

Different Risks Require a Different Process

AEIX Claims Caucus

Designing our Future: Creating a Blueprint
for Catastrophic Claims Management

April 26-27, 2023

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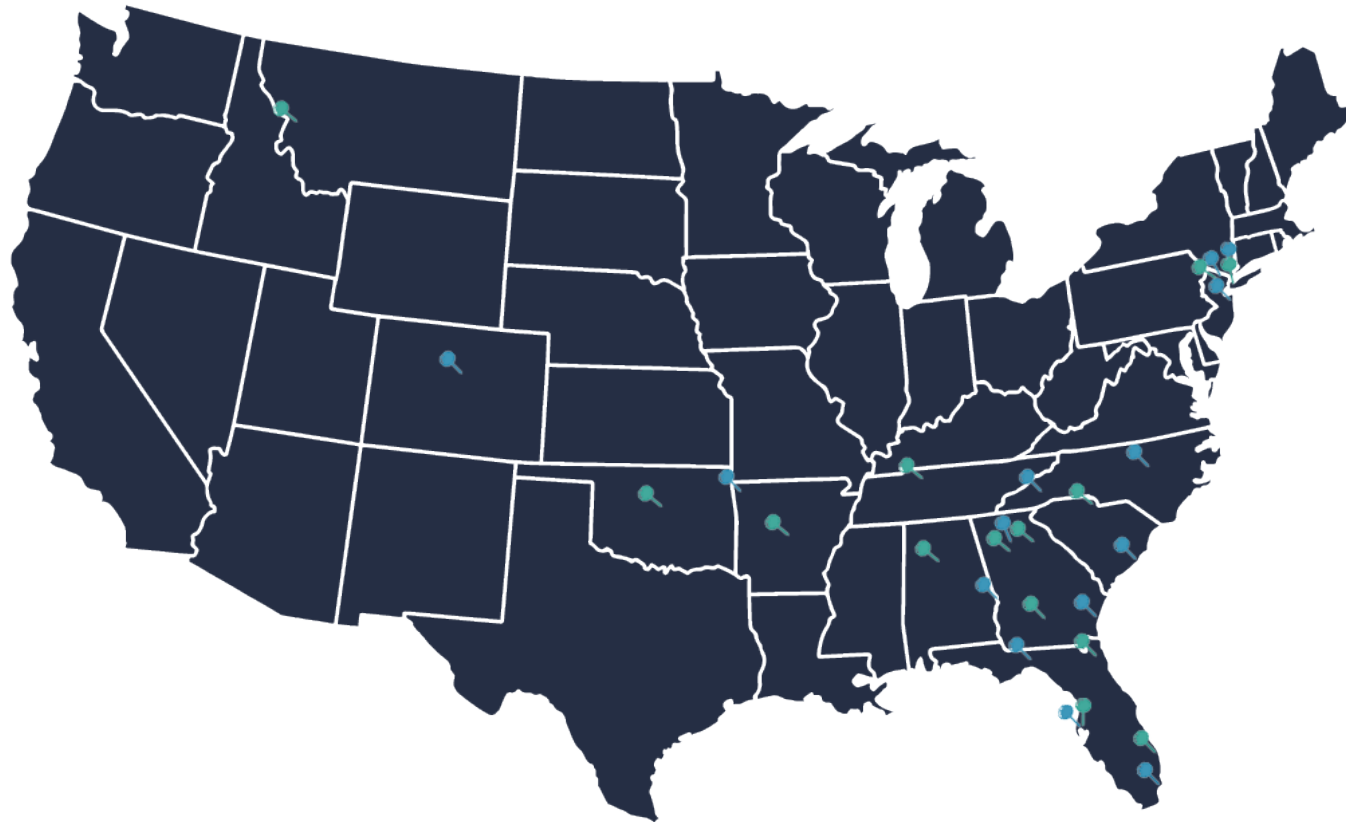
H | B | S HALL BOOTH SMITH, P.C.
ATTORNEYS AT LAW



AMERICAN EXCESS
INSURANCE EXCHANGE

AEIXRRG.com

About Hall Booth Smith, P.C.



- Hall Booth Smith, P.C. is a full-service law firm established in 1989. We have 29 offices strategically located throughout Georgia, Alabama, Arkansas, Colorado, Florida, Montana, New Jersey, New York, North Carolina, Oklahoma, South Carolina, and Tennessee. HBS prides itself on providing knowledgeable, proactive, client-specific counsel to individuals, domestic and international corporations, state and federal agencies, and nonprofit organizations.
- HBS has a recognized national practice handling complex high exposure cases.

Plaintiff attorneys are waging a **psychological campaign** to change the jury decision-making process.



Highly publicized
aberration verdicts are
creating a confidence
crisis and driving up
settlement values.

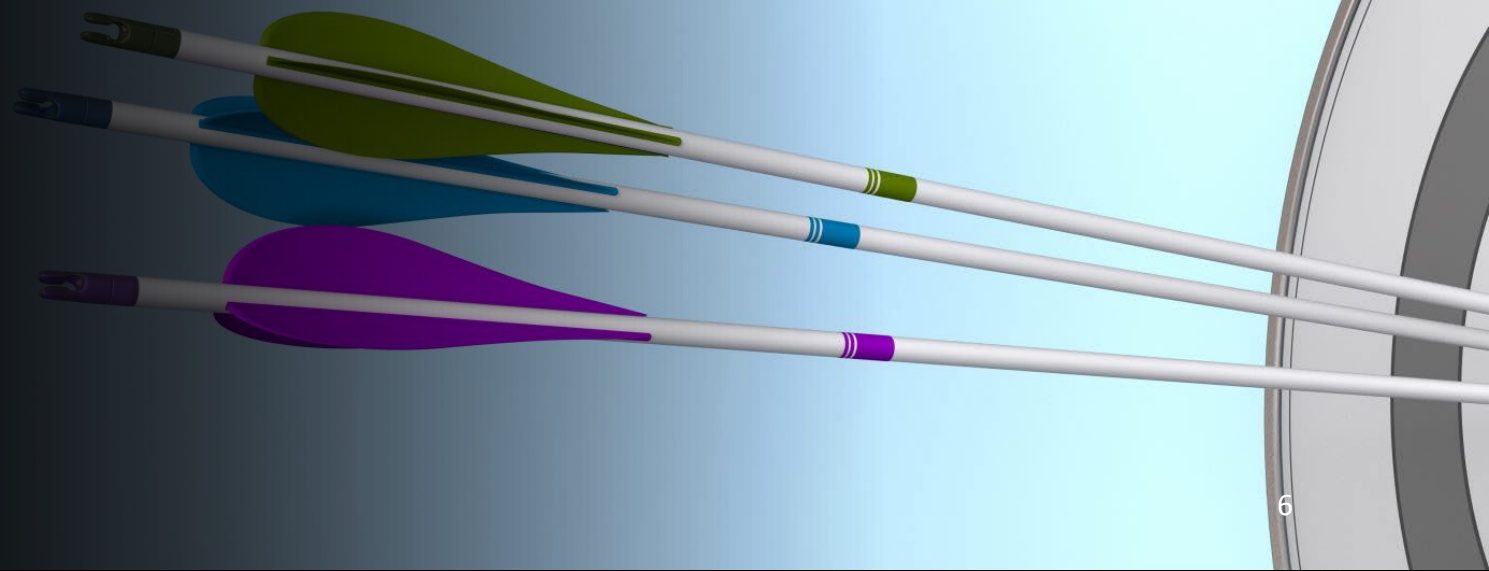
A photograph of a courtroom interior. The walls are covered in dark wood paneling with decorative rectangular frames. In the foreground, there is a long wooden bench. Behind it, several rows of red leather chairs with wooden frames are arranged, facing towards the back of the room. The lighting is warm and even.

Attorneys for **both sides** influence what jurors perceive as a reasonable & fair compensation.

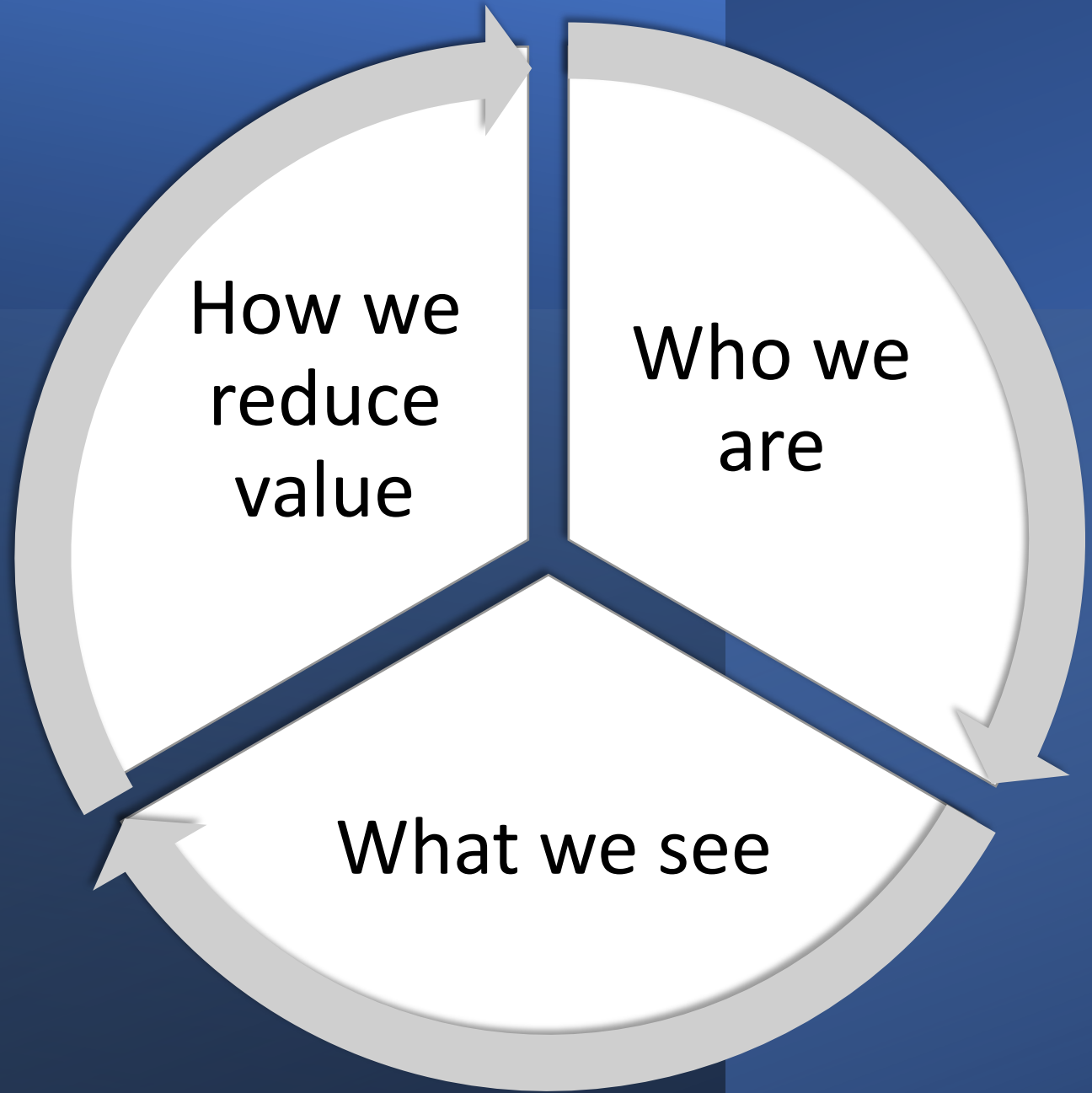
Diamond, S. S., Murphy, B., Rose, M. R., & Meixner, J. B. (2011). Damage Anchors on Real Juries. *SSRN Electronic Journal*, 1–32. <http://doi.org/10.2139/ssrn.1883861>



The goal of national
counsel is to lower
the value of a
specific claim.



National Counsel
Programs





National Counsel



Changing the
paradigm.

During the late 1990s, in response to the increasing severity in medical professional liability, several defense firms began working collaboratively with insurers to develop national counsel programs.

National Counsel Program

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graph TD; A[National Counsel Program] --- B[Evaluation]; A --- C[Strategy]; A --- D[Trial];
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Evaluation

Strategy

Trial

Evaluation

- Initial Analysis Report
 - Records
 - Experts
 - Liability
 - Causation
 - Damages
 - Witnesses
 - Venue
 - Counsel

Strategy

- Strategy Review
 - Damages mitigation
 - Resolution strategy
 - Themes
 - Visuals

Trial

- Appearance in case
- Support trial preparation
- Resources and specialist teams
- Support or lead trial

Timing of Roles of National Counsel

Pre-Trial

- Assist with strategy
- Assist with experts
- Assist with damages
- Appear or not appear in case
- Not always trial counsel

Trial

- Partner with counsel
- Provide support to team
- Build trial preparation capacity
- Bring trial experience with high exposure cases
- Backup and support



What we see

TRIAL BY HUMAN

Nicholas Rowley and Steven Halteman



"If You Are An Enemy"

"If you are an enemy reading this book—say, an insurance defense lawyer, or a government attorney using power of the state to put people in cages for as long as possible rather than rehabilitate them—then your soul may burn by reading any part of this book. Magic markers have sealed this book to curse anybody who reads it with an evil purpose, such as trying to bully ordinary people who are standing up for themselves against the elite power structure in the United States."

"Reconsider the harm you are doing to people and society. Soften your heart and help the people who are in need, rather than making their lives worse and helping the insurance defense industry."

-Nick Rowley

Changing The Paradigm

Understand the opposition

DAVID BALL ON
DAMAGES 3

“With low economic damages, an economic-damages anchor can work against you. **Low economic figures lead to low noneconomic figures.**”

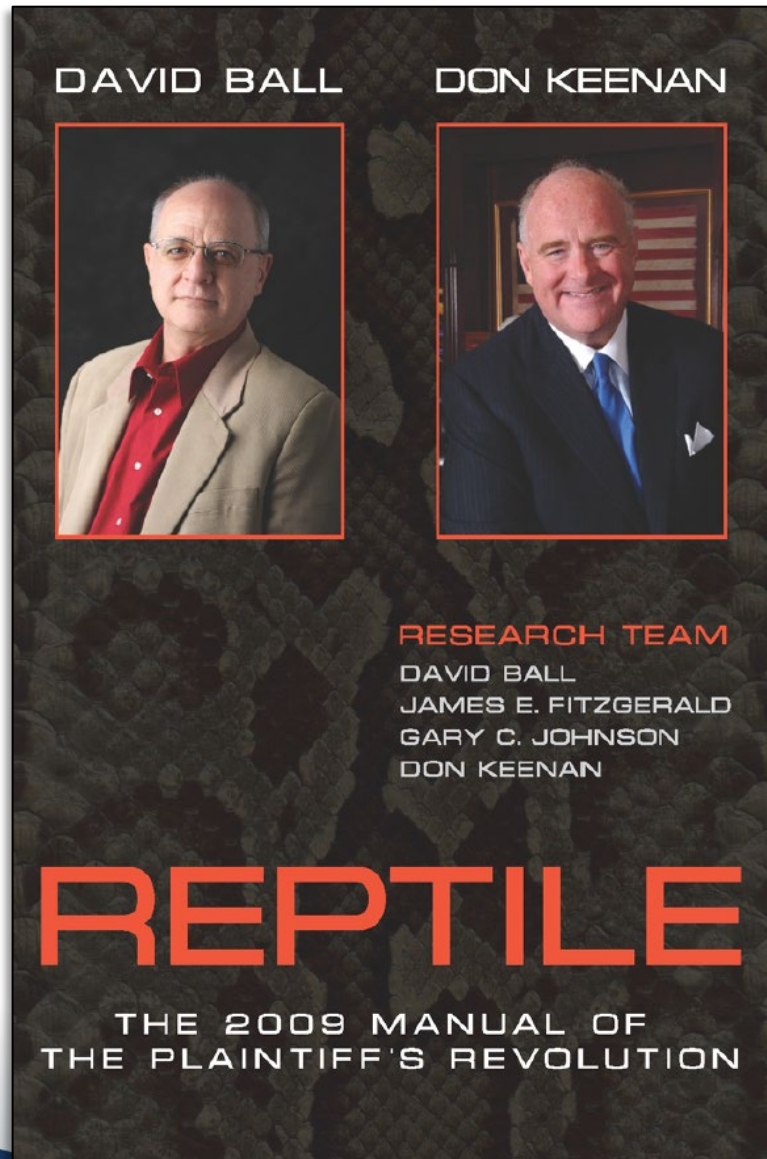
Changing The Paradigm

Understand the opposition

The image shows the cover of a book titled "DAVID BALL ON DAMAGES 3". The text "DAVID BALL ON" is in a smaller, grey font above the word "DAMAGES" in a larger, bold, grey font. To the right of "DAMAGES" is a large, red, stylized number "3". The entire cover is set against a light grey background with a subtle gradient.

DAVID BALL ON
DAMAGES 3

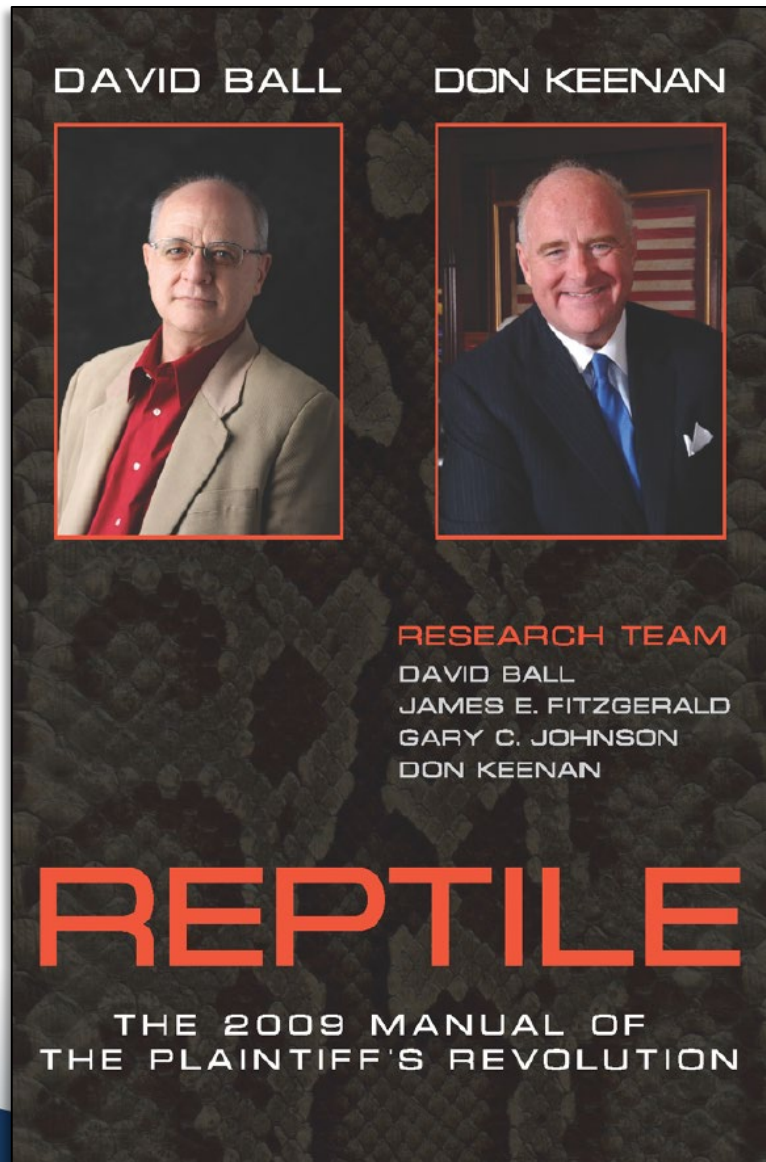
“In cases with significant economic damages, the economic total can serve as an anchor or benchmark for noneconomic damages.”



“A mediator’s career success is measured in direct proportion to his closed cases...so apply subtle pressure:

‘This one should be easy to conclude; everyone I’ve talked to agrees.’

‘How many cases have you done that didn’t settle? I hope this isn’t one.’”



“So, start by finding out whose head is at stake. This can be tricky, but it’s essential...that’s where the fear button will be. You can’t apply Reptilian pressure to a computer, but you can to someone with something – like a head or a job – to lose.”



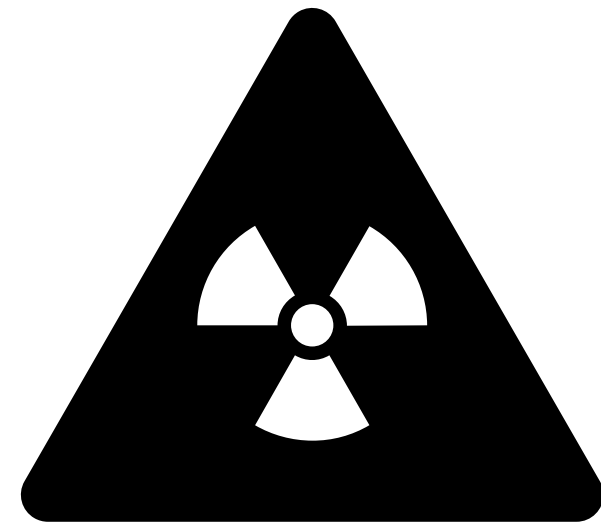
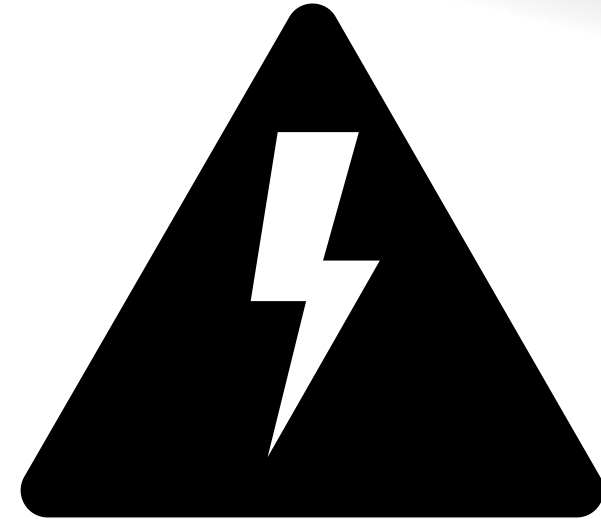
Second & third
mediation frequency
increasing



Resolution at
mediation
decreasing



When describing
large verdicts,
language matters.



Plaintiffs' Tactics to Carry Out Their Threats

- Weaponizing the Electronic Medical Record
- Extensive Rule 30(b)(6) depositions
- Multiple depositions, discovery demands, and experts
- Continually seeking sanctions/expenses throughout the discovery phase
- Personal attacks on the Defendant(s), Defense Team, and Carrier(s)



How We Reduce Value

We assist you to take back control.

01

Be aggressive
and urgent.

02

Understand
the value.

03

Have a
resolution
strategy.

04

Fight the
psychological
battle.

We use a process
for consistently
identifying high
exposure cases.



Evaluation Matrix

Severity

LOW

MEDIUM

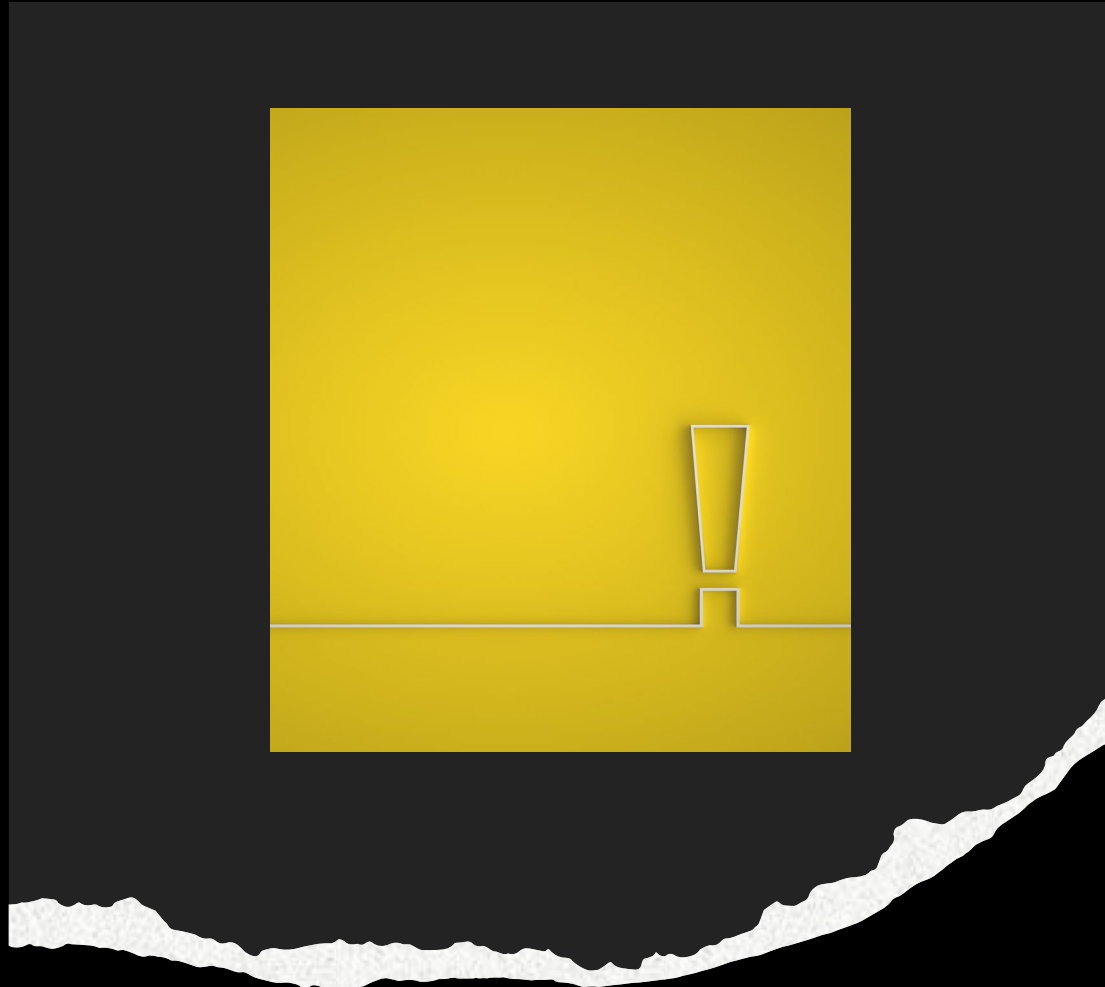
HIGH

Defensibility

STRONG

MODERATE

WEAK

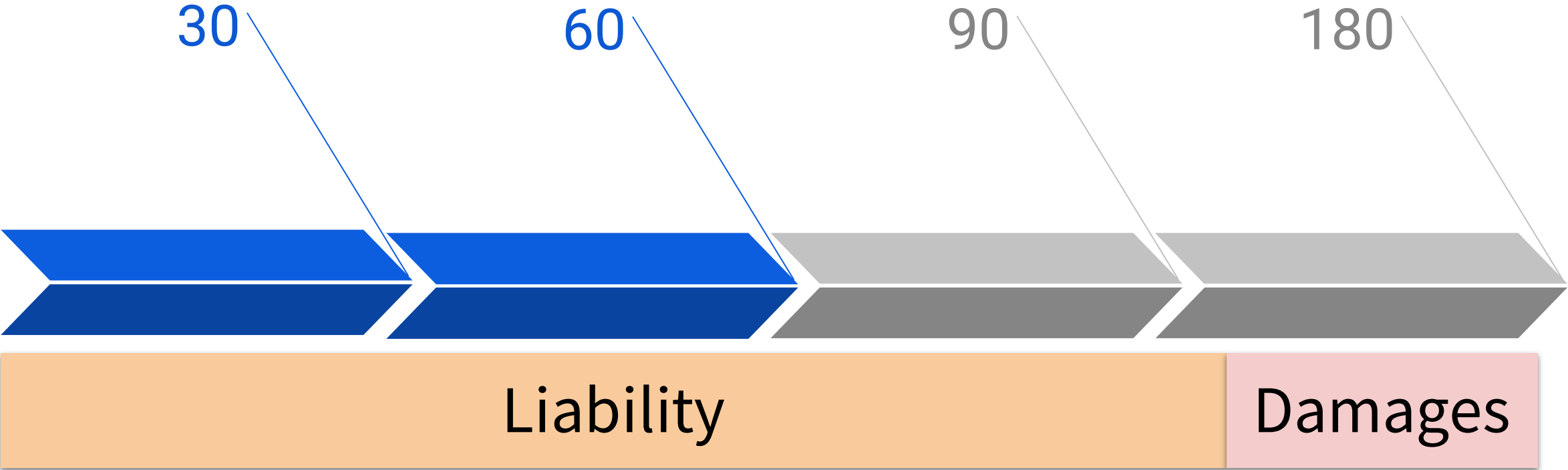


We define severity consistently.

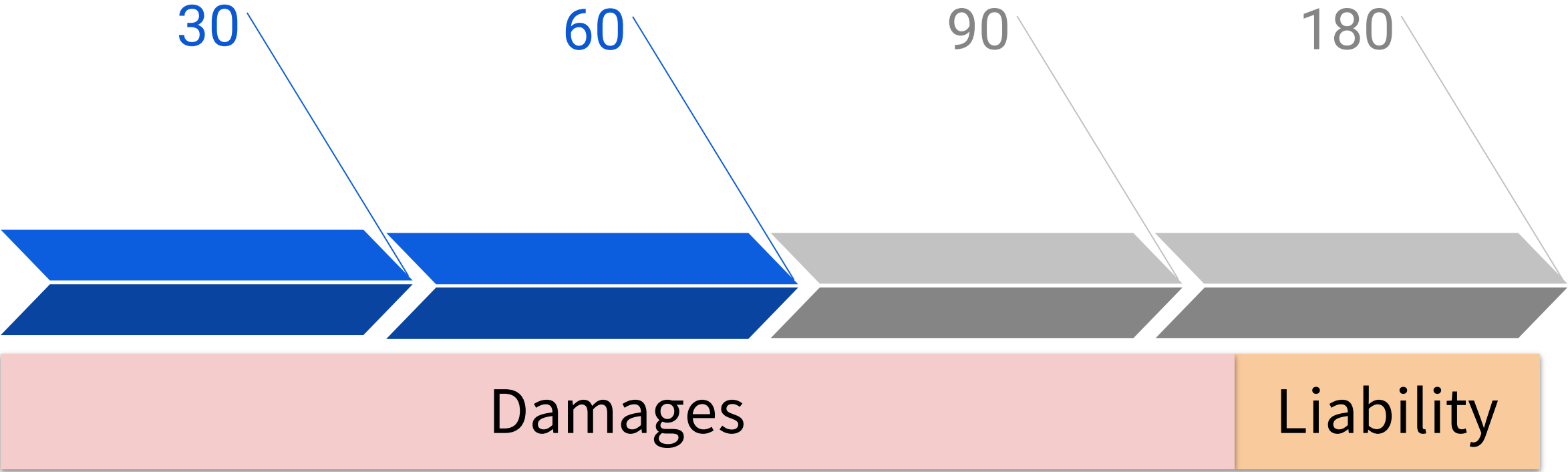
- Economic damages
- Non-economic damages
- Aggravating factors
- Institutional harm/reputation risks

We help change the
paradigm.

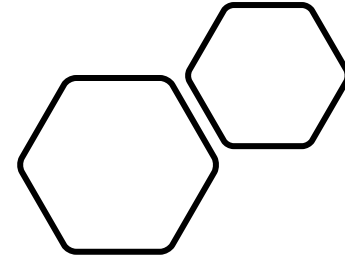
Sample Defense Timeline



Sample Plaintiff Timeline



Case Study: Additional resources



The
\$27,450,000
Life Care Plan

Case Study:
Additional
resources

Plaintiff friendly venue

9-year-old girl (Jordan)

Normal healthy child until this
injury

Meningitis at 6 months

Case Study: Additional resources

Defendant admits the misdiagnosis of Jordan's condition

Misdiagnosis caused delay and injury

IQ is now 65

Can walk 15 steps with assistance

Will never live alone

\$27,450,000 Plaintiff Opening

Plaintiff Economic Damages	
Annual Future Medical	
\$130,000 Medical (LE 74)	\$8,450,000
\$200,000 Assistance in Care (to 18)	\$2,200,000
\$300,000 Custodial Care (18-74)	\$16,800,000
Total	\$27,450,000

\$4,980,000 Actual Historic Cost

Defense Economic Damages on Average, Actual & Real	
Annual Future Medical	
\$130,000 Medical (LE 74) <i>Average cost for last 9 years is \$17,000 per year</i>	\$8,450,000 \$952,000
\$200,000 Assistance in Care (to 18) <i>Actual cost for custodial assistance last 9 years is \$12,000</i>	\$2,200,000 \$108,000
\$300,000 Custodial Care (18-74) <i>Real cost of custodial care is \$70,000</i>	16,800,000 \$3,920,000
Total	\$27,450,000 \$4,980,000

\$4,865,000 Defense Reasonable Alternative 1 (LE 74)

Defense Economic Evidence for Economic Need (Plaintiff LE 74)	
Annual Future Medical	
\$20,000 Medical (LE 74)	\$1,300,000
\$25,000 Assistance in Care (to 18)	\$275,000
470,000 Custodial Care (18-74)	\$3,290,000
Total	\$4,865,000

\$1,265,000 Defense Reasonable Alternative 2 (LE 25)

Defense Economic Evidence for Economic Need (Defense LE 25)	
Annual Future Medical	
\$20,000 Medical (LE 25)	\$500,000
\$25,000 Assistance in Care (to 18)	\$275,000
470,000 Custodial Care (18-25)	\$490,000
Total	\$1,265,000

Defense Reasonable Alternative 3 \$1,155,000 (LE 25 + Insurance)

Defense Economic Evidence for Economic Need (Defense LE 25 with ACA Policy)	
Annual Future Medical	
\$10,000 Medical (LE 25)	\$250,000
\$25,000 Assistance in Care (to 18)	\$275,000
470,000 Custodial Care (18-25)	\$490,000
Total	\$1,155,000

Global Reputation Approach

Set a reasonable value for the case. Stick to it through negotiations

Develop your own number. Do not rely on Plaintiff's calculations

Do this early, through discovery and expert review

Do on an aggressive timeline

Absent change, manage the file based on the set value, including taking to trial if not in that range

The strategy and value stays in place unless there is a drastic change.

Consistency is power.



Revamp Negotiation Norms

If the decision is to seek a reasonable settlement, consider engaging negotiation counsel.

Case Study: Consistency

Birth injury case against health system and nurses

Historically conservative venue

Weak defensibility

Defended by health system's long-time counsel

Targeted to resolve between \$3 and \$6M

National plaintiff counsel appears prior to mediation

Case Study: Consistency

Demand for \$45M

Trial set 3 months out

Mediation reduced demand to \$40M

National defense team retained 60 days before trial

National defense team confirms \$3 to 6M value

Case Study: Consistency

Trial team prepares for trial

1 week before trial reduces demand to \$15M

Defense leaves previously offered \$6M open

4 days before trial reduces demand to \$10M

Defense leaves previously offered \$6M open

2 days before trial resolves for \$6M



How to Engage National Counsel

National Counsel Engagement Process

Identify

- Case
- Goal
 - Consulting
 - Trial
- Team

Investigate

- Preliminary discussion (no charge)
- Scope
- Budget

Retain

- Retention Agreement
- Team Introduction
- Schedule

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