

PLUS JOURNAL

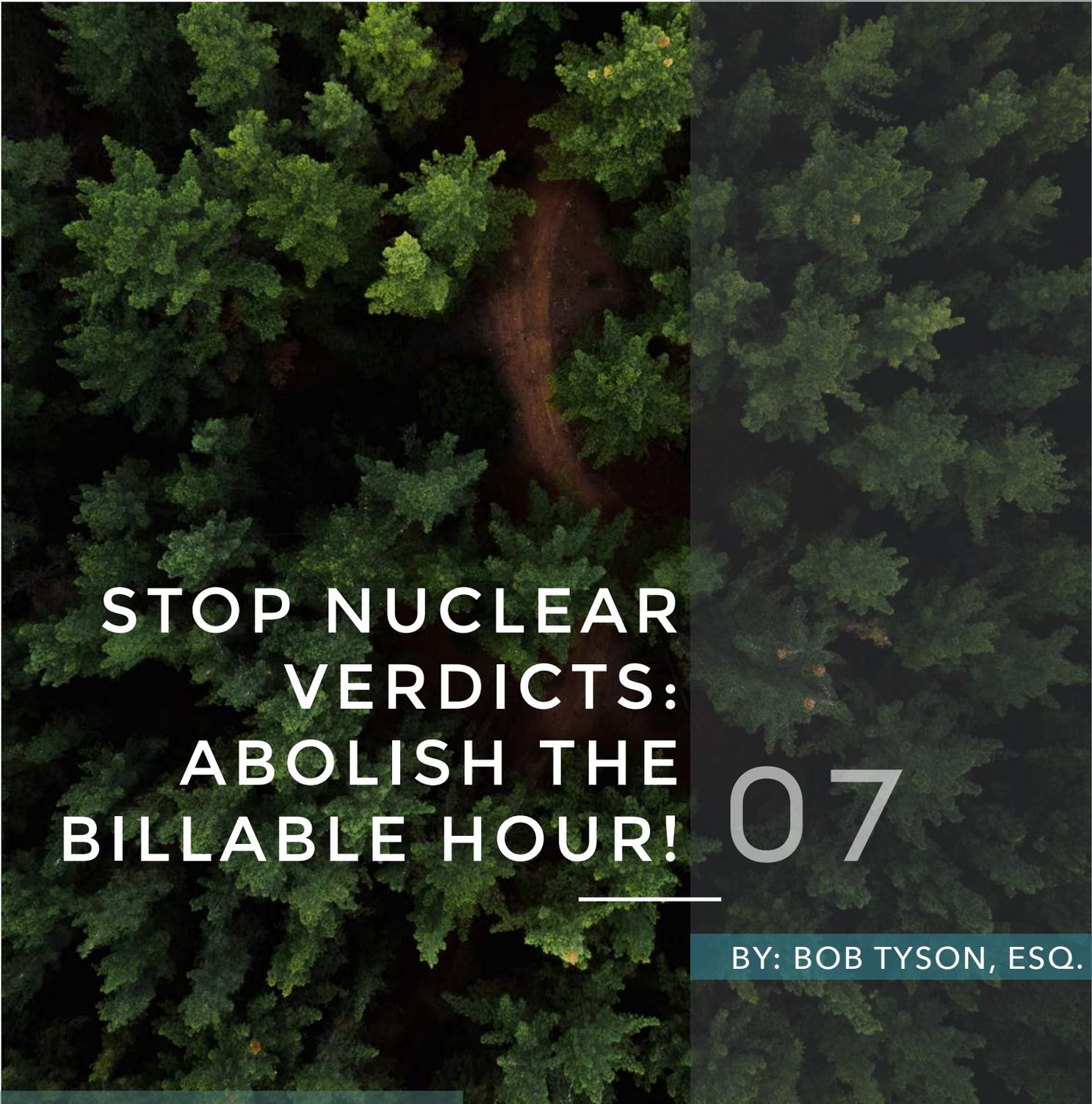
VOL. XLI | FOURTH QUARTER 2020

STOP NUCLEAR VERDICTS: ABOLISH THE BILLABLE HOUR

BY: BOB TYSON, ESQ.



WWW.TYSONMENDES.COM



STOP NUCLEAR VERDICTS: ABOLISH THE BILLABLE HOUR!

07

BY: BOB TYSON, ESQ.

Nuclear Verdicts are a problem, and they are only going to get worse.¹ In particular, “judicial hellholes” such as venues in California, Texas, Florida, and others, have resulted in astronomical verdicts in recent years.² The good news is, you can stop nuclear verdicts. In fact, you can stop them right now, before trials begin again. To change the trajectory of runaway jury verdicts, you must do three things: Educate, Communicate, and Compensate. The plaintiff’s bar does all three of these things much better than the defense industry.

Only in Insurance Defense

Imagine you seek to consult a lawyer for a critical issue you are facing; for example, say you need a trust for an ailing parent. You are referred to the best estate attorney in town, who informs you it will cost you \$750 an hour to assist you in your time of need.

Would you ever say to this highly regarded lawyer, “How about I pay you \$250 an hour instead? Additionally, do not bill me for at least three months. Here are ten pages of rules to further delineate what you can bill me. Do not send your bill to me; send it to a company I hired that will electronically review and automatically cut your bill by 10%. However, I will let you spend a few months appealing the computer’s cuts in hopes of getting back a few percentage points. I anticipate it will take me about six months to pay what I ultimately determine I am going to pay you.”

Would you ever try this? How would the attorney react? If it seems absurd to try this with most lawyers in America, why is it the norm in the insurance defense industry? The answer is fairly simple and obvious: volume. In our world, you are not consulting with a law firm about just one trust, one DUI, or one house closing. In the insurance world, you are dealing with tens or perhaps even hundreds of cases over time. Further, if that defense firm does not agree to handle your cases under your terms, there are thousands of insurance defense lawyers who will do so.

That is our reality, and it works. In fact, it works over 99% of the time. We defense lawyers make our money on volume. No complaints. We are not suggesting you do away with your litigation management departments and change the whole system – it works.

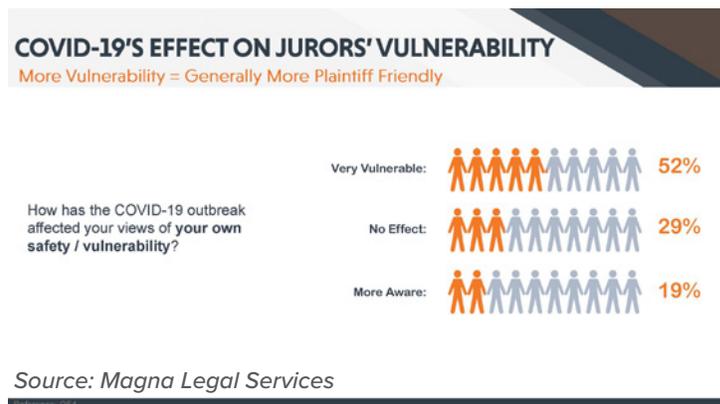
Why Worry?

But what about the much less than 1% of litigated claims that result in nuclear verdicts? Does this traditional billing system work on the few cases a year you *really* worry about? Are your defense attorneys, who make money on volume, ever worried about any one particular case above all others? Are we worried about the same cases you are worried about? Should we be?

Plaintiffs’ lawyers have changed everything about the way they try cases. In years past, they used sympathy to motivate juries to award plaintiff verdicts. For the past 10 years, they have tapped into another juror emotion: *anger*. One way they do so is through the Reptile Theory.

Described in the book *Reptile: The 2009 Manual of the Plaintiff’s Revolution*, the Reptile Theory has changed the landscape for plaintiff lawyers and their approach to jury trials.³ The best plaintiff lawyers will employ Reptile tactics to incite anger in jurors, tapping into the primitive part of jurors’ brains and evoking a fight or flight mentality. In effect, the Reptile Theory is designed to shift the jury’s focus from the law – or standard of care – to *absolute safety* at all costs and a total absence of danger.⁴

Plaintiff lawyers across the country now regularly employ the Reptile Theory in a variety of civil cases. To date, they have attributed over \$8 billion in verdicts and settlements to the Reptile Theory. In addition, they have been utilizing this time of no jury trials due to the pandemic to sharpen this approach. Plus, recent studies demonstrate jurors may be even more susceptible to the Reptile Theory in the aftermath of COVID-19.



What is the defense bar doing differently to anticipate and defend against plaintiff lawyers' strategic tactics, which may prove even more effective post-COVID-19 in light of shifting juror attitudes? In short: nothing, which is why we have seen an increase in nuclear verdicts over the past decade. Instead, your defense attorneys are doing exactly what you asked of us after the Great Recession of 2008: focus on metrics, cycle times, budgets, and electronic billing. Now, we must change the system to evolve with plaintiff's counsel. Why not create some additional incentive by rethinking the way you approach and compensate for those high-exposure cases you already anticipate will be problematic – and may even lead to a nuclear verdict?

Incentivize and Reward Winning

Insurance companies currently compensate defense lawyers the same billable hour rate for delivering a closing argument in a \$50 million professional malpractice trial as drafting discovery somewhere else in your portfolio, perhaps on a very low-value claim. Is that what you want? More importantly, would it make any difference to your bottom line if you paid your defense attorneys based upon whether they won those extra-concerning jury trials? Of course it would.

It is time to stop paying your defense counsel the same amount for every task throughout your entire portfolio. It is time to incentivize your defense counsel to focus on your biggest risks – and win. One way to do this – and arguably the best way – is with a **success fee**.

As an addition to the hourly rate or fixed fee you pay your counsel, a success fee can encourage your defense counsel to be more financially invested in your large jury trial versus preparing a monthly report for the same hourly rate. Success fees can be added to the handful of cases you are truly worried about in many ways. Here is one example:

In a high-exposure wrongful termination and discrimination case, the settlement demand is \$50 million, and liability is not looking good. Your summary judgment motion was not successful, and you are in a notorious judicial hellhole. You are pitted against one of the best plaintiff lawyers in the country, and you know he or she will ask the jury to award \$100 million at trial if the case does not settle. However, you do not believe the case is worth the \$50 million demand, or there is some other reason you cannot settle.

In this example, if your defense firm can bring this case in for a \$10 million jury verdict, they would have “saved” you \$90 million of the \$100 million trial request. It would also be a savings of \$40 million off the lowest settlement demand of \$50 million. Either way, it would be quite the win for the defense.

Based on this scenario, if your defense firm receives a success fee of 25% of the savings from the settlement demand (not the ask at trial), they would get 25% of the \$40 million savings – \$10 million – on top of their hourly rate.

This example certainly involves a great deal of money. But did you receive value for your defense spend? Remember: you only pay a success fee if you win. You are not increasing your defense spend unless you reduce your indemnity payment. Would it not be better to pay your defense counsel for winning, than pay plaintiff's counsel when you lose?

Pay for Value, Not Time

Nuclear verdicts are not going away, but you have the power to minimize your risk. Education and communication are critical for raising the bar of the defense industry. These efforts are underway, but much more is needed. The third option, compensation, is also within your control.

Competent defense attorneys make up your approved panel counsel, but the fact is the defense bar is being out-lawyered. The plaintiffs' bar has evolved and completely changed the way they try cases. While this has happened over the last 10 years, your defense counsel has focused exactly where you have directed us: metrics and controlling your defense spend.

If you want to end nuclear verdicts, make your defense counsel part of the solution. Your defense counsel will do exactly what you want them to do; we always have. While money is a motivator to some, you do not need to change your whole compensation system to see results. Change the way you pay your defense lawyers just a few times a year. Pay your defense counsel for the *value* they bring to cases with the highest potential exposure in your company, not merely the hours they spend on

it. Incentivize your counsel to change the way they try lawsuits. Make winning a behavior you measure and reward, especially on the risks that keep you up at night. Your defense counsel will respond to your concerns – and your money.

Help your counsel get educated on these new tactics, have them share information with each other, and finally, compensate your counsel to care about what you care about. We will listen.

Compensate like plaintiff lawyers and see the results.

End Notes

1. See generally Bill Kanasky, Jr., George Speckart, *THE NUCLEAR VERDICT*, 62 NO. 4 DRI For Def. 14.
2. See, e.g., Zac Lytle and Heather Lytle, individually and as representatives of the estate of Roger Lytle v. Hat Ballou Inc. d/b/a All in the Family Child Care Services; and Gina Moore (2016) No. DC-14-13004 (jury awarded \$142,000,000 to plaintiff in professional negligence action, with \$70,000,000 in noneconomic damages); F.M. v. County of Los Angeles (2018), No. 1901080019 (jury awarded \$45,400,000 to plaintiff in professional negligence action, with \$45,000,000 in noneconomic damages); Raul Adrian Castro Manzano and Catheryne Cristina Lucero v. Carey Royal Ramm Funeral Home, Inc. (2016) No. 2015 2710 CA 01 (jury awarded \$28,000,500 to plaintiff in professional negligence action).
3. See, e.g., David A. Ball and Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009).
4. See generally Tyson, Robert F., "The Reptile Theory: Use It!" *Daily Journal*, July 31, 2020 (https://1ueiu73wal8dku4aj42ic71a-wpengine.netdna-ssl.com/wp-content/uploads/7-31-20__DailyJournal_Reptile-Theory-Use-It.pdf); Tyson, Robert F., "Prevent Runaway Jury Verdicts by Neutralizing the Reptile Theory: Viewpoint," *Claims Journal*, May 10, 2019 (<https://www.claimsjournal.com/news/national/2019/05/10/290858.htm>).

ABOUT THE AUTHOR



ROBERT F. TYSON, JR.

A native of Staten Island, New York, Bob Tyson is a Founding Partner and strategic managing partner of the firm. Mr. Tyson is a trial lawyer and author of the #1 best-selling, first book written for the defense to limit exposure at trial, *Nuclear Verdicts: Defending Justice for All*. In this groundbreaking book, Mr. Tyson sets forth the specific methods to beat plaintiff lawyers and achieve justice. It is the culmination of an over 30-year legal career, during which he has successfully resolved a variety of cases involving complex products liability, commercial and general civil litigation, professional malpractice, environmental, and employment law – representing individuals, corporations, public entities, professionals, and many other different types of businesses.