



# **SOCIAL INFLATION - LEGAL SYSTEM ABUSE**

*Observations and solutions to support the right to fair and impartial dispute resolution*

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# DRI CENTER FOR LAW AND PUBLIC POLICY

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### About The Center

Founded in 2012, the **DRI Center for Law and Public Policy** (The Center)—through scholarship, legal expertise, and advocacy—provides the most effective voice for the defense bar in the discussion of substantive law, judicial processes, constitutional issues, and the integrity of the civil justice system at both the national and state levels. Two of the Center's three primary committees—Legislation and Rules and Public Policy—are comprised of numerous task forces and working groups that undertake in-depth studies of a range of topics and publish comments, articles, and white papers on a variety of issues. These resources serve not only as practical tools for DRI members, but also as objective counsel to policymakers and effective public education assets. The Amicus Committee files amicus curiae briefs in carefully selected cases that present issues of importance to civil litigation defense lawyers and their clients.

### About NAMIC

The **National Association of Mutual Insurance Companies** (NAMIC) consists of more than 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write \$357 billion in annual premiums and represent 69 percent of homeowners, 56 percent of automobile, and 31 percent of the business insurance markets. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

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# INTRODUCTION

The term “Social Inflation” describes a trend of dramatic increases in costs and verdicts associated with civil litigation that outpaces general economic inflation without significant change in legal or factual bases to support it.<sup>1</sup> Social Inflation’s causes are complex. Its damaging consequences are palpable for businesses, consumers, and the rule of law.

Real data proves it exists. The U.S. Chamber of Commerce’s Institute for Legal Reform finds that U.S. tort costs, which reached about \$443 billion in 2020, were equivalent to 2.1 percent of GDP. Costs had steadily increased at an average annual rate of six percent from 2016 to 2020, outpacing the growth in inflation and GDP over the same period.<sup>2</sup> The Institute for Legal Reform found that for jury verdicts of \$10 million or more, the median verdicts increased by 27.5 percent from 2010 to 2019, far outstripping inflation of 17.2 percent over the same period.<sup>3</sup>

Understandably, then, businesses and consumers alike have felt the effects of social inflation. Certain sectors have more openly decried its impact, particularly insurers, trucking, the retail industry, drug and medical device makers, and other product manufacturers. The upward spiral in costs and very large verdicts affects a broad scope of businesses, fueling the concern. Simultaneously, polling shows a continuing downward slide in public trust of the judiciary<sup>4</sup> and business.<sup>5</sup>

What we could not foresee three years ago was the coming cataclysm of the COVID-19 pandemic and multiple consequential social and political upheavals. These turbulent times are revealing negative shifts in the perceptions of business defendants among jury-eligible people. The ideal of a level playing field for business defendants is threatened.

Social Inflation has many causes. One cause is growing litigation involvement by third parties, either outside funders or nonlawyer firm owners. Litigation funding is a multibillion-dollar industry. Critics claim that it negatively affects civil litigation by significantly rebalancing credit risk. It may also exert pressure on borrowers by exacting a significant portion of a settlement or judgment. While the data suggest trends, the influence on specific litigation is unknown, primarily due to a lack of transparency. These arrangements certainly have an influence on setting a settlement floor. Some courts have even considered whether these arrangements constitute usury.<sup>6</sup>

Litigation funding drives up the length, cost, and outcomes in civil cases. It also pays for advertising to drive up litigation.

The lack of transparency in funding arrangements and the fear of outside influence on parties are drawing the attention of the American Bar Association, as well as courts, rules committees, and legislatures.

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<sup>1</sup> Jeff Dunsavage, *What Is Social Inflation? What Can Insurers Do About It?*, Insurance Information Institute (Jan. 25, 2021).

<sup>2</sup> Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System*, November 22, 2022, available at <https://instituteforlegalreform.com/research/tort-costs-in-america-an-empirical-analysis-of-costs-and-compensation-of-the-u-s-tort-system/>.

<sup>3</sup> Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes and Solutions*, September 22, 2022, available at <https://instituteforlegalreform.com/research/nuclear-verdicts-trends-causes-and-solutions/>.

<sup>4</sup> State of the State Courts, NCSC, study available at <https://www.ncsc.org/consulting-and-research/areas-of-expertise/leadership-and-governance/state-of-the-state-courts>.

<sup>5</sup> Confidence in Institutions, Gallup, available at <https://news.gallup.com/poll/1597/confidence-institutions.aspx>.

<sup>6</sup> See for example *Fast Track Inv. Co., L.L.C. v. Sax*, 35 N.Y.3d 997, 149 N.E.3d 432 (June 23, 2020) (dismissed on appeal at the request of both parties).



Also, third-party money is finding its way into litigation through nonlawyer ownership of law firms and nonlawyer providers of legal services. A growing number of jurisdictions are allowing non-lawyer practice models that are largely unregulated by state bar associations and ethics rules, creating a dissonant patchwork of rules. Again, the effect of this third-party money is difficult to trace, but it certainly alters the attorney–client relationship by introducing a pure profit motive to the business model.

Other causes contributing to the overall issue of Social Inflation include the rise of “nuclear verdicts”; use of scare tactics; and attorney advertising to not only recruit clients, but also to influence potential jurors through saturation marketing via third-party funding.

This paper offers a broad definition of Social Inflation affecting all civil defendants. It discusses significant contributing causes. This paper examines and recommends model rules that courts are using to increase transparency and help level the playing field. This paper also examines legislation that targets systemic flaws and exploitative legal tactics that contribute to Social Inflation. Finally, this paper suggests creative, common-sense strategies to combat Social Inflation. Social Inflation is a dynamic phenomenon that is growing in volatility, scope, and public interest. There is no universal agreement about the causes or the solutions. This paper is intended as an introduction, to promote discussion and provoke thought. The DRI Center for Law and Public Policy and its Social Inflation Task Force, along with strategic partner NAMIC, are committed to track the landscape of Social Inflation and to continue to develop best practices and responses to assist all who seek fundamental fairness in the resolution of civil matters.

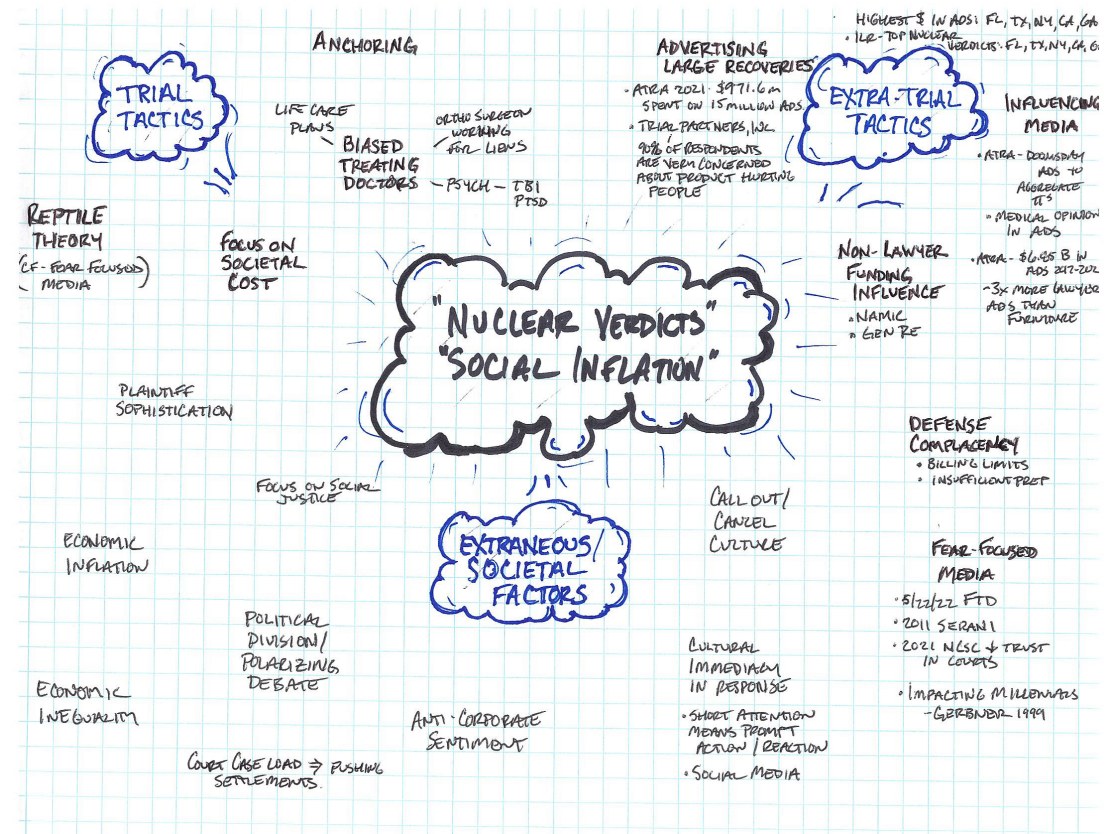


Figure 1

# SIGNIFICANT FACTORS CONTRIBUTING TO SOCIAL INFLATION

Outside money, advertising, trial tactics, and nuclear verdicts all contribute to Social Inflation. These factors present formidable challenges to civil defendants and the right to trial by an impartial jury. Any evaluation of solutions to Social Inflation must first begin with a discussion of the factors that drive it, including third-party litigation funding and nonlawyer ownership of law firms. These contribute to Social Inflation by presenting well-heeled strangers to disputes with opportunities to invest in litigation, raise costs, prolong litigation, and drive the trend toward nuclear verdicts. Another factor driving Social Inflation is the increase in very large verdicts, influenced by psychological factors, advertising that numbs potential jurors with respect to reasonable case values and business motives, anchoring, scare tactics, and other techniques.

## *What Is Third-Party Litigation Funding and Why Does It Matter?*

As examined in the DRI Center for Law and Public Policy's 2018 white paper, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, third-party litigation funding, or "TPLF," refers to "funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer."<sup>7</sup> Third-party litigation funding gives strangers to disputes a direct financial stake in specific cases or portfolios of litigated matters.



Supporters of these arrangements claim that TPLF helps even the playing field in access to civil justice. They argue that this arrangement brings justice to the "little guy" who is no match for well-funded corporate defendants and insurers. However, new problems have surfaced as its use has grown. As noted in an Insurance Information Institute (III) study, it is "no longer about David vs. Goliath, but about speculative investors getting richer as they focus on cases more likely to win the big settlements."<sup>8</sup>

This outside financial stake pushes ever more money and resources to fund litigation and advertising. According to the III, data support the conclusion that TPLF is a driver of Social Inflation due to factors including "rising legal costs, such as those resulting from an increase in the number of outsized jury awards and legal proceedings that take longer than reasonably expected to resolve."<sup>9</sup>

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<sup>7</sup> David H Levitt, et al., [Third Party Litigation Funding: Civil Justice and the Need for Transparency](#), DRI Center for Law and Public Policy (2018) (quoting ABA 20/20, at p. 1.); see also Andrew Pauley and Paul Tetraault, [Curbing a Questionable Practice: A Survey of Public Policy Measures to Address Concerns Surrounding Litigation Funding](#), NAMIC: Advocacy: Public Policy: Public Policy Papers (2018).

<sup>8</sup> *What Is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?*, Insurance Information Institute at 5 (July 27, 2022).

<sup>9</sup> *Id.* at 2.

## **Types of TPFL Arrangements**

Third-party litigation funding takes different forms. While some funders may target a single case, other funders may cultivate a portfolio-level relationship with a law firm or corporation to spread the risk of loss and optimize profits. Under these circumstances law firms arrange funding to cover a combination of working capital, claim monetization fees, and costs.<sup>10</sup> Before funding is provided, funders analyze claims and assess risks. But, despite the potential for risk, rewards can be significant. This is where the inherent incentive-based methodology distorts the litigation process.

Historically, third-party funding went to plaintiffs or their attorneys with personal and consumer litigation claims. Increasingly, such funding appears in commercial litigation.<sup>11</sup> The commercial model funds mass tort matters for firms and investors, whereas the personal arrangement usually provides plaintiffs funding while litigation is pending.<sup>12</sup>

In the personal model, before funding is provided to the client, the investor will determine the “value” of the case, assessing the lawsuit’s strength in its early stages. The funders then offer a loan based on a percentage of that estimate, holding a significant monetary stake in the final payout. The disbursement is typically in the form of a nonrecourse loan because recipients do not have to pay back the money if the case is lost. If the recipient wins or settles their lawsuit, the funder receives the disbursed amount plus interest. When the recipient of the funding is an individual (versus, for example, a corporation), the money could be used for living or medical expenses during litigation. In some instances, clients may use it to hire legal experts or, more rarely, to cover legal fees as local laws permit.<sup>13</sup>

Under a commercial model the funding disbursement goes directly to either the plaintiff to cover legal costs such as expert witnesses and attorney fees, or the law firms, where the funds may be used to cover the costs of a single case or a portfolio of cases, expert witnesses, and even saturation advertising, depending on the agreement with the funder.<sup>14</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3. See also See Brooke Guven and Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, Columbia Center on Sustainable Investment (May 2019), available at <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Disptue-Settlement-FINAL.pdf>.

<sup>12</sup> Andrew Pauley & Paul Tetrault, *Curbing a Questionable Practice: A Survey of Public Policy Measures to Address Concerns Surrounding Litigation Funding*, NAMIC: Advocacy at 13–14 (last visited Dec. 5, 2022).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

## The Extent of TPLF

TPLF is big, lucrative business. Virtually unheard of in the United States at the turn of the century, by the end of 2017, litigation funding had grown to a \$5 billion industry.<sup>15</sup> Transparency has been nearly nonexistent, although estimates of growth in funding of U.S. lawsuits by international hedge funds and other financial third parties since 2017 have ballooned to as much as \$17 to \$39 billion.<sup>16</sup> At the same time that the amounts invested by funders has grown, the number of such funders has also grown.<sup>17</sup>

The practice is so pervasive that, in August of 2020, the American Bar Association weighed in on the issue in a detailed discussion with a heavily

The word "BILLION" is rendered in a large, bold, serif font. Each letter is constructed from a dense, textured collage of US dollar bills, primarily featuring the green and white colors of the \$100 and \$50 denominations. The bills are layered and oriented in various directions, creating a complex, three-dimensional effect that emphasizes the theme of money and finance.

annotated paper tracking the history and treatment of such arrangements. While explicitly disavowing any formal stance on whether the practice should be permitted, the ABA adopted a resolution approving “Best Practices” to guide litigation funding. This resolution recognized significant issues with the practice.<sup>18</sup> The paper discussed fee splitting, referral fees, and ethical concerns such as conflicts, disclosure, documentation, and privilege. It summarized the best practices, recommending that the agreement should be in writing and the attorney negotiating the funding should assume that all or part of the agreement may be discovered or examined by parties “whose interests are not fully congruent with those of the lawyer and client.”<sup>19</sup> Presumably, this means the opposing party, opposing counsel, the court, and perhaps even the public.

These best practices also recognized an almost universal criticism of such arrangements—the potential loss of control over litigation. The paper recommended that “the litigation funding arrangement should assure that the client remains in control of the case.” At the same time, the best practices clearly recognized the influence that funders have over lawyers and clients, including the potential for a complete loss of control. The paper provided that “the written document should address what happens to the funding arrangement if, down the road, the client and the funder disagree on litigation strategy or goals.”<sup>20</sup>

*“Are these third-party funding arrangements in the best interest of the client? Who ultimately maintains the authority to settle? Does a loan made directly to a plaintiff fall within the ethical constraints of the Rules of Professional Conduct, particularly Rule 1.2.?”*

<sup>15</sup> *Id.*

<sup>16</sup> See *Trends and Insights- Social Inflation: What It Is and Why It Matters*, Insurance Information Institute (last visited Dec. 5, 2022); David H. Levitt & Francis H. Brown III, *Civil Justice and the Need for Transparency*, DRI: Center for Law and Public Policy at 1 (last visited Dec. 5, 2022); see also Ellen Milligan & Katharine Gemmell, *Funds Have Made Lawsuit Bets into a \$39 Billion Sector*, Bloomberg (updated Nov. 16, 2021, at 8:57 AM).

<sup>17</sup> The Westfleet Insiders: 2021 Litigation Finance Market Report at 3, available at <https://www.westfleetadvisors.com/publications/2021-litigation-finance-report/>.

<sup>18</sup> ABA Resolution, August 3-4, 2020 (adopting the American Bar Association Best Practices for Third-Party Litigation Funding dated August 2020), available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf>.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.*



## Impacts and Results

The impacts this multi-billion-dollar industry have on the civil justice system are myriad. For example, its effects are well documented in the insurance industry, which systemically collects and analyzes statistically significant samples of data. Far more than a few runaway verdicts have established that more is being expended on claims where TPLF is a factor. As noted by one of the world's largest providers of reinsurance,

TPLF [is] a contributing factor to the trend of Social Inflation ... [noting that] U.S. general liability and commercial auto lawsuit data show a strong rise in the frequency of multi-million-dollar claims over the past decade [and that third party litigation funding companies] back[ed] claims in many of these areas, such as trucking accidents, bodily injury, product liability, mass tort, medical liability claims, etc.<sup>21</sup>

Certainly, the insurance industry must pass costs on, affecting every consumer. Of course, these trends documenting increases in costs and verdicts are not limited to the insurance industry and its insureds, but also include uninsured defendants and those with high deductibles, self-insured retentions, and corridors. These entities, negatively affected by these higher costs, claims and payouts, must pass increases to their customers as well.

The reported increase in costs can also be attributed to a greater volume of claims. It is suggested that TPLF promotes the filing of claims that may normally not have been asserted in the absence of this funding model.<sup>22</sup> Accordingly, even small or marginal claims can have a significant effect on the overall cost and payout in civil litigation due to their sheer number.

There is also evidence that TPLF arrangements, by their very existence, have an influence on the attorneys and parties involved in the case, as recognized by the ABA resolution discussed above. One concern that has been raised is whether funders influence attorneys or parties they fund to “ratchet up” demands to receive the maximum return possible.<sup>23</sup> Certainly, the nonrecourse nature of many of these agreements incentivizes lenders to ensure that steps are taken in litigation to ensure a payout.

From an ethical standpoint, these arrangements are troubling due to their influence on the attorney–client relationship. In some instance, there has been predatory litigation lending<sup>24</sup> as well as outright fraud funded by third parties.<sup>25</sup> But even in the absence of those circumstances, the arrangements beg certain questions. Are these third-party funding arrangements in the best interest of the client? Who ultimately maintains the authority to settle? Does a loan made directly to a plaintiff fall within the ethical constraints of the Rules of Professional Conduct, particularly Rule 1.2.? The higher the settlement or verdict, the higher the returns or profit on the original investment by the funder.<sup>26</sup> Conversely, lower than expected verdicts or settlements can mean a loss for the funder if their share amounts to less than their invested capital.<sup>27</sup> The flip side of the

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<sup>21</sup> Dr. Thomas Holzhau et al., *U.S. Litigation Funding and Social Inflation – The Rising Costs of Legal Liability*, Swiss Re Institute at 2 (Dec. 2021).

<sup>22</sup> Andrew Pauley & Paul Tetrault, *Curbing A Questionable Practice: A Survey of Public Policy Measures to Address Concerns Surrounding Litigation Funding*, NAMIC: Advocacy at 17–18 (last visited Dec. 5, 2022).

<sup>23</sup> *Id.* at 14.

<sup>24</sup> See Report on Judicial Hellholes 2022/23, ATR Foundation at 34 (2022), available at [https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA\\_JH22\\_FINAL-2.pdf](https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf).

<sup>25</sup> *Id.* (citing the criminal fraud indictment and December 15, 2022 conviction of a lawyer and doctor in *U.S. v. Constantine, et al.*, 1:21-cr-00530-SHS (S.D.N.Y. 2021)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

arrangement is that a plaintiff who receives personal funding may turn down an otherwise reasonable settlement offer when the funder's portion builds in an uncomfortably high floor. In commercial third-party litigation arrangements, the funders may command as much as half of a law firm's contingency fee in exchange for taking on risk to cover attorney costs and other case-related fees. This may alter settlement potential and class action or other litigation strategy.<sup>28</sup> The inherent ethical dilemma is compounded by a lack of transparency because of the way TPLF works. Issues are impossible to identify.<sup>29</sup>

Advocates of TPLF have argued that these arrangements are similar to an insurer paying litigation costs of its insured<sup>30</sup> and the tripartite relationship between insurer, defense counsel, and insured client. Thus, they posit, TPLF is merely a vehicle that "levels the playing field" for litigants who are not sophisticated, do not have coverage to pay their costs, and are up against wealthy or carrier-funded defendants.<sup>31</sup> However, such arguments ignore important distinctions.

TPLF runs counter to the nature of insurance, where coverage is intended to manage agreed risks and restore an individual or business to the position occupied prior to the loss event; not fund a speculative, for-profit enterprise.<sup>32</sup> Moreover, although the specific rules vary from state to state, as set out in Model Rule of Professional Conduct 1.8(f), the tripartite carrier-counsel-client relationship requires the insured to give informed consent and there must be no interference with counsel's independence of professional judgment or with the client-lawyer relationship.<sup>33</sup> The threat that funding may cross these particular lines was clear enough to the ABA that it was specifically addressed in the "Best Practices."<sup>34</sup> Moreover, most litigants and their insurers are motivated to seek early resolutions and to limit litigation and its associated costs.<sup>35</sup> Third-party funding essentially erodes the incentive, from a plaintiff's perspective, to litigate as efficiently as possible. The fee structure agreements disincentivize efficiency and strategy as firms may reap a better financial result by litigating longer or using novel, questionable, or more expensive experts and other tactics.<sup>36</sup> TPLF practices have been shown to increase the amount, cost, and length of litigation, particularly because outside influences materially change the traditional litigation dynamic. Plaintiffs no longer share uncertainty and risk with defendants, uncertainty that often leads to compromise and helps drive settlements. Because of this, inefficiency rises and costs are increased.

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Robyn Hahn, *The Problem with Third-Party Litigation Financing: TPLF Is a Money-Making Scheme that Turns Our Civil Justice System into "a casino,"* ALM: PropertyCasualty360 (July 21, 2022, at 9:00AM).

<sup>33</sup> Model Rule of Professional Conduct 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

Model Rule of Prof'l Conduct R.1.8(f).

<sup>34</sup> See fn. 18, *infra*, p.11 at footnote 5 and pp.12–13, 15–16, 19.

<sup>35</sup> *Id.*

<sup>36</sup> *What Is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?*, Insurance Information Institute at 4–5 (July 27, 2022).

# The Impact of Nonlawyer Ownership of Law Firms

Another branch of exogenous influence in civil practice comes in the form of nonlawyer law firm ownership.

## **Access to Justice**

Advocates of nonlawyer ownership of firms claim it increases access to justice, reduces legal costs, and addresses economic and ethical challenges that lawyers face.<sup>37</sup> As explored in DRI's Center for Law and Public Policy white paper, *Nonlawyer Investment in the Legal Economy*, the fallacy in the argument that these alternative providers will improve the legal market is the view that "nonlawyers are less interested in profit than lawyers are."<sup>38</sup> However, much like TPLF, nonlawyer ownership shifts the focus of representation to a pure profit model, which places return on investment above the client's best interest.<sup>39</sup> The reality of this trend is that "alternative legal service providers" and third-party litigation funders are already operating and selling directly to the public without ethical oversight or regulation.<sup>40</sup>

## **Ethical Issues**

Unlike alternative service providers, there is a strong ethical framework governing the legal profession. Through state bar associations and rules committees, the legal profession is "self-regulating," and "professional independence" is highly regarded.<sup>41</sup> Model Rule of Professional Conduct 5.4 (Rule 5.4), which prohibits nonlawyer ownership of law firms, was drafted to ensure professional independence of lawyers, so that they may act in their clients' best interests, and not follow the pure profit agenda of nonlawyer investors.<sup>42</sup> Although this rule has been debated since at least 1982, the ABA and most states have maintained the majority of Rule 5.4.<sup>43</sup>

That said, Rule 5.4 is eroding. Globalization, commoditization, technological advances, and shrinking firm profits have reignited discussions of what professional independence looks like in this new era.<sup>44</sup> Rising interest in "alternative business structures" (ABS) and other innovations in the business of law have sparked regulators to revisit regulations and propose amendments to Rule 5.4.<sup>45</sup> In 2020, the ABA House of Delegates adopted ABA Resolution 115, providing that the ABA "encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also assuring necessary and appropriate protections that best serve clients and the public. . . ." <sup>46</sup> The Resolution also states, however, "nothing in this Resolution should be construed as recommending any changes to any ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject." <sup>47</sup>

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<sup>37</sup> Marta-Ann Schnabel, Susan E. Gunter & Thomas J. Hurney, Jr., [Nonlawyer Investment in the Legal Economy](#), DRI at 1 & 9 (2022).

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.* at 24.

<sup>40</sup> *Id.* at 23.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.* at 3-6.

<sup>44</sup> *Id.* at 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 5.

<sup>47</sup> *Id.*

Furthering the mixed messaging, the ABA released Formal Ethics Opinion 499 on September 8, 2021, stating that “[a] lawyer may passively invest in a law firm that includes nonlawyer owners . . . operating in a jurisdiction that permits ABS entities, even if the lawyer is admitted to practice law in a jurisdiction that does not authorize nonlawyer ownership of law firms.”<sup>48</sup> Though most states regulate law practice through their own regulatory entities—usually the state’s supreme court—the ABA certainly exerts a strong influence on how legal business should operate.<sup>49</sup>

## **Growth and (Non)Regulation**

Due in part to this lack of clarity surrounding business models for legal service providers, “alternative legal service providers” (ALSPs) are permeating the market.<sup>50</sup> For example, the “Big Four” accounting firms are diving into the ALSP space. “The issue with ALSPs is not with the legal services being provided (and supervised), but rather that the legal services are being provided to the public by nonlawyers, or by entities not owned by lawyers.”<sup>51</sup> As reported by the ABA, this issue has come full circle with TPLF in a highly unusual twist, in that one litigation funding firm has begun offering legal services, competing directly with the very firms that it funded.<sup>52</sup>

This change in the legal marketplace is outpacing regulation. The District of Columbia and Arizona have explicitly permitted nonlawyer ownership of firms in limited forms.<sup>53</sup> Other states have considered the issue but have not made an official determination whether to permit nonlawyer ownership.<sup>54</sup> At least three states have considered and rejected the issue.<sup>55</sup>

With states like Arizona eliminating Rule 5.4 entirely, and others opening the legal services sector to nonlawyers in more limited fashion, the rules are a patchwork.<sup>56</sup> In an extreme example of conduct (some of which may have been legal elsewhere), the Nevada Supreme Court affirmed the disbarment of a member who used a nonlawyer and aided that nonlawyer in providing legal services. The court found that clients suffered actual injury, with the potential to suffer further injury, including the nonlawyer “propositioning” a client.<sup>57</sup>

But whether the outside influence comes from nonlawyers owning firms or from outside investment in litigation, there can be little doubt that promoting return on investment over client interests negatively affects civil litigation. In addition to the moral hazard these practices inject, they also siphon value from clients—as well as the claims and risk management ecosystem—away from policyholders, claimants, and insurers, and transfer it to investors.<sup>58</sup>

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<sup>48</sup> *Id.* at 6.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> *Id.* at 10.

<sup>52</sup> Matt Reynolds, *Mighty Big Fight: Tech Company that Services PI Lawyers Sets Up Law Firm to Compete with Them*, ABA Journal (Nov. 7, 2022 at 9:06AM).

<sup>53</sup> Marta-Ann Schnabel, Susan E. Gunter & Thomas J. Hurney, Jr., [Nonlawyer Investment in the Legal Economy](#), DRI at 18 (2022).

<sup>54</sup> *Id.* at 20 (citing California and Washington).

<sup>55</sup> *Id.* at 21 (citing Florida, Illinois, and New York).

<sup>56</sup> Conrad J. Jacoby, *Practice Innovations: Non-lawyer ownership of law firms — Are winds of change coming for Rule 5.4?* Thompson Reuters (March 29, 2022).

<sup>57</sup> *In the Matter of Discipline of Gianna M. Orlandi*, No. 85346, Nevada Supreme Court (November 22, 2022), found at <https://nvbar.org/wp-content/uploads/2022.11.22-Order-of-Disbarment-Orlandi.pdf>.

<sup>58</sup> *What Is Third-Party Litigation Funding and How Does It Affect Insurance Pricing and Affordability?*, Insurance Information (2022), available at Institute [https://www.iii.org/sites/default/files/docs/pdf/triple\\_i\\_third\\_party\\_litigation\\_wp\\_07272022.pdf](https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf).



# “Nuclear Verdicts”: What They Are and Why They Are Problematic

A nuclear verdict is a disproportionately high jury award beyond a typical or rational damage estimate.<sup>59</sup> Some commentators define a nuclear verdict award as being any that exceeds \$10 million, while others would put the threshold at a much higher and more disproportionate number, varying by case.<sup>60</sup> More extreme examples can exceed \$1 billion. The individual nature of cases makes any hard threshold appear arbitrary, although it is useful to have for purposes of studying trends with a statistically significant sampling of verdicts.



## Case Studies

Make no mistake, this discussion is not focused on a McDonalds coffee spill.<sup>61</sup> Although there is nothing new about billion-dollar verdicts,<sup>62</sup> the frequency of large verdicts, particularly those involving a small number of plaintiffs or one-time occurrences, presents a new and growing trend.

For example, in a 2014 case, a Texas jury returned a \$90 million verdict in favor of a driver, a family and their representatives, against a trucking company. This was despite evidence that the truck driver could not have prevented a collision where plaintiff's decedent lost control of his vehicle, crossing into the truck's path.<sup>63</sup> This verdict was appealed, and the Fourteenth District of the Court of Appeals sua sponte ordered en banc consideration of the appeal—without a decision of the panel that had been considering the case for two years.<sup>64</sup>

<sup>59</sup> See, e.g., *What Is a Nuclear Verdict?*, CaseGlide, <https://caseglide.com/blog/what-is-a-nuclear-verdict/>.

<sup>60</sup> See, e.g., Stephanie Fox, *The Rise of Nuclear Verdicts and How to Rein Them In*, Verisk (Aug 24, 2021).

<sup>61</sup> See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994), a \$160,000 compensatory and \$2.7 million punitive verdict, which sparked a national debate on excessive verdicts and tort reform versus fair compensation.

<sup>62</sup> See for example *Penzoil v. Texaco*, 729 S.W.2d 768 (Tex. App. 1987((remitting \$10 billion verdict to \$8.53 billion); *Exxon Shipping Co. V. Baker*, 554 U.S. 471 (2008)(A 1994 \$5 billion punitive verdict reduced to \$500 million)

<sup>63</sup> *Werner Enters. v. Blake*, 2021 Tex. App. LEXIS 5964 at \*16–\*17, 2021 WL 3164005, at \*5 (Tex. App. July 27, 2021). The dissent describes the accident, “On December 30, 2014, . . . Jennifer Blake and her three children. . . were passengers in a pickup truck owned and driven by Jennifer’s friend, Zaragoza “Trey” Salinas, III (the “Salinas Truck”). While it was sleeting, the Salinas Truck was traveling in the left lane of eastbound Interstate 20 in West Texas at a speed of 50 to 60 miles per hour when Salinas lost control of the truck, apparently due to ice on the roadway, and the Salinas Truck crossed the 42-foot-wide, grassy median dividing the eastbound and westbound lanes of Interstate 20 and entered the westbound lanes. Appellant/defendant Shiraz A. Ali was driving a tractor-trailer (the “Werner Truck”) owned by appellant/defendant Werner Enterprises, Inc. Ali was driving on the westbound side of Interstate 20. Testimony at trial showed that Ali was driving at about 50 miles per hour when Salinas lost control of his truck. As soon as Ali saw the Salinas Truck, Ali braked as hard as he could. Ali did not lose control of his truck. About two seconds after Salinas lost control of his truck, the Werner Truck hit the Salinas truck while the Werner Truck was traveling at about 43 miles per hour (the “Accident in Question”). Seven-year-old Zackery Blake died as a result of the accident. His 12-year-old sister Brianna suffered a severe traumatic brain injury and was rendered a quadriplegic. Nathan Blake suffered a broken shoulder blade, broken collar bone, bruised lung, and other injuries. Jennifer Blake suffered a mild traumatic brain injury, contusions, a hematoma, and other injuries.

<sup>64</sup> *Id.*

This verdict was eclipsed by a trucking nuclear verdict, returned in Nassau County, Florida, in which a jury awarded \$1 billion after a distracted semi-truck driver collided with plaintiff's vehicle, resulting in plaintiff's death.<sup>65</sup> The jury award included \$100 million to the decedent's family for pain and suffering and \$900 million in punitive damages.<sup>66</sup> Though the facts of the case were egregious, the \$1 billion award remains hard to justify when compared to historical verdicts for the same conduct.

An even more recent example includes an August 2022 verdict that broke the Georgia record, with a jury returning a \$1.7 billion award in a case involving a Ford pickup rollover that resulted in the death of a married couple.<sup>67</sup>

The vehicle for the increasing size of verdicts is most often noneconomic damages, pervading virtually every type of litigated matter. For example, in a 2021 malpractice case out of the United States District Court for the District of Minnesota, the plaintiff was injured during a soccer game and was transported to a Minnesota hospital by ambulance where he underwent surgery, returning several days after discharge with complaints of pain.<sup>68</sup> The plaintiff returned to the hospital, was discharged that day, but returned six days later with worsening symptoms, having developed acute compartment syndrome.<sup>69</sup> Multiple surgeries and permanent disability followed.<sup>70</sup> The plaintiff's past medical expenses totaled \$493,073, and the jury awarded \$758,486 in future medical expenses.<sup>71</sup> Additionally, the jury awarded more than \$110 million in noneconomic damages for past pain, disability, disfigurement, embarrassment, and emotional distress.<sup>72</sup>

Such verdicts are now seen more frequently, and with this uptick in nuclear verdicts, there is a shadow effect that is not as public, a rise in nuclear settlements. "Just a few years ago, . . . the top verdicts in the United States were measured in the millions of dollars.... Today, it's in the billions.' . . . [T]he median settlement of the top 50 U.S. verdicts rose from \$28 million in 2014 to \$58 in 2018."<sup>73</sup>

## **Statistical Analysis**

These cases highlight increasing prevalence in jury verdicts over the past decade. "[W]hen considering verdicts of more than \$1 million, the average size increased nearly 1,000 percent from 2010 to 2018—rising from \$2.3 million to \$22.3 million."<sup>74</sup>

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<sup>65</sup> See, e.g., Katherine Lewin, *Two Trucking Companies Hit With \$1 Billion Verdict in Death of Jacksonville Teenager Connor Dzion*, The Florida Times-Union (Aug. 24, 2021 4:14 PM), <https://www.jacksonville.com/story/news/2021/08/24/connor-dzion-verdict-100-million-jacksonville-nassau-county/5571037001/>.

<sup>66</sup> *Id.*

<sup>67</sup> *Hill v. Ford Motor Company*, 16-C-04179-S2, (Gwinnett County, Ga., August 19, 2022) jury verdict including compensatory damages of \$24.05 million and Punitive damages of \$1.7 billion, discussed *infra*.

<sup>68</sup> *Thapa v. St. Cloud Orthopedic Assocs.*, 2020 U.S. Dist. LEXIS 118285 at \*2 (Dist. Minn. July 7, 2020).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., Alan Condon, *Minnesota Orthopedic Group Hit with \$111M Negligence Verdict*, Becker's Spine Review (May 18, 2022).

<sup>72</sup> *Id.*

<sup>73</sup> Jeff Dunsavage, *What Can Be Done About Nuclear Verdicts?*, Insurance Information Institute (Nov. 29, 2021).

<sup>74</sup> Stephanie Fox, *The Rise of Nuclear Verdicts and How to Rein Them In*, Verisk (Aug 24, 2021).

Many commentators support the claim that these large awards are increasing in both amount and frequency. According to a recent study conducted by the U.S. Chamber of Commerce Institute for Legal Reform, “[t]he median nuclear verdict increased 27.5% over the ten-year study period, far outpacing inflation, and there was a clear upward trend in the frequency of nuclear verdicts over time.”<sup>75</sup>

## **Why Are Nuclear Verdicts on the Rise?**

### ***Mistrust of Business***

Surveys indicate that there is a correlation with this increase in nuclear verdicts, largely against corporations, and a widespread mistrust of corporations. A recent study shows “[o]nly 25% of people have confidence in big business...”<sup>76</sup> Similarly, “around one-third of Americans say they have little to no trust at all for large companies.”<sup>77</sup>

### ***Plaintiffs’ Trial Techniques***

#### **Reptile Arguments**

Plaintiffs’ counsel’s trial techniques are also shifting, likely contributing to the increasing size and frequency of nuclear verdicts. For example, in the previously referenced 2022 case in the United States District Court for the Northern District of Georgia involving a Ford F-250 roll-over that caused the death of two people, plaintiffs’ counsel used the reptile theory to obtain a verdict of \$24 million for compensatory damages and an additional \$1.7 billion in punitive damages.<sup>78</sup> Plaintiffs’ counsel presented evidence showing that this model truck posed a risk to drivers and passengers in cases of a rollover for seventeen model years. In his closing argument, plaintiffs’ counsel stated, “You know from the evidence that

there are millions of these trucks still out there, with these same roofs, with occupants in them like Mr. and Mrs. Hill, the citizens of America—their children, their grandchildren, their loved ones.” Counsel continued, “How much do you value life? How much do you value pain and suffering? And whether you think this killing has got to stop. That’s what we’re asking you.”<sup>79</sup>



<sup>75</sup> U.S. Chamber of Commerce Institute for Legal Reform, Nuclear Verdicts: Trends, Causes, and Solutions 2 (Sept. 22, 2022), <https://institutefor-legalreform.com/new-research-from-us-chamber-shows-jury-awards-increasing-size-frequency/>.

<sup>76</sup> Joe Dysart, *Pain and Suffering: 10 of the Toughest Verdicts to Hit the Insurance Industry*, ALM: Property Casualty360 (July 12, 2022).

<sup>77</sup> Joe Dysart, *Pain and Suffering: 10 of the Toughest Verdicts to Hit the Insurance Industry*, ALM: PropertyCasualty360 (July 12, 2022).

<sup>78</sup> See Judy Babu & Diane Craft, *Georgia Jury Awards \$1.7 Billion in Ford Truck Crash Case*, AP Reports, Reuters (Aug. 21, 2022 5:42 PM).

<sup>79</sup> Plaintiff’s Closing Argument, *Hill v. Ford*, No. 16-C-04179-S2 (Ga. Aug. 17, 2022). There’s a sub-cultural thought (media pushes back hard on this thought) that the “if it bleeds it leads” news cycle creates distrust and feelings of vulnerability in the community similar to the tactic deployed in *Hill*. Deborah Serani, *If It Bleeds, It Leads: Understanding Fear-Based Media*, Psychology Today (June 7, 2011). As discussed later in this paper, the news cycle correlates with the often-used reptile theme. A key quote from 2011 Serani: “It’s been said that fear-based media has become a staple of popular culture. The distressing fall-out from this trend is that children and adults who are exposed to media are more likely than others to feel that their neighborhoods and communities are unsafe ... and overestimate their odds of becoming a victim.” More than a decade later after Serani’s publication, these children and adults are the current jury pool.

The theory behind the reptile technique is an appeal to the “lizard brain,” or the earliest portion of our brain that evolved from reptiles, which is responsible for fight or flight responses. It is intended to activate jurors’ instincts to respond based on fear and emotion. The jurors tend to turn their focus toward safety and security issues and the technique encourages them to envision themselves in the same situation as the plaintiff—a subtle violation of the “Golden Rule.” Reptile theory affects nuclear verdicts because these tactics psychologically motivate the jury to decide the case with fear and anger, which can lead to irrational verdicts, instead of facts and law. “Successful reptile tactics lead a jury to believe the higher the damages, the higher the likelihood the community will be protected from similar future harmful events.”<sup>80</sup>

## Anchoring

Another trial technique frequently used by plaintiffs is anchoring. Anchoring takes advantage of human tendencies to rely too heavily on primacy: the first information received in the decision-making process.<sup>81</sup> Once the anchor is set, decisions are often made by adjusting or back-filling around that initial anchor, filtering so that more credibility is ascribed to facts that support the conclusion. “Years of experience talking to jurors and watching them deliberate have taught us that the amount [jurors] award in damages (after finding for a plaintiff) is almost always influenced by the amount of the demand.”<sup>82</sup>

## *Attorney Advertising*

Third-party funding’s pervasive influence is certainly felt in an ever-increasing number of attorney or legal-issue-focused advertising. Unquestionably, attorneys advertise to recruit clients, but advertisements are often directed to issues and verdict amounts in an outright effort to influence potential jurors.<sup>83</sup> Attorney advertising exceeded \$6 billion over the past five years.<sup>84</sup> In 2021 alone, it is estimated that over \$971.6 million was spent on more than 15.1 million television ads for local legal services or soliciting legal claims across the United States.<sup>85</sup> This is an 11 percent increase from 2020.<sup>86</sup> For reference, pizza restaurant advertisements totaled around \$67 million during the same timeframe.<sup>87</sup> Similar to the increase in size and frequency of nuclear verdicts, both the amount spent and the quantity of legal service advertisements have increased.<sup>88</sup>

Advertisements can generally be broken into two categories: advertisements to recruit clients and advertising to influence jurors.

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<sup>80</sup> Joe Dysart, *Pain and Suffering: 10 of the Toughest Verdicts to Hit the Insurance Industry*, ALM: PropertyCasualty360 (July 12, 2022).

<sup>81</sup> *Anchoring: How It Impacts Jury Verdicts & Negotiations, What Counsel Can Do*, N.Y. State Bar Assoc. CLE Programs (Sept. 30, 2022), available at <https://nysba.org/events/anchoring-how-it-impacts-jury-verdicts-negotiations-what-counsel-can-do/#:~:text=Anchoring%20is%20a%20strategy%20used,sees%20the%20first%20price%20tag>.

<sup>82</sup> Christina Marinakis, *How to Counteract the Anchoring Effects of a Plaintiff’s Damages Request*, The National Law Review (May 5, 2022).

<sup>83</sup> See *Legal Services Advertising in the United States*, American Tort Reform Association Report 2017–2021.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



## Advertisements to Recruit Clients

A survey conducted by Trial Partners, Inc., found that 90 percent of jurors would be somewhat or very concerned if they saw an advertisement claiming a company's product injured people.<sup>89</sup> Jurors also evaluate advertisements discussing medical injuries as true. Potential jurors tend to believe what is being advertised.<sup>90</sup> Advertisements cast as issue "infomercials" or "legal updates" can thus mislead prospective clients (and jurors) and are effective in recruiting clients.

## Attorney Advertisements to Condition and Influence Jurors

High jury verdicts posted on billboards or touted on television and social media have an effect. Potential jurors see these numbers on a regular basis and become desensitized to the gravity of these large numbers. They may believe such verdicts are awarded with regularity, in the normal course of the legal processes. They are certainly not advised of defense wins, or cases that are ultimately resolved at a much lower figure. Thus, they mislead potential jurors. "The amounts advertised often are misleading because they flash nuclear verdicts that do not disclose that trial courts promptly slashed these amounts or that the awards are likely to be further reduced or overturned on appeal."<sup>91</sup>

For example,

[i]n the four months preceding a trial that led to a \$2 billion verdict, defense lawyers expressed concern that plaintiffs' lawyers had "bombarded" the jury pool with television and radio ads in the local media. The most widely aired local television ad, which ran an average of eight times per day in the weeks leading up to trial, touted a recent award of "nearly \$300 million" in a prior Roundup case. In the three months following the \$2 billion verdict, plaintiffs' lawyers and lead generators aired about 160,000 television ads nationwide at an estimated cost of \$50 million. Courts lowered the \$2 billion verdict to \$87 million, the \$80 million verdict to \$25 million, and the \$289 million verdict to \$78 million—a combined total reduction of 92% from the original, advertised levels.<sup>92</sup>

Of course, this information was not presented to the same market that saw the television ads, but such information could prove influential for potential jurors.

The amount spent on advertising appears to correlate with high damages awards. The states of Florida, Texas, California, New York, and Georgia saw the highest expenditures on legal service advertising in the past five years.<sup>93</sup> According to a 2022 study by the U.S. Chamber of Commerce Institute for Legal Reform, the top five states by cumulative nuclear verdicts from 2010 to 2019 are Florida, California, New York, and Texas, with Georgia ranked seventh, which appears to support the conclusion that excessive verdicts advertised by attorneys are desensitizing jurors to reasonable verdict figures. These jurisdictions also appear in the ATR Foundation's annual report on "judicial hellholes."<sup>94</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Nuclear Verdicts: Trends, Causes, and Solutions*, U.S. Chamber of Commerce Institute for Legal Reform at 28–29 (Sept. 22, 2022), available at <https://instituteforlegalreform.com/new-research-from-us-chamber-shows-jury-awards-increasing-size-frequency/>.

<sup>92</sup> *Id.* at 29.

<sup>93</sup> *Id.*

<sup>94</sup> Report on Judicial Hellholes 2022/23, ATR Foundation (2022), available at [https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA\\_JH22\\_FINAL-2.pdf](https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf).

The influx of third-party money, the rise in nuclear verdicts, and an increase in advertising that influences potential jurors combine to create the problem of Social Inflation. It is not a problem without solutions, however. Some of these solutions call for action by implementing rules or enacting legislation. Other solutions come in the form of strategies to be used while preparing or trying cases.

## A RESPONSE TO SOCIAL INFLATION

Transparency is key to combatting Social Inflation. Strategies should involve defendants and counsel should advocate for or create greater transparency with respect to third-party money being injected into the litigation process. The response must also involve addressing unbridled attorney advertising that influences potential jurors and may include misleading messaging. Nuclear verdicts must be addressed through a combination of these factors and early, effective vetting, preparation, and trial of cases. Through these strategies, counsel, courts, and legislatures can flatten the curve of Social Inflation.

### *Regulating Third-Party Involvement Begins with Transparency*

It is difficult to determine the effect third-party involvement may have on particular cases or classes of cases without knowing the nature and scope of such involvement. Accordingly, courts and litigants should seek methods to determine such involvement. Many courts throughout the United States have begun to do exactly that, regulating, or at least mandating disclosure through the development of local rules and caselaw. Other action has come through legislation. While such changes are welcome, they are hardly uniform, with a split in authorities on whether such arrangements are even discoverable. An ad hoc approach to disclosure and regulation will not achieve the broader goals of limiting the effect of these practices. Instead, uniform and national rules should be implemented to achieve the needed transparency.



## **Federal Legislative Efforts**

Third-party litigation funding came to Australia almost two decades ago, before its use was widespread in the United States. As the industry matured, according to the U.S. Chamber of Commerce Institute for Legal Reform, Australia saw, “an explosion of class action litigation in the country until the federal government introduced regulations to limit some of the fraud and abuses this industry generated.”<sup>95</sup> In 2020, the Australian government enacted sweeping reforms to regulate the practice, requiring funders to have an Australian Financial Services License and mandating compliance with Managed Investment Scheme requirements and other regulations.<sup>96</sup>

The United States Congress has not passed similar legislation to regulate TPLF, although efforts are underway. Federal action was initiated in the House of Representatives on March 18, 2021, when H.R. 2025, the “Litigation Funding Transparency Act,” was introduced. It was immediately referred to the House Committee on the Judiciary and then, in October, to the Subcommittee on Courts. It requires plaintiffs utilizing third party funding to provide the agreement and the identity of the funder to the court and the opposing party.<sup>97</sup> The bill was simultaneously introduced in the Senate as S.840 on the same day and was referred to the Senate Committee on the Judiciary.<sup>98</sup> A similar bill was introduced in the Senate in 2018 and was referred to the Senate Committee on the Judiciary, although the bill has not been released.<sup>99</sup>

## **Changes in Federal Civil Procedure**

In the 1993 (and subsequent) amendments to Federal Rule 26, initial disclosure of basic information was required, including information needed to prepare for trial or make an informed decision about settlement. These changes were implemented at the recommendation of the Federal Rules Committee, which found that courts that required pre-discovery exchange of core information achieved a savings in time and expense, particularly if a judge supports the process, using the results to guide further proceedings in the case. The committee noted that courts in other countries, including Canada and the United Kingdom, had for many years required disclosure of certain information without awaiting a request from an adversary, with salutary effects on the overall level of early case resolution.<sup>100</sup>

If early case resolution supported a major overhaul of Federal Rule 26 in 1993, how much more important is the discovery of influences that affect or impede the ultimate resolution of civil litigation? The case for such disclosure is also compelling, particularly in light of the conflicts of interest that may be presented. Many courts considering this issue have acted.

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<sup>95</sup> *Third Party Litigation Funding: Buying Trouble Across the Globe*, U.S. Chamber of Commerce, Institute for Legal Reform (April 7, 2022), available at <https://instituteforlegalreform.com/blog/third-party-litigation-funding-buying-trouble-across-the-globe/>.

<sup>96</sup> See AISC, Regulatory Guide 166 Licensing: Financial requirements, RG 166.30, RG 166.242 and AISC, Regulatory Guide 166 Licensing: Financial requirements, RG 166.30, RG 166.242.

<sup>97</sup> H.R.2025, Litigation Funding Transparency Act of 2021 (March 18, 2021)

<sup>98</sup> S.840, Litigation Funding Transparency Act of 2021 (March 18, 2021).

<sup>99</sup> S.2815, Litigation Funding Transparency Act of 2018 (May 10, 2018).

<sup>100</sup> Fed. R. Civ. P. 26 advisory committee's note to 1993 amendment.

## Individual Federal Court Efforts

For example, a broad disclosure requirement was implemented by the United States District Court for the District of New Jersey.<sup>101</sup> Local Civil Rule 7.1.1, entitled, “Disclosure of Third-Party Litigation Funding,” requires parties to file, within 30 days, a statement disclosing a nonparty that is providing funding for attorneys’ fees and expenses for the litigation. The rule requires disclosure of whether the funder’s approval is necessary for litigation, settlement decisions in the action and, if the answer is in the affirmative, the nature of the terms and conditions relating to that approval. That rule also specifically allows parties to seek additional discovery, including whether conflicts of interest exist, whether the interests of parties or a class are affected, or where “such other disclosure is necessary to any issue in the case.” A potential shortcoming of this rule appears to be vagueness about disclosure regarding a funder’s involvement with a party’s firm that is broader than the case before the court, notwithstanding the fact that such involvement may affect the litigation.

The Northern District of California<sup>102</sup> has imposed similar disclosure requirements. Other federal districts have rules mandating disclosure of any parties with a “pecuniary interest” in a case.<sup>103</sup> Some limit disclosure obligations to publicly held corporations with a “direct financial interest” in the outcome of the litigation.<sup>104</sup>

However laudable, these efforts towards transparency, disclosure of funding agreements should not take place in a patchwork manner. It should be addressed nationally by the appropriate Federal Rules Committees to avoid a sea of disclosure obligations that differ from circuit to circuit and district to district. A growing number of organizations have encouraged such action.<sup>105</sup>

## State Actions on Funding

Several state courts, including Missouri and California, have enacted rules and issued advisory opinions bearing on third-party litigation funding.<sup>106</sup> However, the vast majority of state activity mandating disclosure has come from state legislatures, not the courts.

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<sup>101</sup> Order Amending Local Civil Rules (June 21, 2021), available at <https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf>.

<sup>102</sup> See *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. Aug. 5, 2016) (noting a pending amendment to the local civil rules); see also United States District Court for the Northern District of California Civil Local Rule 3-15, entitled, “Disclosure of Non-party Interested Entities or Persons” which requires that parties must, “disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves known by the party to have either: (i) a financial interest (of any kind) in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.” N.D. Cal. Civ. L. R. 3-15.

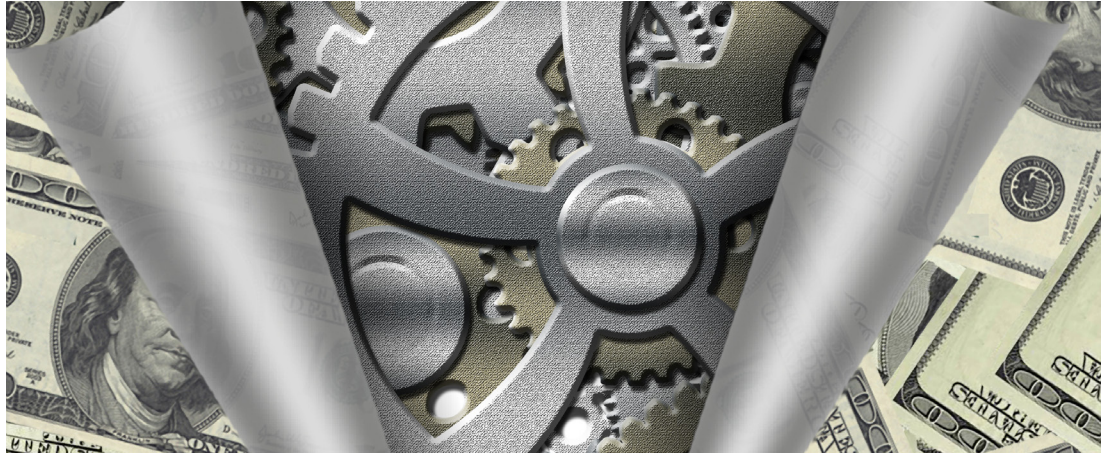
<sup>103</sup> See, e.g., C.D. Cal. L.R. 7.1-1 and S.D. Iowa L.R. 7.1.

<sup>104</sup> See, e.g., E.D. Mich. L.R. 83.4(b)(2) and D. Ariz. L.R. 7.1.1.

<sup>105</sup> For example, Lawyers for Civil Justice addressed the Advisory Committee with such a request in September of 2022. See Rules Suggestion to the Advisory Committee on Appellate Rules, *Pervasive, Yet Unknown: The Prevalence of Direct, Undisclosed Non-Party Financial Stakes in Appellate Outcomes, and Why the Committee Should Amend Rule 26.1*, Lawyers for Civil Justice (Sept. 1, 2022), available at [https://www.uscourts.gov/sites/default/files/22-ap-c\\_suggestion\\_from\\_lcj\\_-\\_rule\\_26.1\\_0.pdf](https://www.uscourts.gov/sites/default/files/22-ap-c_suggestion_from_lcj_-_rule_26.1_0.pdf); see also Andrew Pauley & Paul Tertrault, *Curbing a Questionable Practice: Survey of Public Policy Measures to Address Concerns Surrounding Litigation Funding*, NAMIC (Feb. 2019) (discussing Fed. R. Civ. P. proposals).

<sup>106</sup> See Mo. R. 4-1.8, Conflict of Interest (amended Nov. 23, 2021); see also State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion Interim No. 14-0002 Alternative Litigation Funding, available at <https://www.calbar.ca.gov/Portals/0/documents/publicComment/2019/14-0002-Alternative-Litigation-Funding.pdf?ver=2019-10-11-111840-073>.





Such state legislative measures vary in the extent to which they require disclosure or actually curb third-party litigation funding practices.<sup>107</sup> States that have passed measures mandating disclosure and/or imposing regulations, including Maine<sup>108</sup>, Nebraska<sup>109</sup>, Ohio<sup>110</sup>, Tennessee<sup>111</sup>, Oklahoma<sup>112</sup>, Arkansas<sup>113</sup>, and Vermont<sup>114</sup>. Other states, including West Virginia<sup>115</sup> and Wisconsin<sup>116</sup> have statutorily required mandatory disclosure of such arrangements to all parties at the outset of litigation. While such legislation is not uniform, it provides a guidepost for future legislative and policymaking efforts. .

An unsuccessful attempt to pass legislation on the issue recently took place in Kansas, where there was a contested effort to pass Chamber of Commerce-patterned legislation.<sup>117</sup> This 2022 bill sponsored by the Kansas Chamber of Commerce was introduced in the Kansas House of Representatives. Although the bill died in committee, the work on it should prove useful to continue the fight for transparency and governance of this practice.<sup>118</sup>

<sup>107</sup> See generally Andrew Pauley & Paul Tetrault, *Curbing A Questionable Practice: A Survey of Public Policy Measures to Address Concerns Surrounding Litigation Funding*, NAMIC: Advocacy (last visited Dec. 5, 2022).

<sup>108</sup> M.R.S.A. 9-A § 12-104. (Mandates disclosures to client, regulatory registration of funders, forbids funder input on claim/case decisions (settlement, arbitration or mediation requirements), permits recovery of fees if funding contract breached.)

<sup>109</sup> Neb. Rev. Stat. § 25-3301 through 3309. (Mandates disclosures to client, right to cancel, prohibition on referral fees, preservation of attorney-client privilege, regulatory registration, and oversight by secretary of state.)

<sup>110</sup> Ohio Rev. Code § 1349.55. (Mandates disclosures to client, prohibits funder input on claim/case decisions.)

<sup>111</sup> Tenn. Code Ann. § 47-16-106. (Mandates disclosures to client, prohibits funder input on claim/case.)

<sup>112</sup> OK Stat. § 14A-3-801-817. (Mandates disclosure to clients and licensure of funders, subject to administrative review by Commission on Consumer Credit, restricts funding to only existing legal claims, prohibits referral fees, misleading advertisements, and funder input on case/claim.)

<sup>113</sup> Ark. Code Ann. § 4-57-109 (2020). (Defines lending as providing funding for any purpose other than prosecuting dispute. Regulation under "Interest and Usury," requires disclosures to clients, provides maximum interest rate, violation constitutes deceptive and unconscionable trade practice.)

<sup>114</sup> 8 V.S.A. § 2251 to 2260. (Requires registration with, annual reports to, and regulation by Commission, as well as disclosures to clients. Prohibits lender input on case/claim, referral fees, referrals to specific attorney or healthcare providers, and assignment of funding. Preserves attorney-client privilege and prohibits discovery of communication between funder and client/attorney. Violations by funder constitute unfair/deceptive act.)

<sup>115</sup> W. Va. Code Ann. § 46A-6N-6 (2019) ("Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.").

<sup>116</sup> Wis. Code § 804.01(2)(bg) (2018) ("Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.").

<sup>117</sup> [http://www.kslegislature.org/li/b2021\\_22/measures/minutes/agenda\\_item\\_2022021143367180981](http://www.kslegislature.org/li/b2021_22/measures/minutes/agenda_item_2022021143367180981)

<sup>118</sup> See Kan. H.B. 2694, available at [http://www.kslegislature.org/li/b2021\\_22/measures/HB2694/](http://www.kslegislature.org/li/b2021_22/measures/HB2694/).

While a number of jurisdictions have some form of regulation or disclosure, many do not. Even where they exist, they lack uniformity from state to state, district to district, and between federal and state courts. However, even where there is no applicable disclosure or regulatory requirement, the regulatory efforts provide at least a framework for disclosure, evaluation, or even challenging a funding arrangement. They may also provide a useful guide for discovery requests.

## **State Actions to Address Advertising Issues**

Some states are also taking action to prevent misleading attorney advertising. The Florida Bar, for example, updated its Handbook on Lawyer Solicitation and Advertising in August 2020. In an addition to the handbook, “Rule 4-7.15(a) titled ‘Manipulative Appeals,’ states that an advertisement is misleading if it is ‘designed to solicit legal employment by appealing to a prospective client’s emotions rather than to a rational evaluation of a lawyer’s suitability to represent the prospective client.’”<sup>119</sup> Likewise, Louisiana recently adopted a measure banning deceptive advertising, such as “those presented as a medical alert, health alert, drug alert, or public service announcement.”<sup>120</sup> West Virginia has also taken steps to curb such advertisements<sup>121</sup> and a bill was introduced in the Kansas Senate to do likewise.<sup>122</sup>

## *Individual Trial Strategies to Combat Social Inflation*

Understanding that Social Inflation exists is only part of the battle. Trial counsel must approach factors leading to Social Inflation at trial, recognizing that they have myriad solutions. While trial counsel cannot guarantee that a jury will resist inflammatory messaging from the plaintiffs’ bar inside and outside the courtroom, certain strategies may reduce the risk of an inflated verdict. Key recommendations include creative discovery and jury selection, heavy investment in witness and trial preparation, and responding to the plaintiffs’ counsel’s inflammatory tactics with reasonableness-focused trial themes.

Strategies suggested in this section are meant to provoke discussion and may not universally apply, but may spark creativity in trial preparation. Of course, any strategic suggestion must be thoroughly considered before applying it to a given set of trial issues. Many strategies discussed in this section are topics discussed in online publications, blog posts, journal articles, and conferences.<sup>123</sup> Trial counsel can develop deeper insights about trial strategy from active research and interacting with trial-related associations.

*“While trial counsel cannot guarantee that a jury will resist inflammatory messaging from the plaintiffs’ bar inside and outside the courtroom, certain strategies may reduce the risk of an inflated verdict.”*

<sup>119</sup> Gwyn Taylor, *Misleading Legal Ads: “You Know It When You See It.” Can They Be Stopped?*, Commercial Carrier Journal (June 29, 2021).

<sup>120</sup> See Report on Judicial Hellholes 2022/23, ATR Foundation at 52 (2022), available at [https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA\\_JH22\\_FINAL-2.pdf](https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf).

<sup>121</sup> W. Va. Code §§ 48-28-1 through -5 (2020), Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act.

<sup>122</sup> See Kan. S.B. 150, available at [http://kslegislature.org/li/b2021\\_22/measures/documents/sb150\\_enrolled.pdf](http://kslegislature.org/li/b2021_22/measures/documents/sb150_enrolled.pdf).

<sup>123</sup> See, e.g., Robert F. Tyson Jr. & Shari E. Belitz, *Viewpoint: Jury Blasts Defense with a \$464.5 Million Nuclear Verdict*, Claims Journal (Aug. 1, 2022); ROBERT F. TYSON JR., *NUCLEAR VERDICTS: DEFENDING JUSTICE FOR ALL* (2020); Anthony J. Monaco & Michael McCaskey, *Lessons from Trial: trying a \$250 Million Product Liability Case in Cook County*, DRI Product Liability Conference, presented August 20, 2021; Solheim, M., Rauch, N. Turning the Table: Counter-Anchoring & Reverse Reptile, DRI Litigation Skills Seminar, July 30, 2021.

## **Changes in Discovery Practices to Address TPLF**

Individual counsel can use focused written discovery regarding third-party involvement in litigation, even in the absence of mandated disclosures and regulation in a particular jurisdiction. This practice should extend not only to the specific litigation at hand, but also to whether there are ongoing financial relationships between the plaintiff's firm and third-party litigation funders.

As recognized in the ABA resolution and a number of reported opinions, it is not unusual for such funders to hold a stake in other firm litigation, creating a financial influence that may be much broader than a specific case.

Such discovery can follow adopted and proposed disclosure rules and legislative language. For example:

- Does any person or entity that is not a party to this case provide any type of funding for some or all of the attorneys' fees and expenses for the litigation?
- If your answer is in the affirmative, provide the name, address, and if a legal entity, its place of formation.
- Is such funding provided in exchange for a contingent financial interest based upon the results of the litigation?
- Is the funder's input considered with respect to litigation decisions or settlement decisions?
- If your answer is in the affirmative, please state the nature of the terms and conditions relating to that approval; and
- Please provide contracts, correspondence, and any other documentation regarding such funder and its relation to this action.
- Does any person or entity providing any type of funding in this matter also provide funding for other matters in which the plaintiff's counsel's firm is involved?
- If your answer is in the affirmative, please state the nature of the involvement in other matters, and the terms and conditions relating to that involvement; and
- Please provide contracts, correspondence, and any other documentation regarding such funder and its relation to such other actions.

These requests could also include discovery directed towards an individual plaintiff's (or a class representative's) knowledge of the nature and scope of such agreements, and whether they would affect the ultimate resolution of the matter, including mediation or other settlement efforts.

## **Changes in Advocacy**

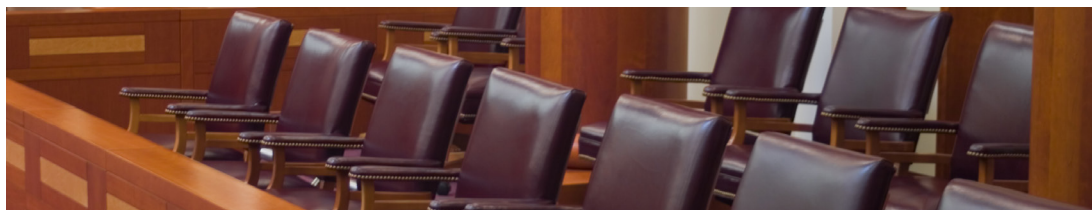
Counsel should creatively and aggressively use such information, particularly where contract terms create an impediment to settlement, may affect litigation, or potentially create a conflict of interest between the plaintiff and counsel. For example, the Ninth Circuit recently considered whether particular contract terms constituted champerty, or usury.<sup>124</sup> While this case settled prior to appellate consideration, it highlights an opportunity for defense counsel to preserve the issues, through discovery, motions, and even appellate relief to require disclosure of TPLF.

## **Countering Tactics Deployed in Jury Selection**

The primary goal in jury selection is to identify those jurors who cannot fairly adjudicate the dispute and to secure a for-cause challenge without forfeiting a valuable peremptory challenge. As such, with each strategy discussed in this section, the primary goal is creating a record to eliminate from the panel those jurors who simply cannot fairly judge the case. Each state has its own standard for “cause” challenges, so an initial step in planning for voir dire is knowing the requisite jurisdictional language to use during the challenge.

After making an appropriate record for those jurors, however, trial counsel can take steps to direct conversations away from them, to reduce the risk that they will untruthfully rehabilitate themselves, while focusing on identifying peremptory strikes and reframing plaintiff’s counsel’s tactics.

These steps can reframe plaintiff’s counsel’s in-courtroom inflammatory tactics, such as anchoring, increasing tension and drama in the courtroom, and vilifying corporations and defense lawyers. This phase of voir dire can also explore juror tendencies regarding extra-courtroom tactics, including advertisements that anchor large verdicts, third-party litigation funding, and media influence regarding the pertinent subject matter.



## ***General Strategy for Reframing Plaintiff’s Inflammatory Tactics in Voir Dire***

A strategy for identifying potential cause challenges involves intelligently tailoring questions to encourage the most extreme adverse jurors to raise their hands. Having 70 percent of the panel raise its hand to your questioning will not likely benefit your case because the judge will not likely strike that large portion of the panel.<sup>125</sup> For this reason, a narrow question that solicits seven or eight extreme jurors will likely yield the best exchange for potential cause challenges. To identify those extreme jurors who will hate the defendant, counsel may telegraph the bad evidence the jury will likely hear, being careful not to open the door to evidence that the court might lean toward excluding. The poorly worded email that will likely come into evidence can be discussed with the jury to identify the panelists who will not be able to pay attention to evidence beyond that document.

<sup>124</sup> See *Fast Trak Investment Co. LLC v. Sax*, 962 F.3d 455 (9th Cir. June 11, 2020).

<sup>125</sup> Christina Marinakis, *The Art of Jury Selection: A Murder Trial Revisited*, 2022 DRI Annual Conference Materials, presented October 27, 2022.



Before concluding voir dire questioning, but only after committing the likely “for cause” strikes, counsel can ask broad questions to the remaining panel only. These questions will reframe some of the narratives that plaintiff’s counsel deployed in jury selection. For example, if Juror 22 has been vocal throughout voir dire, but has not displayed a likelihood of being stricken for cause, consider asking the following:

Juror 22, you have heard several characterizations of this case from the attorneys this morning. You’ve heard that plaintiff’s counsel asked for over \$5 million for his client. Assuming you will hear evidence that my client invested heavily in engineering this product in line with published standards, will you be able to consider that evidence along with the other evidence presented?

By limiting the questioning to an individual juror, counsel can give the juror a chance to talk and then loop other non-strikable jurors into the conversation in a controlled manner that excludes input from the already identified dominant—and hostile—jurors.

## ***Strategy for Countering Plaintiff’s In-Courtroom Tactics in Voir Dire***

As described in the Social Inflation diagram on page 2 of this white paper, plaintiff’s counsel may use a number of in-courtroom tactics to increase the likelihood of a jury rendering an unreasonable verdict. These tactics include anchoring, increasing tension and drama, and vilifying corporate defendants. Trial counsel can strategically prioritize a portion of voir dire to counter each tactic.

### **Anchoring Tactics**

If plaintiff counsel sets an anchor in voir dire, counsel can use the anchor number to secure cause challenges for the jurors who have “swallowed the hook” on that number. For example,

Who among us already believes strongly that the plaintiff should get money for his injuries?

Plaintiff’s counsel has suggested already that they are looking for over \$5 million in this case. Who among us has formed a belief that this must be at least a \$1 million case given the high water mark that plaintiff’s counsel established?

After identifying those jurors who have already determined that significant damages must be awarded, counsel can consider developing a strategy to expose the anchoring tactic with the remaining panel, with the intention of identifying potential peremptory challenges for jurors who do not recognize the anchor for what it is. For example, counsel might identify jurors who have young children and consider the following exchange only during the reconditioning phase:

Juror 19, I see you have young children at home. Do you ever find yourself negotiating with them?

Have they yet learned the tactic of asking for way more than they really want to get you to concede to a lower, yet still unreasonable resolution?

How do you find yourself reacting to situations in which somebody presents an unreasonable resolution to a problem?

In addition, defense counsel can explore other questions to test which jurors failed to identify the plaintiff's counsel's anchor tactic.

Many of us might question the actual impact of a discount at a department store. We all have heard the stories of a company marking up an item so that a 40 percent reduction ends up being what the company wanted, anyway. Who among us does not question the actual impact of a discount offered at a department store?

The same illustration can be discussed in light of car dealership negotiations, and follow-up questions can dive into how jurors negotiate those prices. Jurors who take several trips to shop around for a car might be more deliberate in considering all evidence when putting a price tag on the trial.

When individually questioning the non-strikable panelists, counsel can consider reframing the plaintiff's narrative with a question about the other evidence they will hear at trial.

Will you also willingly pay attention to medical experts who indicate the future life care plan for the plaintiff can be fully funded with only \$350,000?

Other strategies for countering anchoring throughout trial appear later in this section.

### Countering Increasing Tension and Drama in Voir Dire

Some extreme personality types may use their jury service as an opportunity to be heard. As these jurors are drawn toward increasing tension and overdramatization at trial, they may read or create conflict that does not exist. In deliberations, they may be inclined to bolster the most emotional evidence to ratchet up a verdict. One strategy that counsel may consider is identifying the jurors who need drama in their day-to-day lives.<sup>126</sup> In particular, counsel can consider how to identify jurors who actually like to stir up conflict and create tension, as follows:

There are several ways to group people together. For example, some people are drawn toward finding dirt on others, some people love hearing about the dirt on others and another group of people just want to stay out of it altogether. With a room this large, I have to assume we have good representatives for each group.

Who among us can relate to the group that likes to dig and find problems?

Follow-up: Why do you relate to that group?

Follow-up: Can you think of ways that you have found problems in the past?

Who among us best relates to the group who loves to hear "the scoop"?

Follow-up: Would your friends consider you a person in the know?

Follow-up: Do you feel that your social media followers expect that you'll take an early position on controversial topics?

Follow-up: Is there value in forming an opinion about a controversial topic without fully exploring alternative opinions?

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<sup>126</sup> Scott Frankowski et al., *Developing and Testing a Scale to Measure Need for Drama*, Elsevier (Oct. 22, 2015).

Follow-up: Given that value, and given that you seem to have the ability to make up your mind quickly, can we logically understand that you might already have an opinion based on what you heard so far today?

With a tendency to interpret evidence in a way that fits our beliefs and opinions, do you think it is likely that you'll interpret evidence in this case in a manner that conforms to what you already believe?

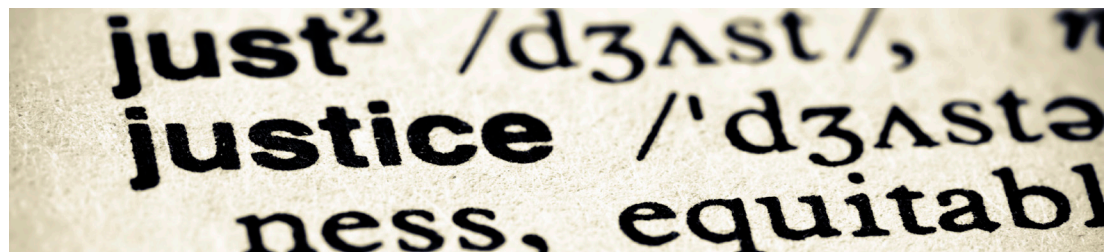
I will assume that anybody else who did not raise their hand fits into the category of those who would really just rather stay out of the conflict. Do any of you who didn't raise your hands disagree with me on that?

This strategy can effectively identify jurors who identify as conflict seekers, who may later be considered for a peremptory challenge.

Another potential factor in nuclear verdicts is that "all-in" personality types might want to make their jury service "count" by rendering a memorable verdict. If an "all-in" personality type must invest weeks in the courtroom, he or she may be inclined to make the verdict "worth it." Counsel can consider voir dire questioning to identify these "all-in" personality types. Even specifically asking the panel who would consider themselves to be an "all-in" personality type can identify those jurors who tend toward extreme, all-in behaviors. If the juror is, indeed, an all-in personality type, he or she will likely be confident in responding to the question. Depending on other leanings from that juror, counsel might identify a risk of an extreme verdict from that juror.

### Lessons from Social Media and Juror Attitudes

Analyzing social media accounts can also identify jurors who show a need for drama. The past decade has provided a valuable window to authentic, strongly held beliefs. Social media provides a large sampling of how our friends, colleagues, and potential jurors feel about social, cultural, and political issues.<sup>127</sup> During the pandemic, many people were particularly vocal, exposing deeply held attitudes of risk aversion, reliance on government to keep them "safe," willingness to comply with the greater good, and general skepticism. While these surface-level issues are important in their own right, deeper analysis compounds the value of social media investigation. Were the individuals posting knee-jerk reactions with little reference to research? When they share research on social media, is it generally one-sided, or from a single source? Were they generally early commenters and sharers? Did they view themselves as trailblazers on particular issues? Did their posts shame people with differing views? Did they tend toward shock value and divisiveness? Did their posts draw a large following, suggesting they are a leader? Did they tend toward extreme and punitive reactions such as the callout-cancel culture? The information goldmine in social media can provide a glimpse into the jurors' internal views that they may not share in the public forum of a courtroom.



<sup>127</sup> Key Considerations for Defense Teams in Civil Jury Trials - Part 2, CSI:courtroomsciences.com.

## Countering Vilifying Corporations and Defense Counsel in Voir Dire

An opponent's efforts to paint a defendant and even defense counsel as untrustworthy can be countered. For example, consider questions along the lines of:

Who among us believes that because my client is defending this case, it must not care about people?

After identifying those jurors and taking measures to establish cause challenges, counsel can attempt to diffuse the issue and identify potential peremptory challenges. For example,

How do you identify people's motives?

Do all mistakes involve carelessness?

Are there honest mistakes?

Do people sometimes make the wrong decision without knowing it?

Who among us has been judged in hindsight?

## ***Voir Dire Strategies for Countering Outside-the-Courtroom Tactics***

As described in the Social Inflation diagram (page 2, *infra*), opposing counsel may benefit from strategies outside the courtroom to increase the likelihood of a jury rendering an unreasonable verdict. These tactics include attorney advertising, third-party litigation funding, and media influence.

## Countering Attorney Advertising's Effect in Voir Dire

The opportunity to expose misleading advertising can be overlooked as, "[l]awyers, who are constantly privy to plaintiff demands, settlement value, and jury verdicts, sometimes forget that most jurors have no references aside from the jaw-dropping figures they hear in the news."<sup>128</sup>

Particularly when plaintiff's counsel has vilified defense counsel for being with a large law firm, or for defending corporations for a living, defense counsel can first establish who among the panelists has already developed a cynical view of counsel or the defendant. After securing supportive cause challenge testimony, counsel can consider asking a humorous open-ended question about attorney advertising.

Has anybody here ever seen an ad for a personal injury lawyer?

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<sup>128</sup> Christina Marinakis, *How to Counteract the Anchoring Effects of a Plaintiff's Damages Request*, The National Law Review (May 5, 2022).

Then, on a more serious note, counsel can consider asking if any panelists have ever made an important life decision based solely on what a personal injury lawyer's advertisement proclaimed. For example,

Has anybody among us chosen to not take prescribed medications based on what's said in a lawyer commercial about the medication?<sup>129</sup>

As follow-up for venire members who respond, consider identifying their approach to research:

Did you conduct independent research about the claims being made in the commercial, or did you take the lawyer's word for it?

What type of analysis do you tend to undertake when making important decisions about health?

Answers to these questions could reveal whether jurors exercise intellectual curiosity in exploring problems they see in advertisements, as opposed to taking shortcuts to rely on what they see or hear from others.

For individuals who express anti-defense sentiments, counsel might consider asking specifically how they might consider billboard verdict numbers in valuing the case. In follow-up with non-striable jurors, consider asking whether they have decided whether the billboard number represents all lawsuits, or whether those results were aberrations. Counsel can also consider asking whether they investigated how many lower dollar verdicts have not been advertised, or whether the large verdicts held up on appeal.

It may also be useful to ask select, individual venire members, "Who among us has read a personal injury lawyer's billboard while driving a vehicle?" As follow-up, ask if any of the panelists took measures to read the small print at the bottom of the billboard. These questions could be particularly useful in automotive, trucking and even failure to warn cases.

### Countering Third-Party Litigation Funding in Voir Dire

It is a common practice during voir dire for the court or counsel to question the venire to determine whether a potential juror is the holder of a policy issued by a mutual insurance company indemnifying any party to the case against liability in whole or in part, or holding a subrogation claim to any portion of the proceeds of the claim sued on, or being otherwise financially interested in the result of the case. An affirmative response supports a challenge for cause.<sup>130</sup> If a venire member is involved in third-party funded civil litigation, or perhaps holds stock or other ownership in a firm that provides third-party funding, they are "otherwise financially interested in the result of the case." Questions can be developed to reveal this financial interest and develop a strike for cause.

<sup>129</sup> See, e.g., Jessica Karmasek, *AMA: Lawyer Ads Alarming Prescription Drug Users, Jeopardizing Health Care*, Legal NewsLine (July 26, 2016).

<sup>130</sup> See, e.g., Ala. Code § 12-16-150(12) (1975).



## Countering the Effect of Media in Voir Dire

Unfortunately, a common source of fear in today's world stems from media.<sup>131</sup> Many news stories highlight people at their worst—the politicians or professional athletes who make a mistake, the company that made a bad decision, or the criminal that terrorized the community.

One primary focus of the “reptile theory” is a defendant’s threat to the community. As news stories permeate our world with information about threats to our community, the jury pool is conditioned to see threats to the community in everyday life.

As such, questioning jurors who routinely watch the news, or “investigative journalism” can reveal individuals who focus intensely on threats to their community. Why do they watch the news? Do news stories focus enough on the negative aspects of our society? Are they drawn to investigative journalism shows like *American Greed* that often report on corporate misconduct, whether proven or not? If so, what draws them to the program?

As a follow-up to such questioning, jurors might reveal whether they use internal intellectual curiosity when asked if they find themselves convinced of corporate misconduct based solely on what the program discloses. After identifying the cause-challengeable jurors, consider asking other individuals whether they ever perceive a bias in how news stories are reported. This follow-up can identify those jurors who may not see bias in witness testimony, and can remind the non-challengeable panel that bias can sometimes seep into publicized media.

## ***Defense Counsel Strategies Outside the Courtroom***

### Witness Preparation

Accuracy is the best advocacy. Defendants and trial counsel must invest in corporate representative deposition preparation so testimony can be as accurate and engaging as possible. Most corporate stories involve examples of creativity and grit—working through hard times to ensure employees have a financial means to raise families, or building a business or product from the ground up. While corporate defendants should not plan to monopolize the jury’s time with anecdotes, particularly in a catastrophic injury case, some insight into how the company came to exist and who its people are can provide important context to the very decisions that are being criticized in trial. Defense counsel can take measures to ensure the corporate story is tied to trial issues so that the jury does not perceive a social unawareness that the corporate defendant is trying to hijack the trial into a simple show-and-tell about the company itself. Tying the corporate story questioning into why the defendant made the decisions it made will help to establish relevance at trial. For example, a major producer of heavy equipment was founded by a visionary who, during the early years, personally operated each model of equipment in the field before selling it. As the company grew, that same testing-related mindset infused the company through a robust engineering department that the founder interacted with daily until he retired.

An accurate and engaging corporate story can alleviate juror concerns that the company is truly a profits-before-safety entity.

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<sup>131</sup> Consider, for example, Deborah Serani, *If It Bleeds, It Leads: Understanding Fear-Based Media*, Psychology Today (June 7, 2011) referenced in footnote 79.

Profits are necessary to a company's existence. However, a company's behavior attracts clients, which generates revenues and profit. Therefore, part of every profit-yielding company's behavior includes understanding risk, safety, employee relations, and community responsibility. If the plaintiff intends to equate profits to an unwavering evil motive, corporate representatives can be prepared to counter with logic that corporate responsibility actually drives clients, revenues, and profits.

The company story should concisely describe how the world would be negatively affected if the company did not exist.

Corporate witnesses may be easily led into admitting that "safety should always come first." While this admission might feel correct on its face, breaking the statement into absolutes will reveal its fallacy. If safety always comes first, should we insist that the speed limit is only 20 miles per hour regardless of the environment? If 20 miles per hour is safe for a school zone, wouldn't it also be safer for a highway? Indeed, safety is a critical factor in transportation, but public access also balances into every transaction, every day. A more accurate statement might be that the company considers how it must manage risks in the best interests of its customers and employees, just as everyday people do.

Reminding a witness that he or she swore to tell the truth, the whole truth and nothing but the truth might illustrate to the witness that providing a simple answer to a nuanced question is not the whole truth.

In response to questions like "should safety always come first," the witness might realize that the whole truth is that safety—or more accurately, risk analysis and management—is part of every analysis and is weighed against several factors—every day and everywhere. Customers will likely not pay \$10,000 for a titanium-handled sledgehammer, and they likely wouldn't be able to lift it off the ground. However, the titanium handled sledgehammer will be less likely to break during use, making it "safer." For this reason, customers would actually rather have the "less-safe" alternative in many situations. Every person must make decisions based on perceived risk as opposed to absolute safety.

With these concepts in mind, witness preparation should challenge a corporate witness to analyze safety-related questions before answering them, and recast them in the more accurate form of risk analysis.

### Screening and Mock Trials

Pre-screening cases for trial will require an early investment to select the most triable cases. Such investment may take the form of medical and liability experts and rapid response teams with trial counsel included to document evidence and begin the case narrative. Where appropriate, early surveillance of the plaintiff is an investment that can help identify the strongest cases to push toward trial.

Another factor in prescreening cases is identifying and preparing company representatives early in the litigation. Identifying the person who can best communicate the accurate and engaging company story can provide key information about how a defense can be presented. Understanding how the company representative will present to a jury and tolerate cross-examination can reveal whether the company can withstand plaintiff's trial tactics and fit within a credible trial theme.

Mock trials are often used by plaintiff attorneys early in litigation. The information gleaned from an early mock trial can identify hot-button issues within the community that could be at odds with a well-developed trial theme. If plaintiffs' attorneys routinely have that insight early in litigation, their trial theme throughout depositions can be set within community sentiment before a defense theme can be thoroughly vetted. With similar community research, defendants can identify not only which cases should be taken to verdict, but also how a defense theme can best counter the plaintiff's tactics.

In prescreening cases, defendants can investigate other similar cases within the trial jurisdiction to identify whether a nuclear verdict can be sustainable. In what circumstances do appellate courts overturn excessive awards? Can grounds be established in depositions to support a later verdict reduction? Not every dispute can be accurately predicted, particularly regarding how an appellate court will react to an excessive verdict. However, developing a mindset for when and why appellate courts reduce or reverse excessive verdicts can assist defense counsel as litigation proceeds.

### Countering Plaintiff's Inflammatory Tactics with Thematic Trial Strategies

No doubt, understanding the opponent's strategy is key to winning any battle. Anticipating the opponents moves will "slow down" the pace of trial for defense counsel. Professional sports teams have large coaching staffs who watch film every day of the year to identify their opponents' propensities. As rookie athletes enter the professional field, they routinely comment about the speed of the game slowing down with every game. The reason behind the phenomenon is that they build experience from every play and learn to anticipate better what their opponent will do in a given situation.

The same holds true for trial attorneys. To respond intelligently to injury lawyer tactics at trial, attorneys can invest heavily in anticipating the tactics throughout the case.

#### ***Anticipate Trial Behavior***

Opposing counsel's demeanor and tendencies often are revealed in depositions and prior trial transcripts. For this reason, deposition reports can focus not only on the substantive testimony, but on tactics deployed by opposing counsel that will tend to increase tension and drama at trial. Moreover, trial counsel can participate in associations to develop a broad network of knowledge to be shared about plaintiff's tactics.

Counsel can study open-source playbooks from the plaintiffs' bar by analyzing the same journals they follow and reading the blogs and they write. When analyzing the content, intelligently examine why the most plaintiff-friendly populations will accept the messaging and creatively evaluate how to flip the message in litigation.

## *Keep the Emotional Temperature Low*

A common thread among large verdicts is that the jurors allowed fear to control their decision-making process. Fear produces an emotional energy that can result in illogical, reactionary behavior. As stated by Courtroom Science, Inc.,

Anxiety and stress sap cognitive resources, and thus increase the likelihood that sufferers will engage in what is known as the heuristic or experiential information processing mode. In this processing mode, individuals rely on heuristic cues or “rules of thumb” for reasoning (e.g., this lawsuit made it all the way to court, so the defendant must have done something wrong; there are many more people at the defense table compared to the plaintiff’s table...it is clear the plaintiff is outnumbered and this is unfair).<sup>132</sup>

Even in personal relationships, arguments can spiral into a cycle in which every statement uttered in an escalated conversation is examined through a lens of skepticism and distrust.

Accepting the premise that fear drives large verdicts, a logical corollary is that tension bolsters fear. Just as a trampoline is effective only when tension is placed on its springs, a verdict’s upward potential can be influenced by tension in the courtroom. Trial counsel, by maintaining a comfortable courtroom temperature,<sup>133</sup> can reduce the verdict’s spring from the trampoline. In every aspect of the trial, counsel can maintain a calm demeanor in front of the jury’s ever-watching eyes.

In the same way, every exhibit can be vetted to ensure that it does not unintentionally escalate emotion. Every witness can be prepared to exercise caution in language and tone to reduce the risk of escalating a cycle in the constant deliberative jurors’ minds. When trial counsel’s tone throughout the case—from interacting with the trial team to interacting with opposing counsel and the judge—is deliberate and rational, the jurors will have reason to trust that the trial attorney is constant and reliable.

Even in cases involving strong comparative fault against the plaintiff, trial counsel may choose to present factual evidence in a light that is as calm as it is respectful and truthful. If evidence is presented in an accusatory manner that forces the jurors to either call the plaintiff a liar or determine that the defendant is unreasonable, then plaintiff-leaning jurors may feel no remorse in returning a large verdict, rejecting the defense attorney’s (and the defendant’s) positions. However, if evidence critical of plaintiff’s actions can be presented factually without “turning up the temperature” in the courtroom, a plaintiff-leaning juror might follow along with the factual narrative without donning the plaintiff-tinted glasses, and find themselves understanding the logic and reason supporting plaintiff’s contribution to the injuries without first developing a skeptical view of defense counsel.

As in any argument, keeping the temperature low assists in resolving differing viewpoints. Thus, as plaintiff’s counsel desires to ratchet up tensions to bolster anxiety and fear in the jurors, the calm and rational defense attorney will gain credibility with the critical decision-makers in the courtroom.

<sup>132</sup> *Key Considerations for Defense Teams in Civil Jur Trials - Part 1*, CSI:courtroomsciences.com (last visited Dec. 8, 2022).

<sup>133</sup> Anthony J. Monaco & Michael McCaskey, *Lessons from Trial: Trying a \$250 Million Product Liability Case in Cook County*, DRI Product Liability Conference Material, presented August 20, 2021.

## *Combating Anchoring Techniques in Trial*

Defense counsel can implement a few strategies to counter plaintiffs' counsel's anchor number. Publications suggest deploying three tactics to counter the plaintiffs' counsel's psychological messaging: (1) removing the anchor, (2) exposing the anchor, and (3) setting a counter-anchor.<sup>134</sup>

### Removing the Anchor

Defense counsel can immediately begin removing anchors that are set in jury selection. As opposing counsel asks jurors questions to identify those who could never award \$10 million in this case, regardless of the evidence, defense counsel can—when rehabilitating jurors—expose the fact that the plaintiff has presented no evidence for such a high number. Defense counsel can further explain that any damages awarded must be based on credible evidence. For those jurors who could “never” award \$10 million, defense counsel can rehabilitate the jurors by explaining there will likely be evidence of some amount of damages and confirming that those jurors will listen to the evidence and award an appropriate amount. While the goal at this phase is rehabilitating good jurors, the messaging can also underscore that no evidence presently exists to support a nuclear verdict.

As the case proceeds into opening statement, defense counsel can carefully present what the damages evidence will actually be. Taking care to not concede liability in opening (unless appropriate), counsel can explain that plaintiff will present damages evidence that will (a) ultimately not support the number communicated in jury selection, and (b) overstate the damages in light of the more credible defense-presented evidence.

With each damage witness, counsel can loosen the anchor further. For example, identifying the plaintiff's hobbies can lower the claim for plaintiff's loss of enjoyment of life. This can be argued to lower the jury's perceptions about the plaintiff's anchor number. Other strategies to explore in trial testimony (which must first be vetted in depositions), include how much life insurance the plaintiff pays for, how much the plaintiff pays for monthly expenses, and what activities the plaintiff would forego before the accident due to high cost. For example, before the injury, would the plaintiff stay in only five-star hotels while traveling for vacation? How much would a family meal cost at a restaurant? Did they drive or fly for vacations? How much did they spend on family vacations? All these numbers could paint a picture that the plaintiff does not need the anchor number to be made whole.

### Exposing the Anchor

If opposing counsel presents damage-based numbers in opening statements, defense counsel can be prepared to advise the jury about real evidence that will be presented about damages to create doubt in the plaintiff's anchor number.

Each medical provider can provide counter-anchor testimony if medical bills are presented at trial. Defense counsel should, however, prepare for the possibility that a plaintiff will present no medical bill evidence, particularly when those bills are low. However, when medical bill evidence is presented, defense counsel can be prepared to make a record of the amounts paid, as opposed to the amounts billed. In jurisdictions where defendants are allowed to present paid amounts to the jury, a natural demonstrative can expose one premise of a plaintiff's unreasonable anchor number.

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<sup>134</sup> See Christina Marinakis, *How to Counteract the Anchoring Effects of a Plaintiff's Damages Request*, The National Law Review (May 5, 2022).



By arguing a failure to mitigate damages defense, a defendant can also explore less expensive alternatives to medications that often drive-up life care plans. For example, if a plaintiff has not presented evidence about the possibility of pharmacy discounts, or pharmaceutical manufacturer's relief, or government-based health coverage discounts, defendants can attempt to present evidence that a plaintiff's anchor number admits a failure to mitigate damages.

Another opportunity to expose elevated claims can be created using the *Physicians Fee Reference* handbook.<sup>135</sup> This resource lists thousands of medical procedures by code with estimated costs determined by zip code. As a life care planner overestimates the value of future medical treatment contrary to the *PFR*, counsel can expose the overreach, leading jurors to distrust the life care planner's objectivity.

While private investigators and surveillance technicians can be employed to expose plaintiff-based overreach, counsel should strategically implement these resources. In a sensitive case involving potential emotional trauma, the tension created by showing surveillance videos could result in increased risk of an escalated verdict.

A trend that increases medical bills and verdicts is that plaintiffs' attorneys guide plaintiffs to doctors who withhold submitting their bill to insurance for treatments. In this regime, the treating doctor agrees to charge a premium rate for treatment and collect only against a settlement. Counsel can explore these relationships by training paralegals to read billing agreements in the medical records and identify when one of these regimes exists. Once the agreement is identified, counsel can depose billing coordinators and administrative staff to discover underlying agreements with attorneys that can be offered as evidence to show a bias in the purportedly "independent" treater.

### Setting a Counter-Anchor

Many defense lawyers have accepted that defendants often need to offer a number to counter plaintiff's large anchor number. However, a counter number to a high anchor must be rooted in the same low-temperature, rational context described in the last section.

Developing a counter-anchor number requires forethought and client communication. Where a client is resistant to offering any anchor, a strategic discussion must analyze the potential that a too-low counter-anchor can increase cynicism toward every argument the defendant has made at trial. This distrust can ratchet up tension—and the verdict. Defense counsel may need to persuade clients to set the counter-number at a higher amount than is comfortable for the defendant. Keep in mind, the downslope of setting too low of a counter-anchor could be steeper than presenting no counter-anchor at all. For example, in an emotionally charged sexual assault case, setting too low a counter-anchor may be perceived as cold-hearted and result in increased tension, decreased trust, and a large verdict. On the other hand, a defendant that challenges liability but presents a reasonable damage amount if liability is established can create credibility with the jury. That credibility can lead the jury to be less skeptical of the defendant's evidence.<sup>136</sup>

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<sup>135</sup> Physicians Fee Reference, Wasserman Medical & Dental (2022).

<sup>136</sup> Mark Solheim & Nick Rauch, *Turning the Table: Counter-Anchoring & Reverse Reptile*, DRI Litigation Skills Seminar (July 28–30, 2021), available at <https://www.dri.org/docs/default-source/webdocs/other/2021/july/litigation-skills-solheim-rauch.pdf?sfvrsn=2>.

When “boarding” a reasonable number at trial, break the number into detailed subparts that are each supported by evidence. While this strategy is first established in voir dire (mentioned earlier), it should be introduced in the opening statement with a survey of the supportive evidence the jury will hear. As each piece of evidence is admitted, counsel can maintain a list of what was discussed in opening statement and incorporate every item into the closing. When the opening and closing numbers are consistent, and when everything mentioned is supported between opening and closing, the jury will see that a logical and rational number exists. Moreover, by tying the counter-anchor number to solid evidence, counsel reduces the risk of the jury thinking the defendant is unreasonably discrediting the injury’s value.

Along these lines, the counter-anchor number must be explored in every deposition taken before trial. Associates can be trained to explore potential dollar values of a plaintiff’s pre- and post-injury hobbies to create one source of anchor numbers. As treating doctors are deposed, billing and collection practices can be explored. Identifying how much money a plaintiff invested in a car or a vacation can present a closing argument that \$1.5 million in noneconomic damages is the equivalent of a new \$50,000 car every year for the next 30 years.

In addition, referencing alternative prescription plans can lead to exposing a life care planner’s overreach of future prescription medication needs.

When evaluating opportunities to counter plaintiff’s anchoring tactic, familiarity with jurisdictional laws about anchoring is critical. For example, if plaintiffs’ counsel does not offer an anchor number during his or her primary closing argument, will he or she be able to present a number in a rebuttal argument? In some jurisdictions that answer is “no,” unless the defendant offers a number in its closing argument. Moreover, some states strictly disallow anchoring that is based upon extra-judicial anecdotes such as professional athlete salaries.<sup>137</sup>

### Unintentional Defense Counsel Messaging

The plaintiff’s bar has bombarded our society with a perception that every wrong can be compensable by a large verdict. Their webpages tend to be derogatory to corporations and insurance companies. At best, they tend to share the worst in their opponents.

Although judges routinely instruct the jurors not to research the parties, the attorneys, and the litigated issues, jurors regularly touch the “wet paint” during trial. Indeed, some plaintiffs’ attorneys actually encourage this behavior by referring to the defense lawyers’ websites in voir dire. For a large defense firm, plaintiffs’ counsel will often point out that there are hundreds of attorneys in this firm that helps the defendant. This paints an unfair picture that the defendant truly has hundreds of attorneys working on the case. Moreover, it subtly encourages the jurors to visit the trial lawyers’ websites after-hours and explore the firm.

When the jurors examine an attorney’s webpage, what do they see? Could plaintiff-leaning jurors be put off by reading defense counsel’s website that can appear hostile to injured parties? Before going into trial, consider softening the website’s messaging in the event that jurors ignore the judicial instruction by researching counsel. Along these lines, defense counsel can take measures to communicate credible, fair, and respectful website content that will not negatively influence the jurors who research the trial attorneys.

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<sup>137</sup> See, e.g., *Faught v. Washam*, 329 S.W.2d 588 (Mo. 1959); *McNally v. Eckman*, 466 A.2d 363, 373 (Del. 1983), overruled on other grounds by *Wright v. State*, 953 A.2d 144 (Del. 2008).

### Other Thoughts

There are additional practice recommendations worthy of consideration. These include use of jury verdict reporters—actual jurisdictional verdict history in prescreening and evaluating cases. Investing in jury consultants to develop themes and test arguments in focus groups and mock trials is highly effective in the development of trial strategies and to detect weaknesses. Defendants must properly prescreen cases that should be tried and should try more cases.

When cases are starting to go awry due to the conduct of opposing counsel, defendants should not hesitate to move for a mistrial, be prepared for a mistrial, and start again. Winning cases at trial will serve as an economic pushback to third-party funding and investment into marginal cases. Where funding companies do not produce a return for their investors, the practice will not continue to grow.

Where permitted, conducting post-verdict jury interviews on factors influencing decisions is part of due diligence. A post-loss (or post-win) critical analysis can assist in retrial or trial of the next case. Such information should be shared through articles and presentations to colleagues. If such interviews are not permitted in a jurisdiction, there should be an effort to change the prohibition.

By carefully selecting a larger percentage of cases to try to verdict, defendants can draw a line and discourage abusive litigation practices.

# CONCLUDING THOUGHTS ON COMBATTING SOCIAL INFLATION

The observations and recommendations in this paper are presented to provide a framework for combatting Social Inflation by practitioners and policymakers alike. Real data support the notion of ever-increasing tort costs for all consumers—cast against a backdrop of growing third-party involvement—negatively impacting the civil justice system. Funding arrangements can significantly erode recoveries and alter the risks to individual and business consumers alike. Some of these arrangements also support increasing expenditures on advertising, and ever-evolving fear mongering among members of the public. These practices, and other psychological tactics like anchoring, can be answered by rule makers and legislatures. Counsel should advocate for those changes, but must also use creative best efforts, through discovery, preparation, and advocacy. Those favoring a level playing field and the right to trial by an impartial jury can and should rise to this challenge.

This paper is intended to provoke thought, generate discussion, and encourage action. Much work remains and much will follow in the ongoing effort to confront the issues and develop solutions. They can be reached. Demand transparency. Practice advocacy. Exert a concerted effort. Defendants can stem the tide, but it will take effort by individuals, businesses, and counsel, all of whom have a role to play in bringing about reasonable reform to flatten the curve of Social Inflation.

*“Increasing expenditures on advertising and ever-evolving fear mongering and psychological tactics like anchoring can be answered by rule makers and legislatures. Counsel should advocate for those changes, but must also use creative best efforts, through discovery, preparation, and advocacy.”*