NEW WAYS TO SHOVEL SMOKE

Samantha A. Huettner*

> —*Lawyers spend a great deal of their time shoveling smoke.*[1]

The story goes that in spring 1857, the state of Illinois charged seventy-year-old Melissa Goings with the murder of her seventy-seven-year-old husband, Roswell.[2] He was a successful farmer but was rumored to be frequently drunk and to beat Melissa.[3] One day, an intoxicated Roswell began choking Melissa, who grabbed a stick of wood and knocked him senseless.[4] After his friends found him on the floor,[5] he regained consciousness long enough to rasp that Melissa tried to kill him to gain sole possession of their house and farm.[6] He then lost consciousness and died four days later.[7] After a coroner's inquest,[8] Melissa was arrested and indicted for first-degree murder.[9]

The circuit court held a preliminary hearing,[10] heard witness testimony, and ordered Melissa to appear for trial.[11] A few weeks later, she appeared for her indictment hearing before the judge, accompanied by her lawyer and his new co-counsel, Abraham Lincoln.[12]

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1 Oliver Wendell Holmes, Jr., unidentified source.

2 George R. Deckle, Sr., "People v. Melissa Going: Transcript of Murder Case Defended by Lincoln." Abraham Lincoln's Almanac Trial Blogsite. Last visited on August 29, 2019, from http://almanac-trial.blogspot.com/search/label/Melissa%20Goings [hereinafter Deckle, *People v. Melissa Going*].

3 E. East & J. Hickey, *Lincolniana*, 46(1) J. ILL. STATE HIST. SOC'Y 79–87 (1953). *Retrieved from* http://www.jstor.org/stable/40189277 [hereinafter East & Hickey, *Lincolniana*].

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

Melissa pled not guilty to the charges.[13] The judge ordered the trial to begin immediately.[14] It became quickly apparent that the judge and several male community members intended to make an example of Melissa.[15] Lincoln, interrupting the proceedings, asked the judge for a continuance to prepare the defense.[16] The judge refused but allowed a short recess.[17] Lincoln escorted his elderly client from the courtroom.[18]

Just before the conclusion of the recess, Lincoln returned alone to the courtroom.[19] The court was called to order,[20] but Melissa "being called, came not."[21] She was nowhere to be found. Someone reported seeing a foot go through an open courthouse window.[22] The judge accused Lincoln of counseling his client to flee.[23] Lincoln denied it. "Your honor," he explained, "I did not chase her off. She simply asked me where she could get a good drink of water. I said that Tennessee has mighty fine drinkin' water."[24]

Melissa was never again seen in Illinois. A year later, Lincoln made a campaign stop in Melissa's hometown and successfully convinced the state's attorney to strike the murder charge against Melissa, a victory sweeter than a defense verdict.[25]

Urging your criminal client's midtrial flight and later getting her charges dismissed is an innovative trial strategy (albeit one that runs squarely afoul of Indiana's Rules of Professional Conduct and must be avoided). A win using this strategy is not a win on the merits; it bears no rational relationship to the evidence. It's gamesmanship that relies on knowledge of human behavior.

In that sense, Lincoln's action is similar to certain (perhaps less noble) litigation tactics that have recently emerged from the plaintiffs' bar. Tactics examined in this article include (1) omitting evidence of past medical specials at trial to avoid the psychological phenomenon of "anchoring and adjustment," (2) exploding policy limits with bad faith setups against insurers, and (3) scaring the jury into large verdicts with reptile theory. This article

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13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 Deckle, *People v. Melissa Going*, *supra* note 2.

22 East & Hickey, *Lincolniana*, *supra* note 3, at 79–87.

23 *Id.*

24 Deckle, *People v. Melissa Going*, *supra* note 2.

25 East & Hickey, *Lincolniana*, *supra* note 3, at 79–87.

describes each tactic, identifies applicable law, and suggests ways defense counsel can identify, address, and undermine the tactic before and at trial.

I. Omitting Evidence of Past Medical Expenses

> *—I was under the impression we would have guidelines. I feel as if we were thrown into a box and had to come out with a number*.[26]

A recent litigation tactic from the plaintiffs' bar sees plaintiffs forgoing compensation for past medical expenses—and even seeking to exclude evidence of those expenses—to avoid anchoring the jury's verdict to their medical specials amount. They are trying to reap big verdicts in cases with low medical specials. Keeping such evidence out of the courtroom complicates the already difficult task of monetizing pain and suffering, a task that has been rightly called "procedurally simple but analytically impenetrable."[27]

A. LIMITED GUIDANCE FOR JURORS

Indiana law entitles injured persons to reasonable compensation for their injuries, but Indiana's Model Civil Jury Instructions provide only limited guidance to jurors seeking to quantify a plaintiff's personal injuries and fix a reasonable amount of compensation. Indiana Model Civil Jury Instruction 703, General Elements of Damages, instructs jurors to decide the amount of money that will reasonably compensate a plaintiff and references several broad categories for consideration.

> If you decide from the greater weight of the evidence that [defendant] is liable to [plaintiff], then you must decide the amount of money that will fairly compensate [plaintiff].
>
> In deciding the amount of money you award, you may consider:
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> (1) the nature and extent of the [injury][injuries], and the effect of the [injury][injuries] on the [plaintiff]'s ability to function as a whole person;
> (2) whether the [injury][injuries] [is][are] temporary or permanent;
> (3) the value of [lost time][lost earnings][and][loss or impairment of earning capacity];

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26 Edith Green & Brian Bornstein, *Precious Little Guidance: Jury Instructions on Damage Awards,* 6(3) Psychology, Public Policy, and Law 1076 (2000) (quoting an anonymous juror lamenting lack of guidance for jurors tasked with deciding damages).

27 David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 265 (1989).

(4) the physical pain and mental suffering [plaintiff] has experienced [and will experience in the future] as a result of the [injury][injuries];
(5) the reasonable value of necessary medical care, treatment, and services plaintiff incurred [and will incur in the future] as a result of the [injury][injuries];
(6) the aggravation of a pre-existing [injury][disease][or] [condition];
(7) the [disfigurement][and][or][deformity] resulting from the [injury][injuries]; and
(8) the life expectancy of [plaintiff].

Objective evidence in the form of wage documentation and medical bills often makes it a straightforward matter to assign a reasonable amount of compensation for those claims. More difficult, however, is assigning value to pain and suffering, which requires "monetization of a product for which there is no market."[28]

B. ANCHORING AND ADJUSTMENT

Studies on jury behavior show that juries use objective evidence to determine pain and suffering awards. Tasked with putting a fair market value on an injury, jurors look for signs to steer them toward a damage award that fits their concept of reasonable compensation under the circumstances of the case at hand. New jury research shows jurors often use the powerful cognitive heuristic of "anchoring and adjusting" to assist their task.[29] In other words, jurors look for an objective monetary anchor that provides a starting point for valuing an injury. They adjust the value from that anchor depending on the evidence. Although the value may be adjusted, the anchor strongly influences the outcome.

In a classic study 1974 study by psychologists Amos Tversky and Daniel Kahneman,[30] research participants were asked to estimate the percentage of African countries that make up the United Nations. Before giving an estimate, they first watched an experimenter spin a "wheel of fortune" containing numbers ranging from 0 to 100. The participants were asked whether the actual percentage was higher or lower than the number provided by the wheel of fortune and to give a specific percentage. Despite knowing that the starting number was arbitrary, it influenced participants. When the wheel

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[28] Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23(4) HOFSTRA L. REV. (1995), *available at* http://scholarlycommons.law.hofstra.edu/hlr/vol23/iss4/1.

[29] *See, e.g.,* Thomas Mussweiler, *The Malleability of Anchoring Effects*, 49 EXPERIMENTAL PSYCHOL. 67 (2002).

[30] Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, SCIENCE, NEW SERIES, Vol. 185, No. 4157 (1974), at 1124–31.

landed on sixty-five percent, the average estimate was forty-five percent.[31] When the wheel landed on ten percent, however, the average estimate dropped to twenty-five percent.[32]

C. MEDICAL SPECIALS AS ANCHOR

In a civil jury trial, medical bills resulting from a plaintiff's past injury-related care are a realistic anchor upon which jurors can premise pain and suffering awards. Where a plaintiff's past medical bills are far lower than his desired recovery, however, the principle of anchoring and adjusting may result in a verdict considerably lower than plaintiff's request. Recently, in response to this tendency, many plaintiffs' attorneys have avoided putting into evidence a plaintiff's past medical bills and have abandoned requests for past medical expense compensation. Untethering a plaintiff's damages from hard figures, a plaintiff's attorney can assign a high-dollar amount to pain and suffering and request huge returns in cases with relatively small medical expenses.[33] Some have gone further, seeking to prevent defense attorneys from introducing evidence of a plaintiff's past medical bills and payments, adjustments, and write-offs via pretrial motion. In so doing, plaintiffs' attorneys argue that such evidence is irrelevant to a plaintiff's care and treatment and/or inadmissible to prove damages.

Indiana Rule of Evidence 413 provides that medical bills are admissible as prima facie evidence of the reasonableness of the charges associated with medical diagnosis or treatment as "occasioned by an injury." Medical bills are subject to traditional evidentiary considerations of relevance and authenticity. They are generally admitted into evidence as business records under Evidence Rule 803(6) through live witness testimony, healthcare provider affidavit, or through the testimony of the patient to refresh his memory under Evidence Rule 803(5).

But what if plaintiff's counsel has withdrawn his claim for past medical expenses and/or argues against the admission of such bills as irrelevant? Or, what if he chooses not to introduce—or seeks to exclude a defendant's introduction of—the plaintiff's medical bills at trial? Although Indiana's appellate courts have not yet decided this issue, a handful of other state courts have weighed in. In *Chapman v. Mazda Motor of America, Inc.,*[34] for example, the District Court for Montana concluded that past medical bills that were irrelevant to prove past medical expenses were admissible because

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31 *Id.*

32 *Id.*

33 *See* Shari Seidman Diamond, Mary R. Rose, Beth Murphy, & John Meixner, *Damage Anchors on Real Juries*, J. EMPIRICAL LEGAL STUDIES (2011), for an excellent discussion of the impact of plaintiff's ad damnum amount on jury behavior, an examination of the impact of high ad damnums on jurors, and guidance on whether to suggest to the jury a specific damage ceiling in a contested liability case.

34 7 F. Supp. 2d 1123 (D. Mont. 1998).

they were relevant to the plaintiff's care and treatment.[35] Holding that such evidence was admissible to show, among other things, the severity and extent of a plaintiff's injuries, the court explained:

> Even if medical expenses were disallowed by Medicaid, the documentation for such expenses presumably lists the medical procedures and treatment dispensed. They may bear on the necessity of future needs and provide a foundation for a life care plan. They are relevant to prove the nature and extent of [plaintiff's] injuries. Evidence of cost for the complete range of treatment and care dispensed in past medical treatment may be relevant to future care and expenses required.[36]

Echoing Montana, the Supreme Court of Mississippi held that "the entire medical bill may be relevant to aid the jury in assessing the seriousness and extent of the injury."[37] The District Court of Maryland similarly held that "the amount of medical expenses incurred by plaintiff . . . is relevant to the determination of the full extent and nature of plaintiff's injuries."[38]

Defense attorneys should be mindful of this growing trend and should plan thoughtfully to avoid a pretrial scramble to address it. Among other things, attorneys should craft discovery designed to understand each element of damage a plaintiff will claim at trial. If a plaintiff fails to claim past medical expenses in written discovery or at deposition, this may indicate that he will forego such evidence at trial. Under those circumstances, defense attorneys should be prepared to introduce such evidence in their case-in-chief and to anticipate that plaintiff's counsel may object to its introduction as irrelevant where no past medical expenses are claimed. Ideally, defense counsel will seek a pretrial ruling on the admissibility of a plaintiff's medical bills at trial. Until Indiana's appellate courts have occasion to consider this issue, defense practitioners should be mindful of other states' treatment of the issue and be comfortable arguing for the admissibility of these records.

II. THE BAD FAITH SET-UP

> —*It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and*

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35 *Id.* at 1125.

36 *Id.*

37 McGee v. River Region Med. Ctr., 59 So. 3d 575, 581 (Miss. 2011).

38 Brice v. National R.R. Passenger Corp., 664 F. Supp. 220, 224 (D. Md. 1987); *see also* Melaver v. Garis, 138 S.E.2d 435, 436 (Ga. App. 1964) (concluding, in a case where plaintiff claimed only pain and suffering, that medical bills were "relevant to show not only the amount of medical expense incurred but the number and duration of plaintiff's treatment as illustrative of pain allegedly suffered by the plaintiff").

> *energies trying to maneuver the insurers into committing acts which the insured can later trot out as bad faith.*[39]

As early as 1985, Justice Kaus of the California Supreme Court expressed concern that "attorneys who handle policy claims against insurance companies . . . spend their wits and energies trying to maneuver the insurers into committing acts which the insured can later trot out as bad faith."[40] Other courts have echoed Justice Kraus's concern. In *Wade v. Emcasco Ins. Co*.,[41] for example, the Tenth Circuit warned:

> Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator.[42]

The bad faith set-up is not a new tactic, but the last few years have seen an increase in manufactured bad faith claims against insurance companies. This does an injustice to the important public policies underlying Indiana's recognition of extra-contractual liability. The bad faith set-up transforms the insurance agreement from a shield for the insured into a weapon against the insurer, injecting tension and mistrust into the insurer-insured relationship to both parties' detriment.

A. WHAT IS BAD FAITH?

Indiana law recognizes an important legal duty, implied in all insurance contracts, requiring a insurer to deal in good faith with its insured.[43] The evidentiary standard to establish bad faith by an Indiana insurer is high: "[A] good faith dispute about the amount of a valid claim or about whether the insured has a valid claim at all will *not* supply the grounds for a recovery in tort for the breach of the obligation to exercise good faith."[44] This is true even if it is ultimately determined that the insurer breached its con-

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39 White v. Western Title Ins. Co., 710 P.2d 309, 328 n.2 (Cal. 1985) (Kaus, J., concurring and dissenting); *see also* STEVEN PLITT & JORDAN ROSS PLITT, PRACTICAL TOOLS FOR HANDLING INSURANCE CASES § 7:9, *Bad Faith Setup* (2014).

40 *Id.*

41 483 F.3d 657 (10th Cir. 2007).

42 483 F.3d at 669–70 (quoting Peckham v. Continental Cas. Ins. Co., 895 F.2d 830 (1st Cir. 1990)).

43 Erie Ins. Co. v. Hickman by Smith, 622 N.E.2d 515, 520 (Ind. 1993); *see* Jackson v. Allstate Ins. Co., 780 F. Supp. 2d 781 (S.D. Ind. 2011).

44 *Hickman*, 622 N.E.2d at 520 (emphasis added); *accord*, McLaughlin v. State Farm Mut. Auto. Ins. Co., 30 F.3d 861, 867–68 (7th Cir. 1994) (applying *Erie v. Hickman* and reversing award of punitive damages for bad faith denial of coverage).

tract.[45] The lack of a diligent investigation by the insurer is not, without more, a breach of the duty of good faith dealing.[46] An insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insureds.[47] To prove bad faith, a plaintiff must establish, by *clear and convincing evidence*, that the insurer had knowledge at the time of its determination that there was no legitimate basis for the position it was taking.[48]

Bad faith is more than negligence and mistake: "[P]oor judgment and negligence do not amount to bad faith; the additional element of conscious wrongdoing must also be present."[49] "A finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will."[50] A bad faith determination includes and requires an element of culpability.

The obligation of good faith and fair dealing includes the obligation to refrain from

(1) making an unfounded refusal to pay policy proceeds;

(2) causing an unfounded delay in payment;

(3) deceiving the insured; and

(4) exercising an unfair advantage to pressure an insured into settlement of his claim.[51]

B. THE BAD FAITH SET-UP

Claims with damages that exceed coverage limits are problems for the claimant (who may never be fully compensated for his injuries), the insured (whose personal assets may be at risk), and for the insurer (which faces

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[45] *Id.*

[46] *Hickman*, 622 N.E.2d at 520.

[47] Burr v. United Farm Bur. Mut. Ins. Co., 560 N.E.2d 1250, 1255 (Ind. Ct. App. 1990); Thompson ex rel. Thompson v. Owensby, 704 N.E.2d 134 (Ind. Ct. App. 1998).

[48] Masonic Temple Ass'n of Crawfordsville v. Indiana Farmers Mut. Ins. Co., 779 N.E.2d 21, 29 (Ind. Ct. App. 2002).

[49] Hoosier Ins. Co. v. Audiology Found. of Am., 745 N.E.2d 300, 310 (Ind. Ct. App. 2001); Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc., 97 F. Supp. 2d 913, 936 (S.D. Ind. 2000) (quoting Colley v. Indiana Farmers Mut. Ins. Group, 691 N.E.2d 1259, 1261 (Ind. Ct. App. 1998)).

[50] *Colley,* 691 N.E.2d at 1261.

[51] *Hickman*, 622 N.E.2d at 519; *see also* Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 40 (Ind. 2002) (finding that an insurance company did not act in bad faith in refusing to defend its insured based on its interpretation of contract provision, even though that denial might have been erroneous); Thompson Hardwoods, 21 Inc. v. Transp. Ins. Co., No. NA 0074CHK, 2002 WL 440222 (S.D. Ind. Mar. 15, 2002) (summary judgment in favor of insurer on bad faith claim; applying *Erie v. Hickman* and determining that the predominant issue in bad faith setting is whether insurer had a rational, principled basis for its actions at the time of the claimed improper acts, not whether those actions were correct in hindsight); *Masonic Temple*, 779 N.E.2d at 29 (under Indiana law an insurer avoids liability for acting in bad faith when its claims handling decisions were made in good faith and upon a rational basis).

potential liability if it should in bad faith reject a settlement offer within policy limits).[52] Under these conditions, "creative plaintiffs attorneys often seek to expand the insurer's policy limits by staging facts that would give rise to bad faith liability," setting up insurers for bad faith claims.[53] In his article "The Bad Faith Set Up," Stephen R. Schmidt explains:

> The desire to expand policy limits also sometimes creates an alliance between the plaintiff and the insured defendant in which the two enter into an unreasonable settlement. The insured may pay nothing but may assign claims against the insurer and stipulate to a judgment collectible only from the insurer in return for a covenant not to execute on his assets. The consent judgment may be in excess of policy limits to create a claim for bad faith failure to settle, or it may be within policy limits and designed to spare the plaintiff the risk of losing a weak case. These settlements can cross the line into bad faith, collusion, and fraud, and can result in the voiding of the policy altogether, thereby releasing the insurer from all liability.[54]

C. RECOGNIZING A BAD FAITH SET-UP

The bad faith set-up typically arises in the context of third party claims or claims where an insurer is defending its insured in a tort case.[55] The tort claimant "tries to manipulate settlement negotiations so that the insurance company will reject a policy limits settlement demand."[56] The tort claimant then gives the insured a covenant not to execute and demands that the insured assign to it any bad faith claim against his insurer exchange for the tort claimant's promise not to execute on any excess judgment against the insured. Some red flags that may herald that a plaintiff's attorney is attempting to set up the insurer for bad faith include

- making policy limits offers with unreasonable, "sudden death" time limits
- making policy limits offers before there has been adequate time for investigation and discovery

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[52] Stephen R. Schmidt, *The Bad Faith Set Up,* 29(4) TORT & INS. L. J. 705–39. *JSTOR*, www.jstor.org/stable/25762459.

[53] *Id.* at 705.

[54] *Id.*

[55] Paul Wright, John T. Harding, and Sharon Stuart, Bad Faith Update: Trends, Tips, and Sand Traps, *available at* http://www.iadcmeetings.mobi/assets/1/7/20.1-_Harding-_Bad_Faith_Update.pdf [hereinafter Wright, *Bad Faith Update*]; *see also* Stephen R. Schmidt, *The Bad Faith Set Up,* 29(4) TORT & INS. L. J. 705–739 (1994). *JSTOR*, www.jstor.org/stable/25762459.

[56] Wright, *Bad Faith Update, supra* note 55.

- backing out of settlement agreements under pretexts they blame on the insurer[57]

- making a policy limits demand with one or more unusual acceptance conditions

- the involvement of plaintiff's counsel predates certain medical or psychiatric care (such as testing for a traumatic brain injury)

- the plaintiff seeks treatment from doctors with whom the plaintiff's counsel has a preexisting relationship

- correspondence from plaintiff's counsel is replete with grandiose, hyperbolic, and self-serving rhetoric (about insurance companies, the potential for an excess verdict, *etc.*)

Case law contains good examples of the way these set-ups function. In *DeLaune v. Liberty Mutual Insurance Co.*, the plaintiffs offered to settle their claim stemming from a car accident for policy limits of $10,000, attaching a ten-day response deadline.[58] Defense counsel, who had been retained just eight days before his receipt of the settlement demand, believed settlement was possible but lacked settlement authority. Defense counsel contacted the plaintiffs' counsel on the last day of the deadline (a Friday) and requested an extension until the following Monday to respond. The plaintiffs' counsel refused and initiated a common-law bad faith action for the excess judgment.

Affirming judgment for the insurer, the Florida District Court stated:

> [T]he evidence fails to prove any negligence, much less negligence rising to the level of bad faith. The accident happened December 27, 1971. In less than a month suit was filed. Defense counsel received the file to defend eleven days later. Eight days after that plaintiffs' counsel offered to settle for the policy limits but limited the time for acceptance to ten days. It is the latter aspect of the offer which we find totally unreasonable under these circumstances. In view of the short space of time between the accident and the institution of suit, the provision of the offer to settle limiting acceptance to ten days made it virtually impossible to make an intelligent acceptance. Nor does the enclosure of an affidavit from a doctor stating that the injured plaintiff would be totally disabled warrant a different conclusion.

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[57] *Id.*

[58] 314 So. 2d 601 (Fla. 4th Dist. Ct. App. 1975).

The Court continued:

> Since when does one party to a lawsuit have to accept at face value the medical information furnished by the other party without even any inquiry? The evidence here shows that appellee, its adjusters, and its counsel proceeded with all due haste to determine and evaluate their position, and they almost made plaintiffs' unreasonable deadline. It should be noted that the personal injury case went to trial ten months after the deadline, so the time limitation was not invoked because the trial was imminent. Finally, to demonstrate that this whole charade might have been a "set up" for just such a suit as we are considering (as argued by appellee) when Monday came, after the Friday deadline, and the home office authorized settlement, plaintiffs' counsel refused it.

D. RESPONDING TO A BAD FAITH SET-UP

Defense counsel (and insurers) who suspect a bad faith set-up should consider the following:[59]

- The insurer should never delay in investigating a plaintiff's claim, both before and after suit is filed. Defense counsel should promptly propound written discovery to plaintiff and should seek to depose plaintiff regarding his medical treatment, injuries, and damages.
- If defense counsel and/or the insurer receives a set-up demand letter with an unreasonably short deadline, or where there has been insufficient time for a full investigation of plaintiff's claim, defense counsel "should not simply adopt a hard line and deny the claim based on lack of substantiating information." Rather, defense counsel "should respond to the letter courteously and within the time limit, acknowledge the communication, request information and documentation that is reasonably necessary for evaluation of the claim (or releases to obtain that information), and, if necessary, request a reasonable extension of the response deadline so that the appropriate persons may review and evaluate information."[60] Defense counsel's response should address all reasons why the insurer cannot act immediately on the demand but should express a clear willingness to negotiate further once the necessary information is gathered.
- Defense counsel should work with the insurance adjuster to review the file and determine whether sufficient information exists to evaluate the plaintiff's claim and respond to the settlement demand. Defense counsel should work with the adjuster to identify what

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59 *Id.* (identifying and exploring many of these suggestions).

60 *Id.*

additional information may be needed (medical records, bills, wage information, *etc.*). "The letter should outline the nonconfidential information the adjuster or defense counsel presently has and the documents and information needed to complete a proper evaluation," and should ask plaintiff's counsel to provide those documents.

- Defense counsel must inform the insured of the settlement demand. If there is excess verdict exposure, the insured must be made aware of this and counseled, as appropriate, to seek independent counsel regarding this possibility.
- The defense may accept an appropriate demand and place the funds in escrow in an interest-bearing account pending the satisfaction of all settlement conditions.[61]

E. BAD FAITH SET-UP AS AN AFFIRMATIVE DEFENSE

What if—despite the best efforts of the insurer and defense counsel—the insurer finds itself embroiled in a bad faith lawsuit? Some states now recognize the affirmative defense of a bad faith set-up. Indiana does not; but case law from jurisdictions that recognize the affirmative defense may help defense counsel defend bad faith claims.

- *Lopez v. Allstate Fire & Casualty Insurance Co.* The insurer asserted bad faith set-up as a defense in its policyholder's suit for bad faith failure to settle. On summary judgment, the court found that the insurer can raise as a defense that there was no reasonable opportunity to settle, which is "to be decided based on all the circumstances."[62]
- *Shannon v. New York Mutual Insurance Co*. The court refused to strike a "Bad Faith Set-Up Affirmative Defense" where the insurer claimed it was set-up by "a quick settlement demand, followed by a quick closing of the window before important information is provided so that any subsequent limits offers by the insurer are bemoaned as too late."[63]
- *Moore v. GEICO General Insurance Co.* The district court granted summary judgment in favor of GEICO in an alleged bad faith set-up case. Claimant's counsel conditioned his offer to settle for policy limits on receipt of affidavits of the insureds that they had no other insurance and a precisely worded release; he then treated GEICO's transmittal of noncomplying documents as a rejection of the policy limits

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61 Ryan M. Baker IV & Lisa M. Dillman, *Insurance Bad Faith Set-Up: Dealing with the Practicalities,* The INDIANA LAWYER, March 30, 2011, at 19.

62 2015 WL 5320916 (S.D. Fla. Sep. 14, 2015) (quoting Rynd v. Nationwide Mut. Fire Ins. Co., 2011 WL 4754520 (M.D. Fla. Oct. 7, 2011)).

63 2013 U.S. Dist. LEXIS 165280 (M.D. Pa. Nov. 21, 2013).

settlement demand. He sued GEICO for bad faith after a $4 million verdict was returned for claimants. In granting summary judgment, the district court found that GEICO's conduct was "sloppy" and "bordering on negligent," but that it did not rise to the level of bad faith. The court concluded that counsel had attempted to manufacture an artificial bad faith claim by creating unnecessary obstacles to settlement and that it was counsel's conduct that resulted in the failure to settle. The Eleventh Circuit reversed, finding that there was evidence both supporting and contradicting the allegations of bad faith and that the district court had improperly focused its analysis on the conduct of claimant's counsel, when it should have focused on the conduct of the insurer in fulfilling its obligations to its insured.[64]

- *Dietz & Watson, Inc. v. Liberty Mutual Insurance*. The insurer argued the assignment of a bad faith claim involved collusion similar to a bad faith set-up. Tacitly acknowledging the "bad faith set-up" as the basis for an affirmative defense, the court noted: "if proven, these two affirmative defenses, without limitation, are valid defenses to [policyholder's] action. The facts alleged by [insurer] are sufficient for it to take discovery into the areas of [policyholder's] alleged voluntary payment made without the consent of [insurer] and [policyholder's] bad faith."[65]

- *Striegel v. American Family Mutual Insurance Co.* The court held that it was reasonable for the insurer not to settle a claim within a two-week time-limited settlement period. The court noted that counsel had "a modus operandi of using similar demand letters in multiple cases in this District, which impose an unreasonable time constraint of two weeks on their demands for payment to set-up a bad faith claim," and referred counsel to the state bar for disciplinary review.[66]

- *Nelson v. Progressive Northwestern Insurance.* Progressive was sued for bad faith failure to settle a third party personal injury claim and argued, among other things, that the excess verdict was caused by its policyholder's "refusal to defend the claim" and her "counsel's intent to pursue a bad faith claim." Denying summary judgment, the court observed that the proper inquiry involves whether the facts "raise a suspicion of the 'cat-and-mouse' game between claimants and insurers" and that operative facts include things like setting arbitrary settlement deadlines and depriving the insurer of information in order to hamper the insurer's ability to investigate the accident.[67]

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64 633 Fed. Appx. 924 (11th Cir. Feb. 19, 2016).

65 2015 U.S. Dist. LEXIS 58827 (E.D. Pa. May 5, 2015).

66 2015 WL 4113178 (D. Nev. Jul. 7, 2015).

67 2016 WL 880506 (D. Kan. Mar. 7, 2016).

III. RECENT TREATMENT OF REPTILE THEORY ARGUMENTS

—You are the conscience of this community.[68]

Most defense practitioners are by now familiar with the reptile theory, a trial tactic that has captivated plaintiffs' lawyers and frustrated defendants' for the last decade. Although the theory is not new, it took time for the defense bar to develop effective countermeasures and even longer for courts to speak to the propriety of reptile theory argument in the American courtroom. Recent case law sheds light on how courts view reptile theory arguments and provides valuable insight for defense attorneys seeking to stymie plaintiffs' pet scare tactic.

A. A REPTILE REFRESHER

David Ball, a jury consultant, and Don Keenan, a lawyer, first introduced the legal world to the reptile theory, which they heralded as "the most powerful tool against tort reform," when they published *Reptile: The 2009 Manual of the Plaintiff's Revolution.*[69] Ball and Keenan proposed a new trial strategy for plaintiffs' attorneys grounded on a 1960s study that posited that humans had a "triune brain" composed of three "complexes."[70] The first was the reptilian complex, concerned primarily with survival. Next was the paleomammalian complex, concerned with emotion and empathy.[71] Finally, the neomammalian complex, concerned with logic, reason, creativity, and language.[72] Ball and Keenan suggested that if plaintiffs' attorneys could tap into jurors' dormant reptile brains by linking a defendant's bad behavior to the safety of the community at large (and, therefore, to the individual juror's *own* safety), then huge damages awards would result.[73] Once triggered, they suggested, jurors' reptile brains would dominate logic and reason and compel them to reach a result that prioritizes safety survival above all else. Ball and Keenan coached plaintiffs' attorneys in framing a defendant's conduct in terms of a threat to community safety, identifying an "umbrella rule," and then accusing the defendant of violating that rule.[74]

Reptile scare tactics are designed to trigger jurors' survival instincts. The theory (1) makes defendant's conduct, rather than plaintiff sympathy, the focus of every case; (2) changes the standard of care from the conduct of a reasonable person to "as safe as possible"; and (3) encourages jury awards

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68 Regalado v. Callaghan, 207 Cal. Rptr. 3d 712, 725 (Ct. App. 2016).

69 DAVID BALL & DON C. KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF 'S REVOLUTION 13 (2009) [hereinafter Ball & Keenan, *Reptile 2009 Manual*].

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

based on the maximum harm that could have been caused to the community as opposed to harm that was actually caused to the plaintiff.[75] Reptile arguments are designed to make jurors *angry*, not sympathetic.[76] Social science research shows that a desire to punish a perceived violation of a core societal principle drives anger-based verdicts.[77] The cornerstone of the reptile case is defendant's violation of safety rules, calculated to induce anger by showing defendant's flawed personal decisions or business practices and lead jurors to conclude that a message must be sent.[78] It is interesting that younger generations of jurors seem particularly responsive to such arguments. In his article *Never Mind the Facts: The Damning Narrative that Plaintiffs Can Aim at Any Defendant*, asbestos defense attorney Robert Thackston explains: "[T]his tactic shift is uniquely suited to persuade members of the Gen X and Millennial generations, who now make up the majority of potential jurors."[79] Such jurors, research indicates, are more desensitized than earlier generations to sympathy and pleas.[80] They are far more cynical than Baby Boomers and tend to believe that "you can't be too careful" when dealing with people.[81]

B. RESPONDING TO REPTILE THEORY

Plaintiffs' attorneys begin building cases around the reptile theory as early as the filing of the complaint. Thus, defense attorneys must be prepared to recognize and combat reptile theory argument from the case's inception and at every trial stage thereafter.

1. Initial Pleadings

Defense counsel should consider addressing reptile-theory-based statements in initial pleadings. In their article, *Defense Techniques for Combating Plaintiff's Reptile Strategy*,[82] Iowa-based defense counsel Kevin M. Reynolds and Zachary Herman note that reptile plaintiffs often allege in their complaint that a defendant violated "community standards" or "safety

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75 Robert Thackston, *Never Mind the Facts: The Damning Narrative That Plaintiffs Can Aim at Any Defendant*, ASBESTOS MEDICINE 2015 [hereinafter Thackston, *Never Mind the Facts*].

76 *Id.*

77 Thomas M. O'Toole, *Defeating the Reptile: Strategies for Dismantling the Plaintiff 's Revolution,* Sound Jury Blog: A Litigator's Guide to the Universe, *available at* http://soundjuryconsulting.com/files/publications/Defeating_the_Reptile.pdf.

78 *Id.*

79 Thackston, *Never Mind the Facts, supra* note 75.

80 *See* John J. Delany III, David M. Governo, & Mary Noffsinger, *The Generation X and Y Factor*s, FOR THE DEFENSE, Jan. 2013.

81 John G. Browning & Wendy A. Humphrey, *The Millennial Juror*, 75 TEX. BAR J. 275 (2012).

82 Kevin M. Reynolds & Zachary Herman, *Defense Techniques for Combating Plaintiff's Reptile Strategy*, XX(1) DCA DEFENSE UPDATE (Winter 2018).

rules."[83] Violating community standards and safety rules is not synonymous with violating a legal standard of care. Defense counsel's response, then, should be to plead failure to state a claim upon which relief may be granted. For Indiana practitioners, this could be a motion under Rule 12(b)(6) of the Indiana Rules of Trial Procedure coupled, if warranted, with a narrowly tailored motion to strike allegations that are "redundant, immaterial, impertinent, or scandalous." (Rule 12(f)). Once pled, affirmative defenses responsive to reptile theory pleading allegations may become a springboard for future deposition questions and pretrial motions.[84]

2. Written Discovery

If the plaintiff has alleged a violation of reasonable care or of a community and/or safety standard then defense counsel may employ pointed written discovery to flesh out plaintiff's theory. For example, if a plaintiff contends that a defendant violated safety rules, defense counsel may respond with a contention interrogatory as follows:

> In Paragraph 8 of Plaintiff's Complaint for Damages, you allege that X Corporation "failed to comply with certain safety standards." Please state with specificity:
>
> a. all facts that support your allegation;
>
> b. all documents that support your allegation;
>
> c. all persons with knowledge of the above facts; and
>
> d. all persons who may testify at trial regarding these facts.

Focused contention interrogatories may provide valuable information that can be further developed at the plaintiff's deposition.

3. Plaintiff's Deposition

Plaintiff's deposition is a good opportunity to understand the contours of plaintiff's reptile theory argument. The following depositions questions may be useful.

- What facts or information do you have that my client did anything wrong?
- What specific documents do you have that show my client did anything wrong that caused this accident?
- Have you spoken with an expert that told you my client did something wrong that caused this accident?

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[83] *Id.*

[84] *Id.*

4. Safety Rule Questions during Defendant's Deposition

Defendant's deposition can be a trap for the unwary in a reptile case. The general strategy plaintiff's counsel employs involves lulling the unwary defendant into (1) recognizing or adopting a safety rule that reflects neither industry standards nor the applicable standard of care, and (2) causing the defendant to admit that prioritizing that standard is of paramount import. The following questions are common.[85]

- Would you agree with me that safety is a top priority?
- Would you agree with me that a company should not needlessly risk harm to the public?
- Would you agree with me that any amount of risk to the public associated with product use is unacceptable?

The typical deponent wants to agree with these "no brainer" questions, which sound deceptively straightforward but completely misstate the applicable standard of care. Simple yes or no responses will not suffice. Instead, defense counsel should work with the defendant to craft thoughtful, measured answers. The deponent, before jumping into a response, should first ask clarification questions to ensure he knows what he is being asked:

- Would you define "top priority" for me?
- Would you give me an example of a "needless risk"?
- What do you mean by "any amount of risk?" Can you quantify that for me?

After the deponent is sure that he understands the meaning and scope of the question asked, then he should respond with care and thought. In his article "Debunking and Redefining the Reptile Theory," Bill Kanasky, Jr.,[86] advises that the best way to respond to hypothetical safety questions is to be honest. He offers several good examples of suggested responses, including:

- "It depends on the circumstances."
- "Not necessarily in every situation."
- "Not always."
- "Sometimes true, but not all the time."
- "It can be in certain situations."

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85 *Id.*

86 *See* Bill Kanasky, Jr., *Debunking and Redefining the Plaintiff Reptile Theory*, FOR THE DEFENSE , Apr. 2014, at 14

5. Pretrial Motions in Limine

Defense counsel should craft strong evidentiary motions designed to keep reptile argument out of the courtroom. Reptile arguments play to the jury's emotions, bias, and prejudice, which Indiana law forbids. Rule 502 of Indiana's Model Civil Jury Instructions, for example, instructs jurors: "Do not base your argument on sympathy, bias, or prejudice."

Further, these arguments are closely analogous to Golden Rule arguments, which our trial courts uniformly forbid. Golden Rule arguments ask the jury to place themselves in the plaintiff's shoes and decide a case accordingly. Courts universally recognize such arguments as improper because they encourage the jury to "depart from neutrality and to decide the case based on personal interest and bias rather than on the evidence."[87] Thackston suggests using the following quotes from Ball and Keenan's manual to educate the court on the interrelatedness of reptile theory and Golden Rule argument in any evidentiary motion:

- "Your most important Reptilian task in closing is to show how the dangers represented by this case affect the community."[88]
- "You will bring jurors to figure out that community safety is enhanced by means of justice. You are not asking jurors to sacrifice justice for the sake of safety. You instead show that justice creates safety."[89]
- "This gives us our primary goal in trial: To show the immediate danger is the kind of thing the defendant did—and how fair compensation can diminish that danger within the community."[90]
- "To gauge whether a defendant's act or omission was negligent—and whether it represents a community danger—jurors need answers to these three questions: . . . 3. How much harm could it cause in other kinds of situations?"[91]
- "The basis is never the harm actually caused; it's always the potential maximum."[92]
- "Our research showed that once jurors understand that a full verdict will protect the community, they will actually want the plaintiff to take the money."[93]

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87 United States v. Roman, 492 F.3d 803, 806 (7th Cir. 2007) (citation and quotation marks omitted); Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982) (Golden Rule remark is "clearly improper").

88 Ball & Keenan, *Reptile 2009 Manual*, *supra* note 69, at 145.

89 *Id.* at 19.

90 *Id.* at 30.

91 *Id.* at 31.

92 *Id.* at 33.

93 *Id.* at 151.

- Example given by the authors: "Analogizing to familiar situations gets past the narrow circumstance of this case, clarifies the rule, and shows how dangerous the violation is to everyone in the community not some stranger's baby."[94]
- Example given by the authors: "Your experts can say . . . 'Ignoring the rules of a Differential Diagnosis will kill patients whether they are in a labor and delivery room as in this case or in an emergency room, or in a children's clinic, or in any other medical setting.' Then have your expert give examples of how it can hurt or kill in each setting."[95]

Interestingly, Ball and Keenan devote almost one-fifth of their book to countering accusations that reptile tactics violate the Golden Rule prohibition.[96] Appendix B-1 of the book includes the leading case holdings on Golden Rule from every state.[97] Moreover, Ball and Keenan explain that reptile tactics rely on convincing jurors to make their decision based on "personal reasons."[98]

Defense counsel should prepare motions in limine designed to (1) educate the court on reptile theory generally and (2) point the court to *specific examples* from the pleadings, written discovery, or deposition transcripts that tend to show that plaintiff's counsel will make reptile theory arguments at trial. As explained below, vague motions in limine that request categorical bans on reptile arguments, safety arguments, and the like have met with mixed success. As the case develops, counsel should make note of any instance where plaintiff has invoked or inquired regarding a safety rule and/or community safety as this may support a future motion in limine.

6. Trial

Defense counsel should be wary of reptile theory arguments in opening and closing statements and, where appropriate, should object. Further, at the beginning of trial, voir dire is a valuable opportunity to gauge potential juror's receptiveness to such arguments and to educate jurors about the difference between a hypothetical safety rule and a legal standard of care.[99] For a detailed discussion and several great examples of effective voir dire in a reptile case, see *Defense Techniques for Combating Plaintiff's Reptile Strategy*.[100]

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94 *Id.* at 59.

95 *Id.* at 34.

96 *Id.* at 13.

97 *Id.* at Appx. B-1.

98 *Id.*

99 *Id.*

100 Kevin M. Reynolds & Zachary Herman, *Defense Techniques for Combating Plaintiff's Reptile Strategy*, XX(1) IDCA Defense Update (Winter 2018).

C. EMERGING CASE LAW

As the number of cases based on reptile theory have grown, so too have the number of defense efforts designed to keep such argument out of the courtroom. The result has been an uptick in appellate opinions considering the propriety of reptile theory arguments.

In 2016, the California Court of Appeal in *Regalado v. Callaghan* was the first court to address reptile theory, which it rejected as improper argument of counsel.[101] In that case, the installer of a propane-fueled pool heater sued the supplier of the heater for injuries he sustained when the heater exploded during installation. The plaintiff's attorney's closing argument perfectly implemented reptile theory.

> Your voice is really going to have an impact. You are the voice. You are the conscience of this community. You are going to speak on behalf of all the citizens of Riverside County and, in particular, Coachella Valley. You are going to make a decision about what is right and what is wrong; what is acceptable, what is not acceptable; what is not safe. You are going to announce it in a loud, clear, public voice. And that is going to be the way it is.
>
> . . .
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> These courtrooms, these courthouses, exist for one reason: It's to keep the community safe. Period. That is the sole function of courtrooms, and it's why the state spends so much money on courtrooms. In the criminal part of the system, the jury identifies criminals and gets rid of them It's a matter of public policy, public safety. On the civil end of things, same function it's all about keeping the community safe. You identify bad conduct, negligent conduct. You don't send anybody to jail, but you announce what it is, and everybody is going to live by it. And in the civil end, you, the jury, tells the wrongdoer, 'You are going to compensate the person you hurt.' And you are going to tell the wrongdoer, "If you do this stuff in our community, you are going to pay."

Defense counsel objected to these statements as reptile argument. The court of appeal agreed with defense counsel that the remarks were improper, explaining: "In our view the remarks from [plaintiff's] counsel telling the jury that its verdict had an impact on the community and that it was acting to keep the community safe were improper."[102] In rejecting reptile theory arguments, the court cited to the basic rule that an attorney cannot "'pander to the prejudice, passion or sympathy of the jury.'"[103] The

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101 Regalado v. Callaghan, 207 Cal. Rptr. 3d 712 (Ct. App. 2016).

102 *Id.* at 726

103 *Id.* at 725 (quoting Martinez v. State, 238 Cal. App. 4th 559, 556 (2015)).

court explained, "The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury."[104] Finally, the court emphasized that an appeal to "jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality."[105]

Other courts that have examined reptile theory arguments include:

- *Brooks v. Caterpillar Global Mining America*. The court granted defendant's motion in limine on the grounds that "send a message" or "conscience of the community" arguments are prejudicial and distract the jury from reaching a fair verdict.[106]
- *Biglow v. Eidenberg.* The court upheld a trial court's decision to grant a defendant's motion in limine to prohibit reptile arguments because they could mislead the jury with respect to the applicable duty of care.[107]
- *Wahlstrom v. LAZ Parking Ltd., LLC.* The court granted a new trial where plaintiff's counsel's extensive use of reptile tactics deprived defendants of a fair trial.[108]
- *Hopper v. Ruta.* The court barred plaintiffs' counsel from using the following phrases during trial: "community safety or protection," "public safety or protection," "safety rules," "sending a message," "needlessly endangering patients," and "being guardians of the community."[109]

Some courts have refused a wholesale preclusion of reptile theory arguments, opting instead to rule on reptile issues that arise during trial on an ad hoc basis.[110] Still others have allowed reptile evidence to be used at trial because reference to "community safety standards [is] fundamental to the underpinnings of tort law."[111]

As plaintiffs continue to employ reptile theory, the body of case law addressing its propriety will continue to grow, and new defense tactics to deal with it will emerge. Ball and Keenan, in the meantime, have since updated their original work and published: *Reptile in the Mist (and Beyond): The Plaintiff's Attorney's Guide to the MIST—Case Revolution.* Ball and Keenan

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104 *Id.*

105 *Id.* at 725–26.

106 2017 U.S. Dist. LEXIS 125095, *25 (W.D. Ky. Aug. 8, 2017).

107 369 P.3d 341, 2016 WL 1545777 (Kan. Ct. App. Apr. 15, 2016).

108 2016 WL 3919503 (Mass. Super. May 19, 2016).

109 Colo. Dist. LEXIS 249 (Dist. Ct. of Colo., Oct. 23, 2013).

110 *See, e.g.,* Turner v. Salem, 2016 WL 4083225 (W.D.N.C. July 29, 2016).

111 Bostick v. State Farm Mut. Auto. Ins. Co., 2017 U.S. Dist. LEXIS 113897, *6 (M.D. Fla. July 21, 2017).

guard it from purchase by defense attorneys. Their web site (www.reptileballandkeenan.com) contains the following warning as a precursor to purchase:

> Sale of this product will not be completed or shipped until the purchaser is verified as a Plaintiff's lawyer or as a member of a Plaintiff's firm. All persons previously vetted for the Welcome To The Revolution seminar are automatically qualified and the purchase of the product is governed by the same confidentiality agreement signed as a prerequisite to attend the WTR seminar. Additionally, all products are protected by a trademark, patent, and copyright and any resale, gift, or transfer of the products to anyone is a crime and will be prosecuted.[112]

IV. CONCLUSION

There will always be new ways to shovel smoke before and after trial. Defense attorneys must remain aware of emerging litigation tactics from the plaintiffs' bar and be prepared to address them and, when necessary, to educate courts regarding those strategies, particularly those that rely on gamesmanship and emotion to the detriment of facts and evidence.

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[112] The book is $65.00 on the Ball and Keenan web site but is available on Amazon for $873.53, apparently without any such restrictions.