

# Trial Budgets: A Defense Lawyer's Dilemma – How Much is Enough?

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Answering the question “How large should the trial budget be?” is like asking a financial advisor for a uniform investment program suitable for individuals of all circumstances and means. A uniform plan as to what will be spent at trial is just as inappropriate. General flexibility in litigation budgeting is essential, as are considerations of funds to be spent on our client’s ultimate investment: trial.

A topic most of us tackle on a daily basis is how to spend our client’s money in defense of a claim. This kind of decision-making shapes a case from the outset. Are we to take an aggressive approach, or step back and let the case gradually evolve? Knowing we are bound to spend only what our clients allow us to, our task becomes one of convincing the client (or the obligated insurer) that each step we recommend is not just suggested, but necessary. We would like to focus on a recent trial experience to present a case for an appropriately flexible trial budget.

## **What It All Boils Down To In the End**

For the past three weeks you’ve been trying a personal injury case to a jury, and they are now out deliberating. The lawsuit was based on an incident that occurred in your client’s restaurant. As the plaintiff was thanking the staff for a great meal, she slipped and fell, fracturing her sacrum. The medical bills for treatment

of the fracture alone approached \$100,000. Before trial, you offered more than twice that amount in settlement. Plaintiff’s closing argument was extremely well presented, which makes you nervous enough to ask for more settlement authority (actually, quite a bit more settlement authority). You gave the case everything you had: your time, your thoughts and your tireless preparation. But then there is the jury factor.

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## **The Trial**

By virtually every medical account, the fracture healed normally within two to four months. But some five years after the fall the woman continued to complain of horrific neurological, urological and gynecological symptoms. She was seeking some \$2.28 million in damages. At trial, you admitted liability but disputed what, in your mind anyway, was an excessive amount of damages.

The woman’s credibility and sympathetic appeal were a significant challenge. Her friends and family filled the courtroom on a daily basis in a show of support. She was in such severe pain that she had a bench moved into the courtroom where she lay during much of the trial. Because she

was unable to sit at the witness stand during her testimony, she stood for periods of time, microphone in hand. Her devoted husband attended trial each and every day.

The woman’s friends, family, doctors and economic experts filled the first two weeks of trial with testimony, each of whom attested to plaintiff’s bleak prognosis. The plaintiff called an out-of-state orthopedic surgeon to testify about a concealed spinal injury ostensibly undetectable by “traditional” medical science. The surgeon had performed a very complicated, “revolutionary” surgical procedure on the plaintiff in an attempt to alleviate the constant and severe back pain she had experienced every day since the accident. The jury appeared interested in plaintiff’s continuous use of strong narcotic pain medication, but plaintiff’s actions were not questioned: The pain was real.

The restaurant’s insurer rose to the task. The case was ably administered from the beginning, which gave the defense the latitude to take all necessary depositions, and there were many. You were allowed to hire a jury consultant to help you select an appropriate panel. You used graphic demonstrative exhibits, including anatomical illustrations and timelines, to explain the plaintiff’s long history of medical contacts for a whole host of conditions. These visual aides were the tools that gave the jury an objective

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understanding of the plaintiff's injuries, to offset their pro-plaintiff emotional reactions.

In the end, the jury awarded plaintiff less than half of her total medical bills, finding much of her treatment was unrelated to the fall. A total of \$89,000 was awarded, including compensation for medical expenses and pain and suffering. The jury rejected plaintiff's sometimes dubious arguments, watched and listened to the defense presentation, and was persuaded by it.

## **Adequate Trial Practice Requires an Adequate Legal Budget**

The Washington State Bar News recently published an article entitled *Random Thoughts from 20 Years on the Bench*, by Judge David A. Nichols, Whatcom County Superior Court. In the article, Judge Nichols urged attorneys to be more organized, prepared and thoughtful in their presentations. But preparation takes time and money. Money can't be spent without authority, and authority is not obtained without a good reason. The important thing is to ask early so you can start getting prepared early. As we know, time is not always on our side, especially given recalcitrant witnesses and deadlines that must be met. Balancing the requirements we have as litigators against client expectations may be our greatest challenge.

If proper strategies are executed early and often, we know that 99% of our cases will end in settlement. For the select few that don't, adequate preparation will reduce the tendency to waste a jury's (and a judge's) time. One of Judge Nichols' chief complaints is the unprepared lawyer, something

we have all witnessed at one time or another.

Where a courtroom presentation is concerned, lawyers must be over-prepared to reach the intended result: a flawless representation of your client's interests. Each stage of the process is time-consuming and must be included in your budgeting scheme. The goal is to organize your thoughts into a workable system, know where things are, and know how to access them quickly. In the electronic age, people, including jurors, have become more impatient and expect information to be readily accessible. Both juries and judges hate to watch us sort through a mountain of paperwork to find things.

One way to avoid a paper chase is to use visual aids such as PowerPoint. In document driven cases, designing this type of system can be a significant task in and of itself. For example, a pre-accident timeline can be designed to showcase pertinent medical records with the click of a button. But designing the electronic visual aid is just the beginning. The key is making sure you (or someone on your trial team) know how it works, and that you have "plan B" ready in case it doesn't.

Another point Judge Nichols made in his recent article is: "do voir dire well." This can only be accomplished with practice, practice, and more practice, which is part of your client's investment. While lawyers have many skills, one thing many of them are not particularly good at is the art of listening. This skill must be honed in order that you can properly react when you are questioning jurors. Only when potential jurors are prompted to openly discuss their beliefs will voir dire

be meaningful. By using a jury consultant, we learned more about human psychology than simply how to craft a good question. By focusing our questions on the right people, we aimed to create a defense-friendly environment. Once they were comfortable, the potential jurors couldn't wait to talk. Those in the health care and insurance industries provided the foundation and developed a theme for the defense: overreaching plaintiffs should not be rewarded. As it turned out, the investment in the jury consultant paid off in spades.

As our recent trial experience demonstrates, well-crafted trial budgets can make a huge difference. Turning to some recent jury verdicts around the country, we highlight a few noteworthy examples. National Jury Verdict has recently reported the near drowning of a 14-year-old boy in Miami-Dade County, Florida. It was a product liability case involving a defective swimming pool pump, which caused the boy's arm to become caught in the unprotected drain. The boy suffered catastrophic brain injury as a result. The award for the plaintiff was \$104 million, and is believed to be one of the largest personal injury awards in Florida history. In Washington D.C., a jury awarded \$10 million to a plaintiff who fell while exiting a transit bus, and was trampled by other passengers as they exited. Plaintiff alleged the driver failed to properly pull to the curb. When asked how much was spent defending these cases, one response might be "not enough."

Although preparing legal budgets with a vigorous defense in mind is a careful balancing act, it can be done. It is our responsibility to do it well.