

HOW TO COUNTER PLAINTIFFS ANCHORING AT TRIAL

KNOW YOUR TRIAL JUDGE

Judges generally have broad discretion to bar or limit courtroom arguments that are inflammatory, misleading, or unsupported by evidence. Going into your trial, you should be familiar with your trial judge and the arguments he/she will entertain to limit any anchoring tactics.

How has your judge ruled on the issue of anchoring tactics? More specifically, you may encounter the argument in a plaintiff's motion in limine to exclude comment by defense counsel that the lack of evidence of medical bills should not be mentioned in front of the jury because they are not being claimed as an element of damages, and therefore reference to them is irrelevant and highly prejudicial. Be prepared to counter this argument and know how your judge has ruled on the issue in other cases. Just because the Plaintiff does not offer the medical bills as evidence does not mean that reference to them by defense counsel as having been paid is not relevant or should not be allowed due to the plaintiff not claiming them as damages. Medical bills are relevant to illustrate the nature, extent, and severity of the injuries. Do not give up on the need to articulate a reason for their relevance—one of which is to assist the trier of fact in determining the nature and severity of the claimed injuries.

MOTIONS IN LIMINE

Defense counsel should carefully consider appropriate motions in limine. Some anchoring tactics are closely aligned with improper "Golden Rule" arguments and reptile theory strategies employed by plaintiff's counsel. Every effort should be made by defense counsel to prevent this.

"Golden rule" arguments by plaintiff's lawyers invite jurors to put themselves into the shoes of the plaintiff and are improper. *Allen v. Mobile Interstate Piledrivers*, 475 So. 2d 530, 537 (Ala. 1985). ("A request that the jurors put themselves in the place of the Plaintiff is an improper argument."). They are improper because they invade juror objectivity—rather than encouraging jurors to decide the case based upon an analysis of the facts controlled by applicable law. As such, arguments of this sort are improper, and the courts should not allow arguments or comments that:

1. Invite jurors to imagine how they would feel if they couldn't do a certain activity

2. Intimate that jurors would react in a particular way identifiable with the plaintiff, or

3. Imply that jurors should make a decision based upon hypothetical situations that trivialize or demean the

defendants, the applicable defenses, or the arguments being made by the Defense in the case.

4. Invite jurors to "step into the shoes" of plaintiff.

5. Invite jurors to pretend or imagine that pain is "like a job."

This list is certainly not all-inclusive but is offered as examples of the type of arguments that plaintiff counsel will make and the court should disallow because they are "jury nullification" invitations, "personal opinion" arguments, or "golden rule" arguments.

KNOW YOUR OPPONENT

Use any means available to discover how your opponent has made arguments in similar cases at trial. Research your jurisdiction's jury verdict reporter. Order trial transcripts. This information will give you invaluable insight into the tactics you will likely encounter in your case.

There are numerous large plaintiff's firm that aggressively advertise. They tend to stick to a script in the pain and suffering only case. They argue that pain and suffering is like a job to their client and in closing they ask that the plaintiff be paid hourly for that "job." This is not allowed in some jurisdictions, but it is in Alabama. Be prepared to counter these types of arguments if not successful in keeping them out altogether in motions in limine.

VOIR DIRE

Each case implicitly involves a defendant's liability for damages and request for damages. Selecting a good jury is critical, therefore, it is important to identify juror bias towards damages early on. Asking pointed questions of potential jurors during voir dire and paying attention to plaintiff's questioning on damages can help you identify biased jurors early on. Although defense attorneys hesitate to ask jurors questions about damages attitudes early on, if your jurisdiction allows, here are some written questions that you can use to flesh out high damages jurors:

- Do you think that civil damage awards today are: too high, about right, too low? (High damages jurors say too low, about right)
- How do you feel about the large awards given recently in tobacco lawsuits? (High damages jurors strongly favor them)

THANKS FOR ATTENDING THE 2025 DEPOSITION BOOTCAMP!

On May 8, **23 participants and 20 volunteers** attended IDCA's 2025 Deposition Bootcamp.

During this one-day seminar, attendees practiced their deposition skills, listened to presentations by experienced IDCA members, and participated in mock exercises to apply critical skills in taking and defending depositions.

A special thank you to event organizers Katie Gral and Bryn Hazelwonder for organizing the event and to Kami Holmes and Grinnell Mutual Reinsurance Company for hosting!

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- It is more important to compensate an injured party than to figure out who is at fault. (High damages jurors strongly agree)

Strategies for Minimizing Damages: Evolving Juror Attitudes and Strategies for Uncovering Bias, Trial Behavior Consulting (July 6, 2015).

If your jurisdiction allows, some effective damages questions to ask in open court voir dire include:

- Do you think giving large damage awards is the best way to punish a company you feel has done something wrong?
- Knowing that the plaintiff in this case is (dead, disabled, likely to die shortly), do you start off with some number in your head that is a reasonable amount to award for that kind of damage?
- Who here believes that most people do not take emotional distress and suffering seriously enough?
- Is there any number that in your mind is too low?
- Would you be able to go home and look your union buddy in the eye and say that you voted to send a fellow union member home with no money at all?
- Do you feel that it might be hard for you to set sympathy aside in making this decision?

Strategies for Minimizing Damages: Evolving Juror Attitudes and Strategies for Uncovering Bias, Trial Behavior Consulting (July 6, 2015).

Focusing on anti-corporate attitudes and sympathy for the plaintiff will help identify high damages jurors and elicit grounds for challenges. *Id.*

Plaintiffs questioning on damages may also help you identify jurors who are willing to use money to send a message. Sarah E. Horbrook and Jill M. Leibold, *Top Strategies for Voir Dire and Jury De-Selection*, Commercial Litigation (October 2008). Be cognizant of plaintiffs' attorneys use of anchoring techniques to numb jurors to high damages. *Id.* Note jurors' responses to plaintiffs attorneys' damages questions as their responses may be used in cause challenge arguments. *Id.*

If the case is a "pain and suffering" only case, use voir dire to explore potential jurors' understanding of how damages are assessed at trial. Do as much as the judge will allow you to do. Explain non-economic damages and how they differ from medical expenses.

SHOULD YOU COUNTER PLAINTIFF'S ANCHOR?

Many defense attorneys hesitate on whether or not they should offer a counter anchor out of fear that doing so would be a concession to liability. However, a study conducted by legal professors at the University of Denver and the University of Arizona ("the Campbell study") presented mock jurors with a medical malpractice trial. John Campbell, Bernard Chao, Christopher Robertson & David Yokum, *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543 (2016). The plaintiff demanded either $250,000 or $5 million in non-economic damages. The defendant responded in one of three ways: (1) offering the counter anchor that, if any damages are awarded, they should only be $50,000; (2) ignoring the plaintiff's damage demand; or (3) attacking the plaintiff's demand as outrageous. Christina Marinalas, JD, PsyD, *How to Counteract the Anchoring Effects of a Plaintiff's Damages Request* (May 5, 2022). Mock jurors were then asked to render a decision on both liability and damages. *Id.* The study confirmed that anchoring has a powerful effect on damages; damages were 823% *higher* when the plaintiff requested $5 million as opposed to $250,000. *Id.* In addition to showing that anchoring is an effective strategy, the study established that offering a counter-anchor was effective. *Id*. In fact, more effective that when the defense ignored the anchor. *Id.* (stating when the plaintiff's demand was high, jurors awarded 41% *less* when the defendant offered a counter-anchor than when the defense merely ignored the request or attacked it as unreasonable). *Id. See also* Nicholas Rauch, *Reversing the Tide: Counter Anchoring and Reverse Reptile,* For The Defense (January 20, 2021)(stating in general, the "ignore" strategy is the least effective at neutralizing a plaintiff's use of the anchoring effect.").

Overall, the Campbell study establishes that not only does anchoring work, but it also challenges the conventional wisdom that juries will interpret a defendant's proffer of a lower counter-anchor as a concession of liability. *Id.* Ultimately, the Campbell study suggests that although no defense strategy may completely counteract the anchoring effect, offering a counter anchor would have the largest effect on lowering the total damages award in general. Campbell, *supra*; *see also*, Rauch, *supra*. In the end, however, whether to counter plaintiff's anchor will have to be made on a case-by-case basis after a close analysis of the relevant facts, liability, and jurisdiction.

The decision to counter anchor is necessarily tied to how good the liability defenses are. If liability arguments are very strong, you might opt not to counter anchor. If liability is questionable, you likely want to give the jury an option to measure damages tied to a lower anchor. If liability is established, quite clearly your focus will be on limiting damages at trial and it will be necessary to provide the jury with counter anchors.

IF ANCHORING, ANCHOR AWAY!

If you cannot anchor traditionally because the plaintiff does not introduce the medical bills at trial and therefore, you cannot take advantage of the lower collateral source subrogation number, then anchor by any other means available. Point out in voir dire, and especially in opening, what the plaintiff is *not* claiming. After you tell the jury what you expect the evidence to be, tell them what it will *not* be. For example, "members of the jury, you will not hear any testimony about medical bills today." No doctor is going to testify about medical bills or the cost of medical treatment because the plaintiff is not even claiming them." Predispose the jury to be skeptical as to why they will not hear about the medical bills—because often, that is one of the first things several jurors will want to know. If not presented, the jury will likely believe that the medical bills were insignificant or that they were already paid. Pointing out that medical bills are not being claimed or framing questions in a way that suggests that the jury will not hear any information about them will operate to anchor the jury to a lower figure relative to the damages that are being claimed.

Ask in voir dire if there is a minimum amount that anyone thinks they have to award simply because the plaintiff was in an accident and injured as a result. If plaintiff's counsel questions if anyone would have a problem awarding tens of millions of dollars or hundreds of thousands of dollars, counter by asking if anyone would have a problem awarding a few thousand dollars if the evidence supports it. Would sympathy prevent them from being able to do so? These kinds of questions can create skepticism and alert the jury to pay attention to the key facts that refute the plaintiff's claim for outrageous non-economic damages.

Another practice pointer to consider when the Plaintiff does not introduce medical bills is to focus on the medical treatment—or lack thereof. Jurors understand the cost of medical treatment. They know it is expensive. If you cannot anchor to lower medical bills or low subrogation numbers from collateral source payments, frame your questions and evidence to highlight "nuggets" in the medical records themselves. Medical treatment records contain a plethora of information. Defense counsel would be wise to dig into the details.

Delays in initial treatment or follow-up care can be highlighted. Significant gaps in treatment can likewise serve to counter the plaintiff's claims of significant life-altering impact from the accident and resulting injuries. Often, the plaintiff will testify that they have undergone certain treatment or that they understand their injuries are permanent and that they will have to deal with it for the rest of their lives. In fact, medical treatment records regularly contain information that is inconsistent with the plaintiff's version of life-altering impact. Use these gems at trial to point out that the plaintiff is over-reaching and that the treatment

records illustrate the real picture. If a plaintiff has testified that she has low-back pain as a result of the accident and that it has significantly altered her life to the point that she can no longer engage in certain activities that brought her enjoyment in the past, point out that she has only treated three times in the last year and half, or that she has not treated for low back pain in over two years. Show that she has been to the doctor for several other things in that time frame and not once is it mentioned that she complained of back pain. Anchor to the number of visits. Point out the number of physical therapy visits that she missed, was late for, or cancelled altogether. All these examples give the jury an opportunity to anchor to a lower more reasonable number. Or stated another way, the evidence can be used to show that the plaintiff's anchor is outrageous and not supported by the actual evidence.

For example, if the plaintiff testifies that she can no longer do yard work, do not let that go unaddressed. Did she do yard work before the accident? If not, who did? How paid? Plaintiff's counsel may argue that not being able to do yard work and other activities is worth an hourly or weekly dollar amount that will seem reasonable ("$50 a day") but will result in a large number. $50 multiplied by 365 days a year equals $18,250 multiplied by a life expectancy of 20 years equals $365,000, not adjusted for inflation, or reduced to present value. This is just one example of one activity. Consider getting quotes for similar size yards and average cost of lawn care for the months of the year that lawn care is needed. $75 dollars a week for 7 to 8 months of the year is $2,100 to $2,400 a year for lawn care. In our example, we have given the jury a more realistic and reasonable number to anchor to–and a tangible counter anchor that is based on the evidence. A juror can relate to realistic lawn care cost. $2,100 per year for the same life expectancy equals $42,000–a lot less than the emotionally charged $365,000 number which is not supported by any evidence.

These are just a few examples of countering the anchor suggested by plaintiff's counsel. As Plaintiffs' lawyers tactics change, defense counsel must strive to not only identify potential anchors well ahead of trial, but also be prepared to provide creative and sensible anchors supported by the evidence when appropriate.

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1 Marc Jaskolka is a shareholder in Gaines Gault Hendrix's Birmingham, Alabama office where his practice is focused on defending businesses and commercial defendants in cases arising out of trucking accidents, premises liability, and complex commercial general liability. He has over twenty years of experience in representing contractors in the telecommunications infrastructure construction and maintenance industry. Marc is an accomplished trial lawyer. He leads the firm's 24/7 Trucking Accident Response Team and is experienced in the coordination of early response and investigation of accidents of varying size and severity. Marc is longtime member of DRI, serving on the Trucking Law Committee and as Vice Chair of the Insurance Coverage Specialized Litigation Group.

2 Meg Hogan of Scopelitis, Garvin, Light, Hanson & Feary has a diverse practice serving clients in the transportation industry, primarily litigating claims regarding motor vehicle accidents, catastrophic injury, wrongful death, and other high-exposure cases. Licensed in Illinois, Wisconsin, and Missouri, Meg has worked with clients to assess cases, formulate strategies early on in litigation, and negotiate a resolution of challenging cases when appropriate. Meg's litigation experience helps her clients develop strong legal positions that assist them with navigating risks.

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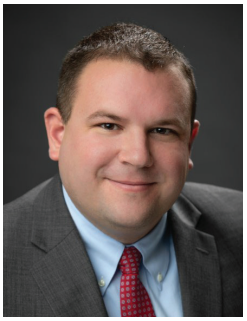

Nick Crosby

Nick serves as Legal Counsel for Illinois Casualty Company ("ICC") and works remotely from Cedar Rapids, Iowa. ICC is an insurance carrier specializing in coverage for restaurants, breweries, wineries, bars, gentlemen's clubs, package liquor stores, and gas stations. As Legal Counsel, Nick manages and oversees a large caseload of catastrophic injury and property damage cases across ICC's fifteen state footprint. He also handles complex coverage, and cyber liability matters for ICC. Additionally, Nick serves on ICC's New State Expansion and Product Development Committees and provides legal services to Two Rivers Investment Properties, a subsidiary of ICC Holdings.

Nick earned his undergraduate degrees in Political Science and Criminal Justice from Mount Mercy University in 2013. He then attended Washington University in St. Louis, School of Law, and graduated in 2016. After law school, Nick worked as a judicial law clerk for the Second Judicial District of Iowa (2B) in Fort Dodge, Iowa. He then practiced law at Cartwright, Druker & Ryden as an associate in Marshalltown, Iowa, where he predominantly handled insurance defense matters and gained experience in family, criminal, and estate law.

Nick currently resides in Cedar Rapids, Iowa, with his girlfriend, Alex, and their two dogs, Millie and Leia. He spends most of his free time golfing at the Cedar Rapids Country Club and local municipal courses. Nick also enjoys traveling to Mexico with Alex during the cold winter months.

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