

January 23, 2020

**By Electronic Mail**

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Re: Defense Bar/Business Group Comment on Proposed Amendment to Mass. R. Civ. P. 51

We, the undersigned, are the leading Massachusetts and national organizations representing lawyers who primarily represent defendants in civil litigation. We are also leading businesses, civil justice, and public policy organizations. Over 22,000 attorneys are members of the Massachusetts Defense Lawyers Association, DRI-The Voice of the Defense Bar, International Association of Defense Counsel, Federation of Defense & Corporate Counsel, Association of Defense Trial Attorneys, and Lawyers for Civil Justice. Our members include countless Massachusetts employers.

It is vital to us that procedures in civil litigation in the Commonwealth remain fair and equitable for all parties. We support the Massachusetts Supreme Judicial Court Standing Advisory Committee's proposed addition of Rule 51(a)(2). The proposed rule is practical, equitable, and non-partisan.

Resolution of civil cases in the Commonwealth of Massachusetts depends on a fair and balanced process. In 2014, the Legislature amended Mass. Gen. Laws. c. 231, §13B to allow plaintiffs in civil actions to request a specific amount of damages during closing arguments. As the plaintiff in Massachusetts presents closing arguments last, after the defendant, this created the potential for tremendous unfairness – the plaintiff could request a specific amount of damages with the last word at trial, and the defendant (who already gave its closing argument) would be deprived of any opportunity to respond.

Numerous studies have shown that suggesting a specific amount of damages, or “anchoring,” is a powerful tool for plaintiffs’ attorneys that has a significant effect on jury deliberations. One study went so far as to suggest, “the more you ask for, the more you get.” Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519, 538 (1996). A jury consultant for plaintiffs further explains, “once an anchor has been provided, the number exerts undue influence on the final figure. *Anchoring can sway decisions even when the anchor provided is completely arbitrary.*” Sonia Chopra, *The Psychology of Asking a Jury for A Damage Award*, Plaintiff, Mar. 2013 (emphasis added). We understand why plaintiffs’ counsel ask juries for a specific damages number in closing arguments, but fundamental considerations of fairness require providing defendants with an opportunity to respond and put the number in context.

Recognizing the potential inequity of the situation, courts in Massachusetts have addressed the issue in several ways, including by requiring plaintiffs’ counsel to disclose to opposing counsel in advance of closing arguments whether they will ask the jury for a specific damages amount (and if so, what amount) or giving defense counsel a limited opportunity to respond to plaintiffs’ closing

arguments (but only as to the amount of damages requested). *See* Pat Murphy, *Plaintiffs' Bar: Changes to Right to Argue Damages 'Problematic,'* Mass. Law. Weekly (Dec. 5, 2019). This has become the standard practice in Massachusetts since the amendment of Mass. Gen. Laws c. 231, §13B. It has, by all accounts, proven workable, effective, and above all, fair. The Massachusetts Supreme Judicial Court Standing Advisory Committee's proposed Rule 51(a)(2) simply codifies the practical solution adopted to address a problem that was not addressed by the legislature and ensures that civil trials remain balanced for all parties.

As long as the Commonwealth permits a specific damages number in closing arguments, it is imperative that all parties are treated fairly and that neither side is given an advantage. Proposed Rule 51(a)(2) is necessary to ameliorate an inequitable situation created by the amendment of Mass. Gen. Laws c. 231, §13B. The proposed change is consistent with procedures already adopted by the courts in the Commonwealth to ensure fairness and should be adopted.

Massachusetts Defense Lawyers Association	Associated Industries of Massachusetts
DRI-The Voice of the Defense Bar	International Association of Defense Counsel
Federation of Defense & Corporate Counsel	Association of Defense Trial Attorneys
Lawyers for Civil Justice	American Medical Association
U.S. Chamber Institute for Legal Reform	American Tort Reform Association
Product Liability Advisory Council, Inc.	National Federation of Independent Business
Coalition for Litigation Justice, Inc.	American Property Casualty Insurance Association
Medical Professional Liability Association	National Association of Mutual Insurance Companies
Washington Legal Foundation	