



Keeping Damages Down

**Evaluating, Resolving, Avoiding High
Damage Claims**



"And then I said, 'So sue me!'..."

Still About the 80/20 Rule?

D&O

MPL

EPL

PO

A&E

FI

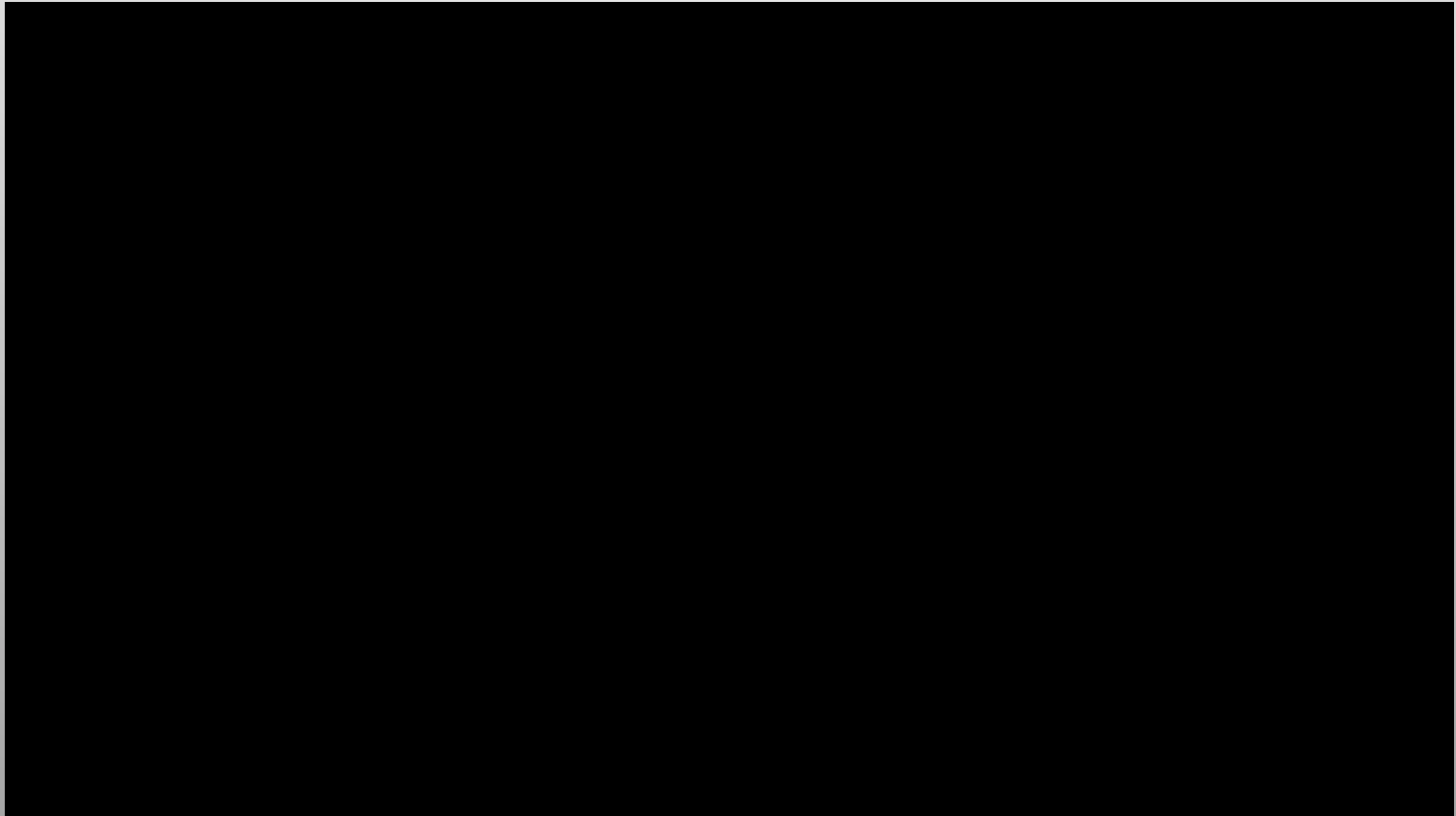
LPL

Schools

Goals Today

- Don't Overpay - Identify Cases That Are Better Than Many Think They Are
- Avoid Surprises - Identify Cases That Are Worse Than you Think They Are
- Understand the Components of Damage
- Understand the Drivers of Damage Components
- Strategies- Reduce Risk of Damages for Best Resolution

Why Is It So Hard?... Public View's of Insurers



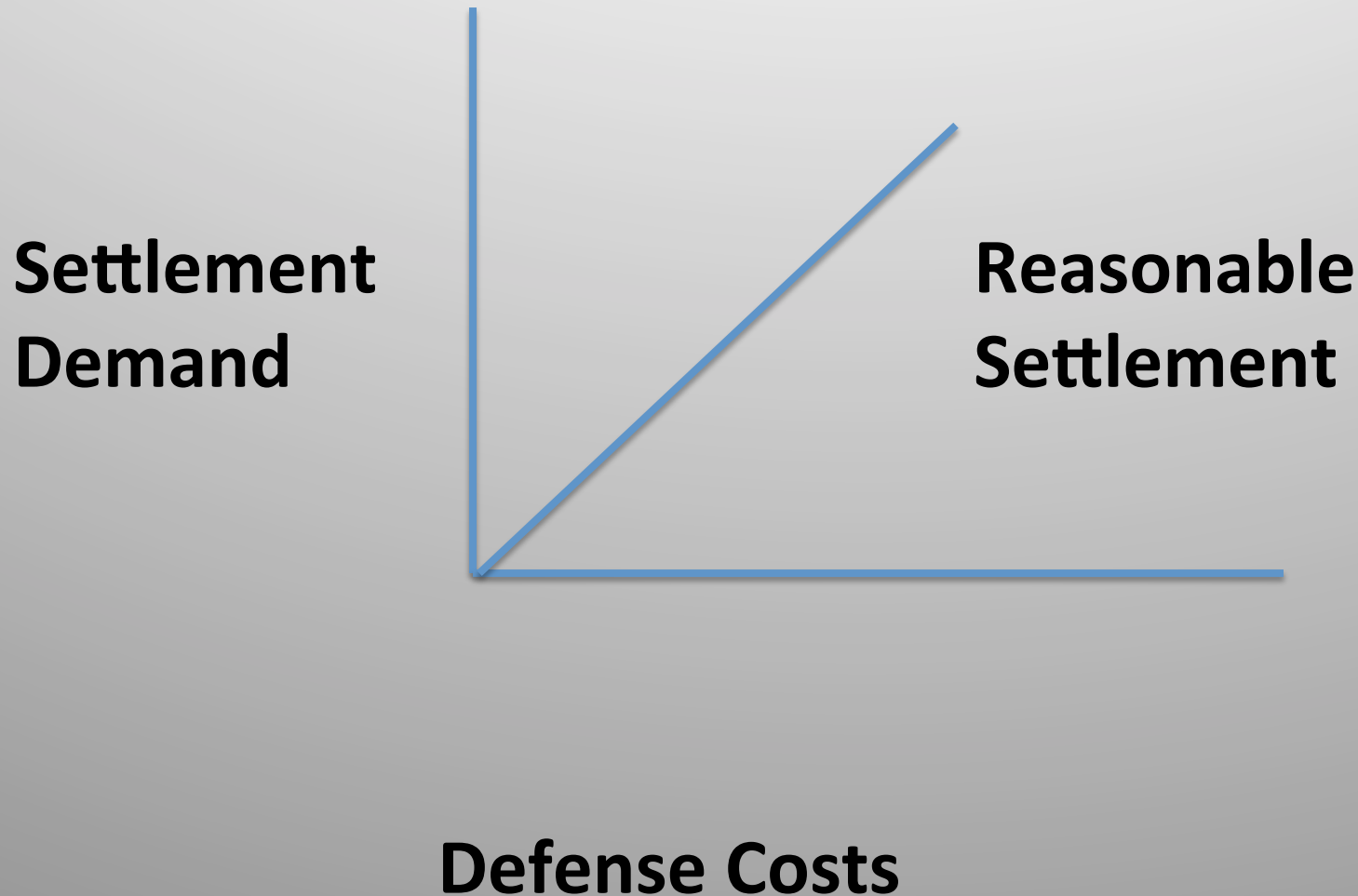
Is This An Older Woman or a Young Girl?



Is this a Patio or a Balcony?

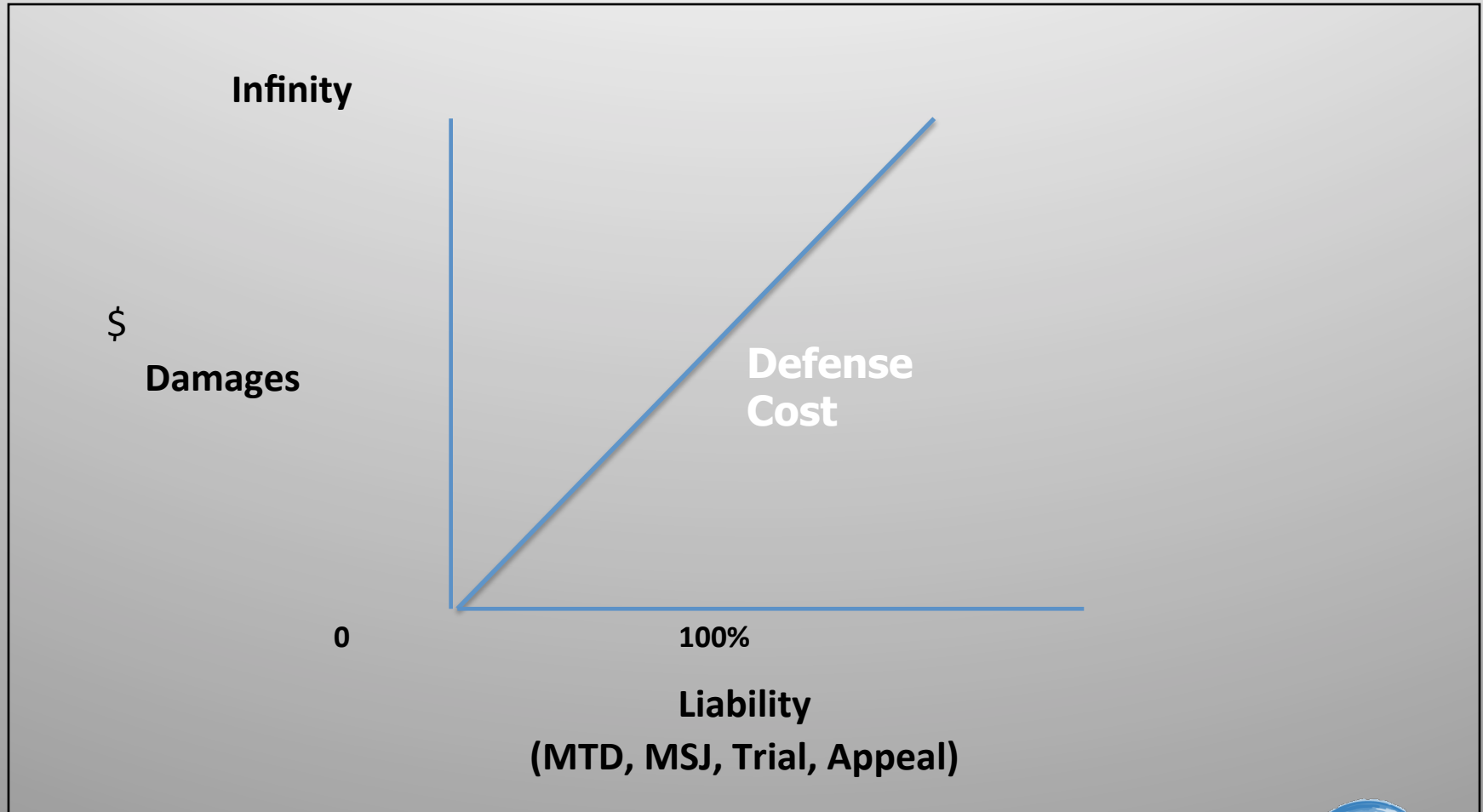


If Demand and Defense Costs Are Only Considerations... It Is Easy!



Costs, Liability and Damages...

It Is Much Harder!



Litigation -

A Range of Outcomes

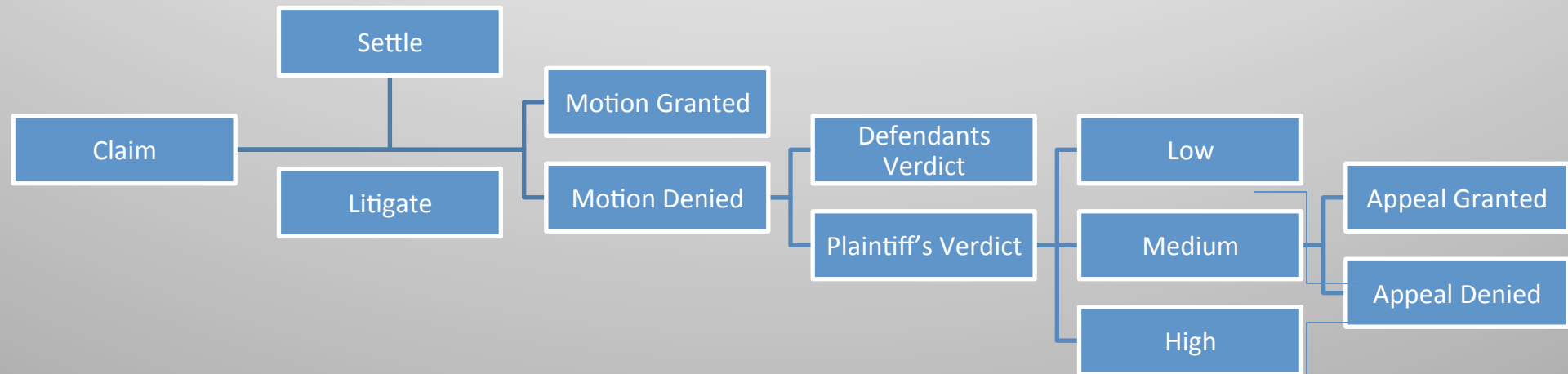
- **Not- What is Worst Outcome Possible?**
- **But- What is the Range of Likely Outcomes?**
- **Liability and Damages Evaluations:**
 - Probabilities---Low, Medium, High
(25%, 50%, 24%) and the 1%
- **Decision Tree- Bringing Liability and Damages Together for Evaluation**

Components of *Decision Tree*

1. Odds of Dispositive Motion (eg MSJ)
2. Cost of Motion (or to get to Motion)
3. Probability of Favorable Verdict
4. Estimated Verdict
 - Low
 - Medium
 - High
5. Cost of Defense
6. Cost of Attorneys' Fees

<http://kleinmediation.com/tree/generator>

Litigation--Decision Tree



Evaluations– Why They are Hard!

Pre-trial Fixed Variables

- Jurisdiction
- Plaintiff's Counsel
- Defense Counsel
- Litigations Cost
- Judge
- Special Damages

Pre-trial Unfixed Variables

- **D i s c o v e r y**
Developments
 - Witnesses
 - Experts
 - Documents
- Coverage Issues
- Bad Faith Exposure
- Emotional/Punitive Damages

Trial Variables

- Jury Makeup
- Evidential Rulings
- Attorney Credibility
- Witness Presentations
- Mid-Trial Motions and Submissions
- Jury Reaction

**Always Ask, “Assuming We Lose...
What are Components of Costs and Damages?
(it is always about the Unknowns)**

Amount

Cap

Litigation Costs

Attorneys Fees – Defense
Expert Fees
Other Costs

Predictable Damages

Economic Damages (*usually predictable*)
Medical or Other Special Damages
Attorneys Fees – Plaintiff

Unknown Damages

Pain and Suffering	Jury?
Punitive	Jury?

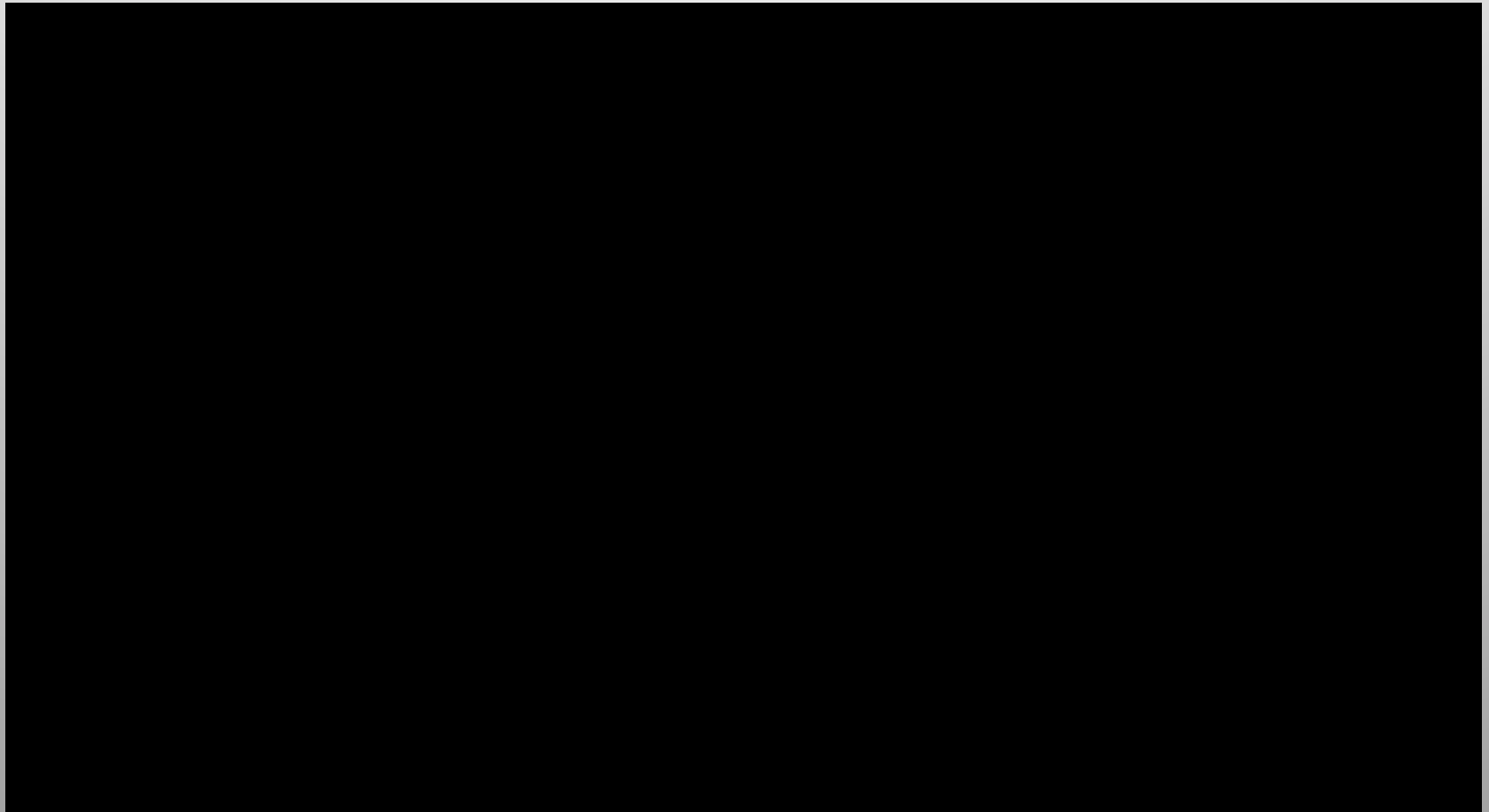
Evaluating Cases – Understanding Juries

What They Think--

Tells You About Why

They Decide Cases and Award Damages!

A Jury of Our Peers

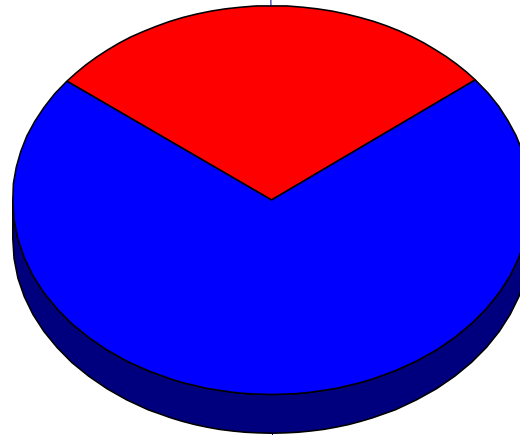


Jury Mindset

Which of the following statements best describes your feelings?

It is more important to follow the "letter of the law" than the "spirit of the law":

29%

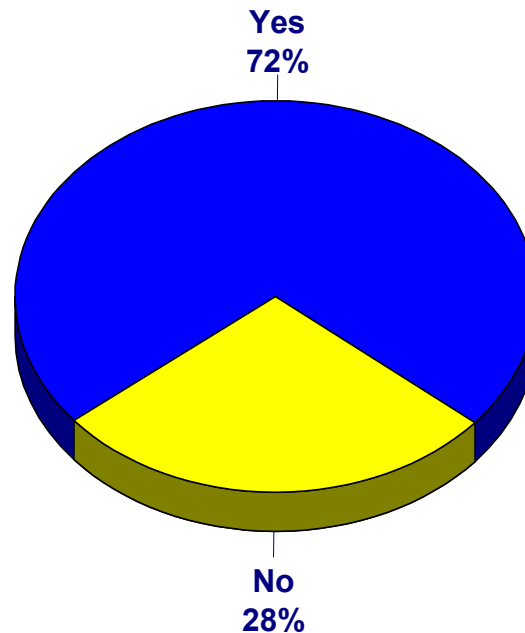


71%

It is more important to see that "justice is done" than to follow the "letter of the law":

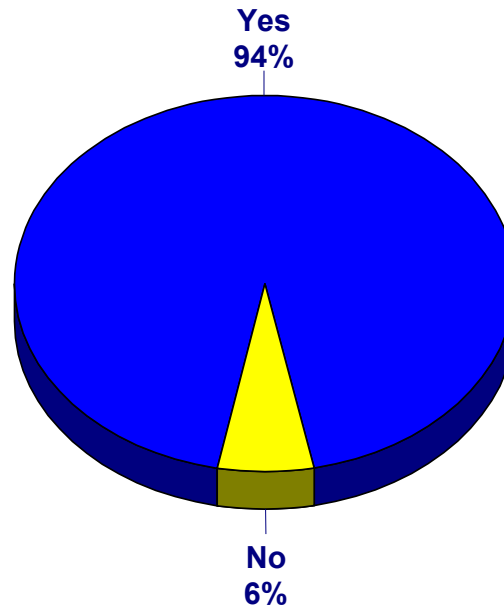
Opinion of Jury's Function

An important function of juries in America is to send messages to organizations to improve their behavior.



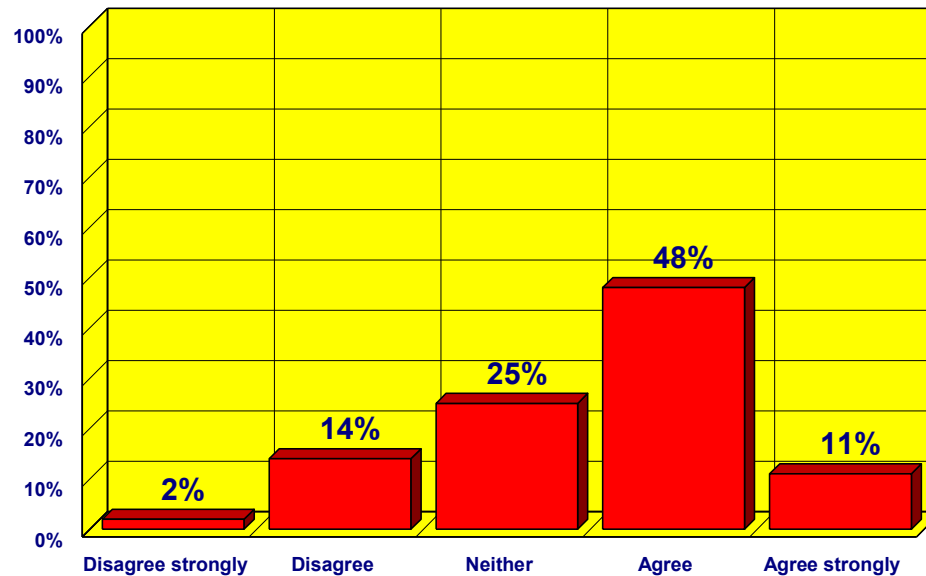
Opinion of Organization's Responsibilities for its Employees

An organization is responsible for the actions of its employee.



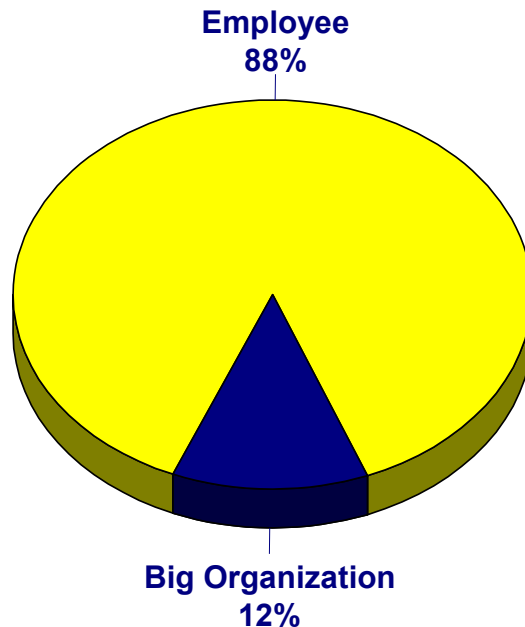
Jury's Perception of Large Companies

Large companies will lie to win a lawsuit.



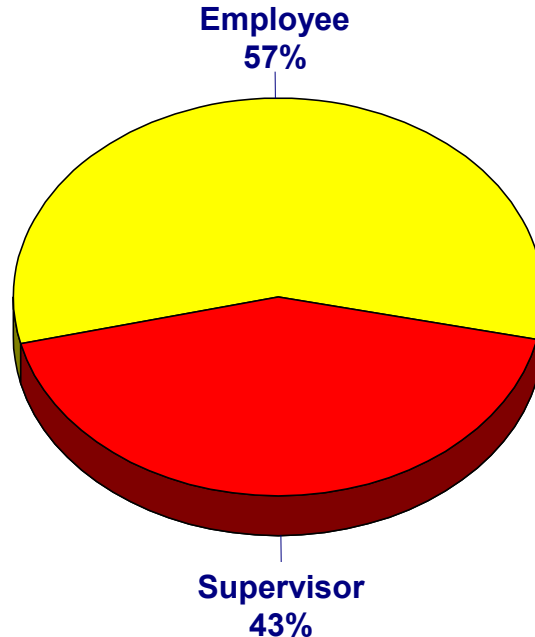
Jury's Perception of Big Organizations

In a dispute between the employee and a big organization, who would you tend to believe?

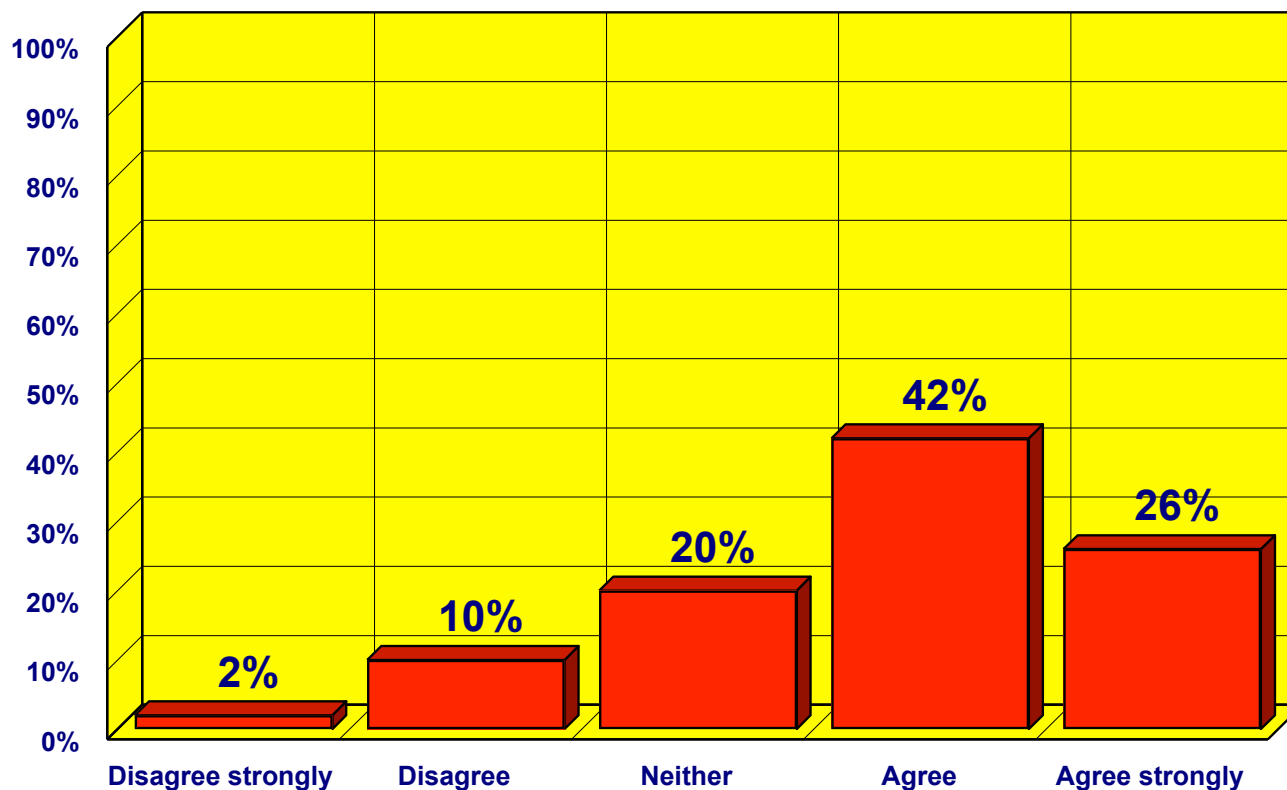


Jury's Perception of Supervisors

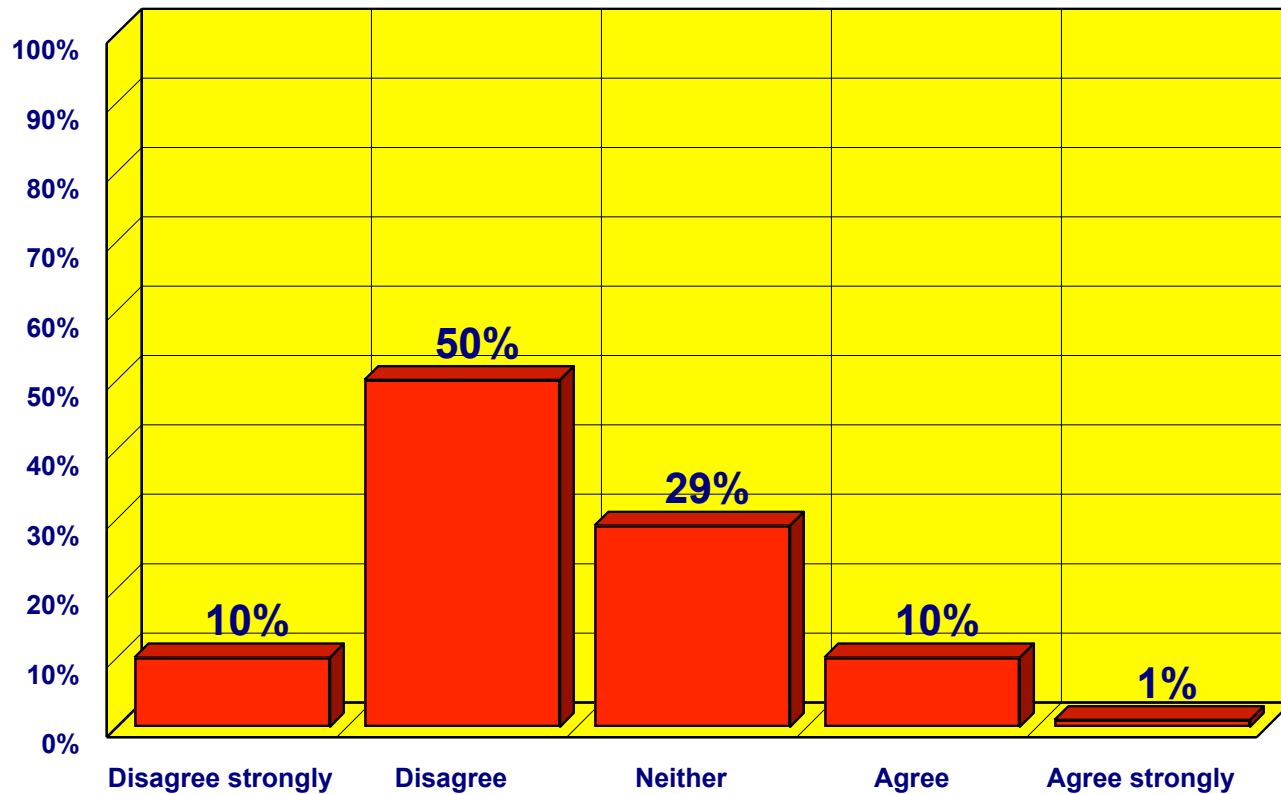
In a dispute between an employee and his/her supervisor,
who would you tend to believe?



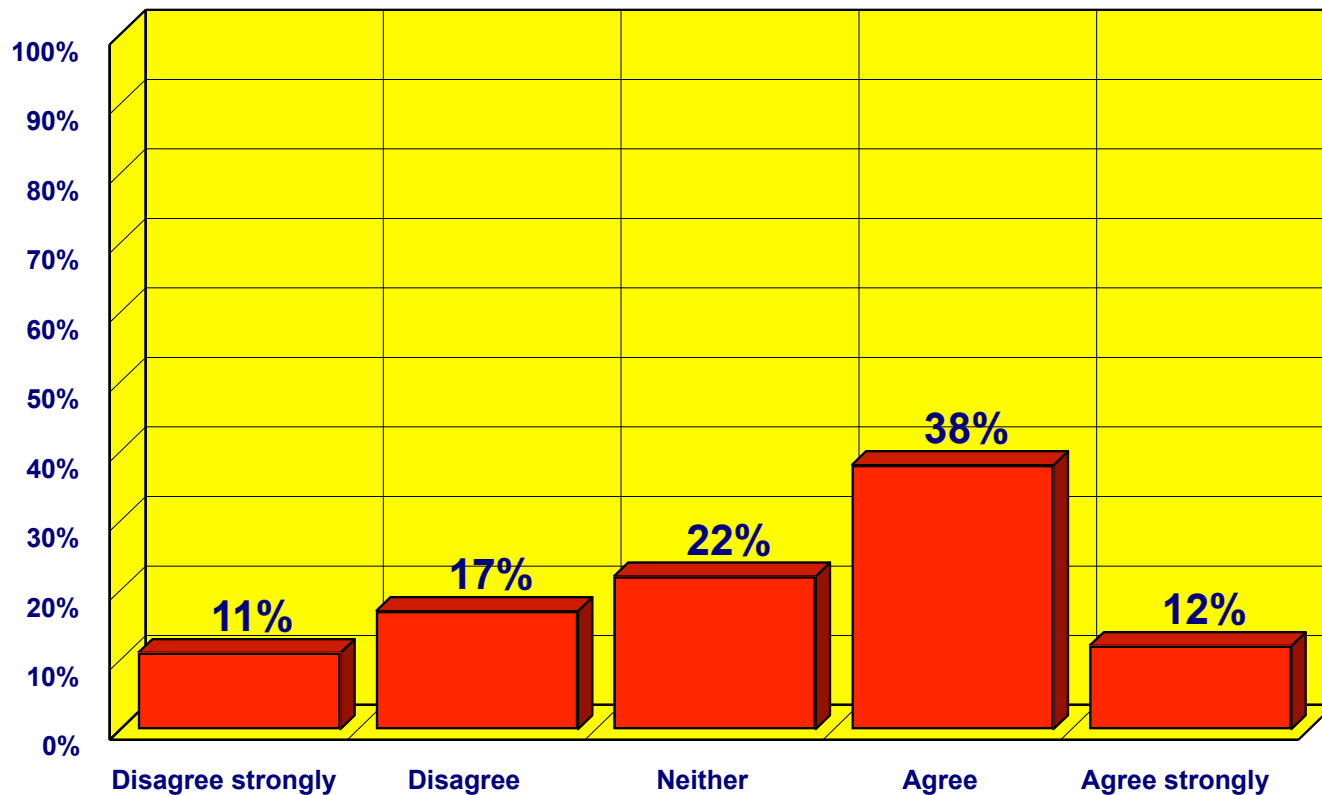
There has been a significant decline in corporate ethics over the last few years.



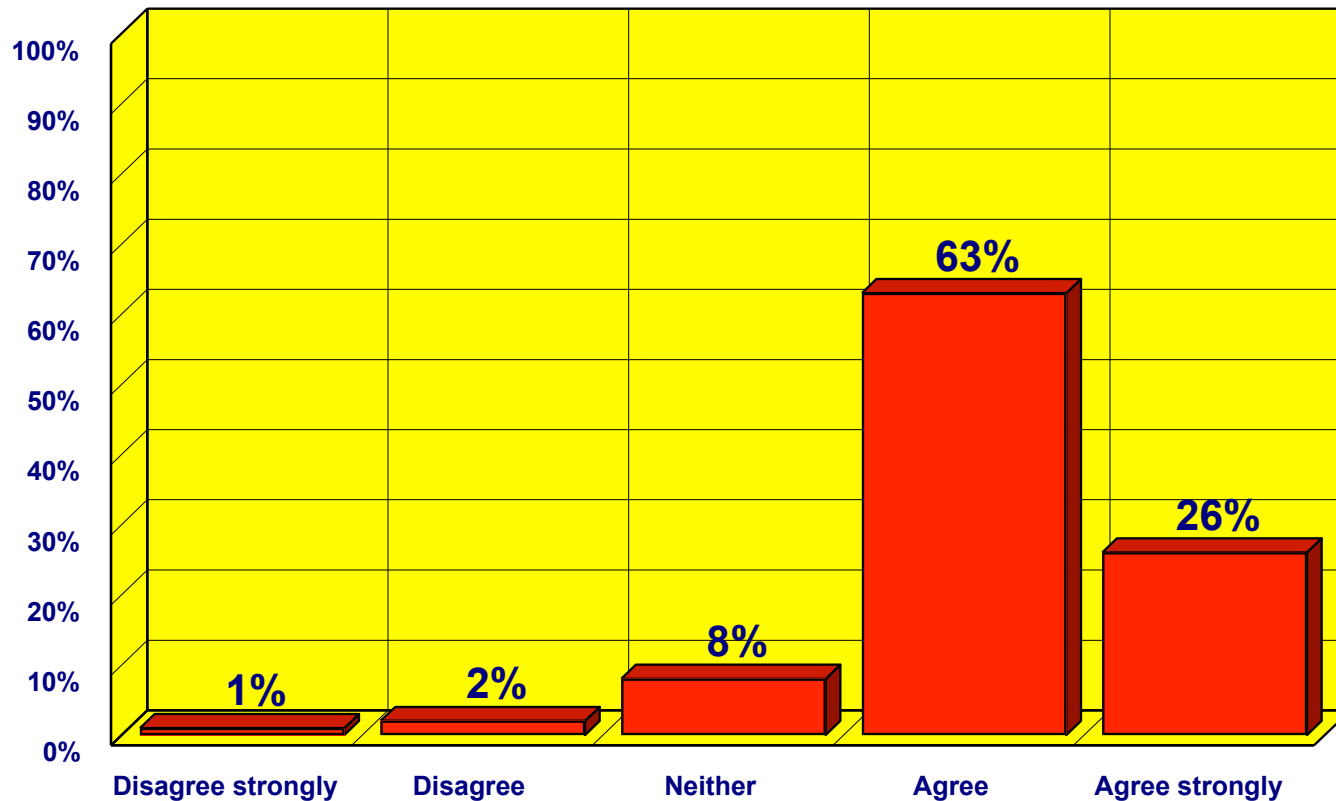
I am against punitive damages.



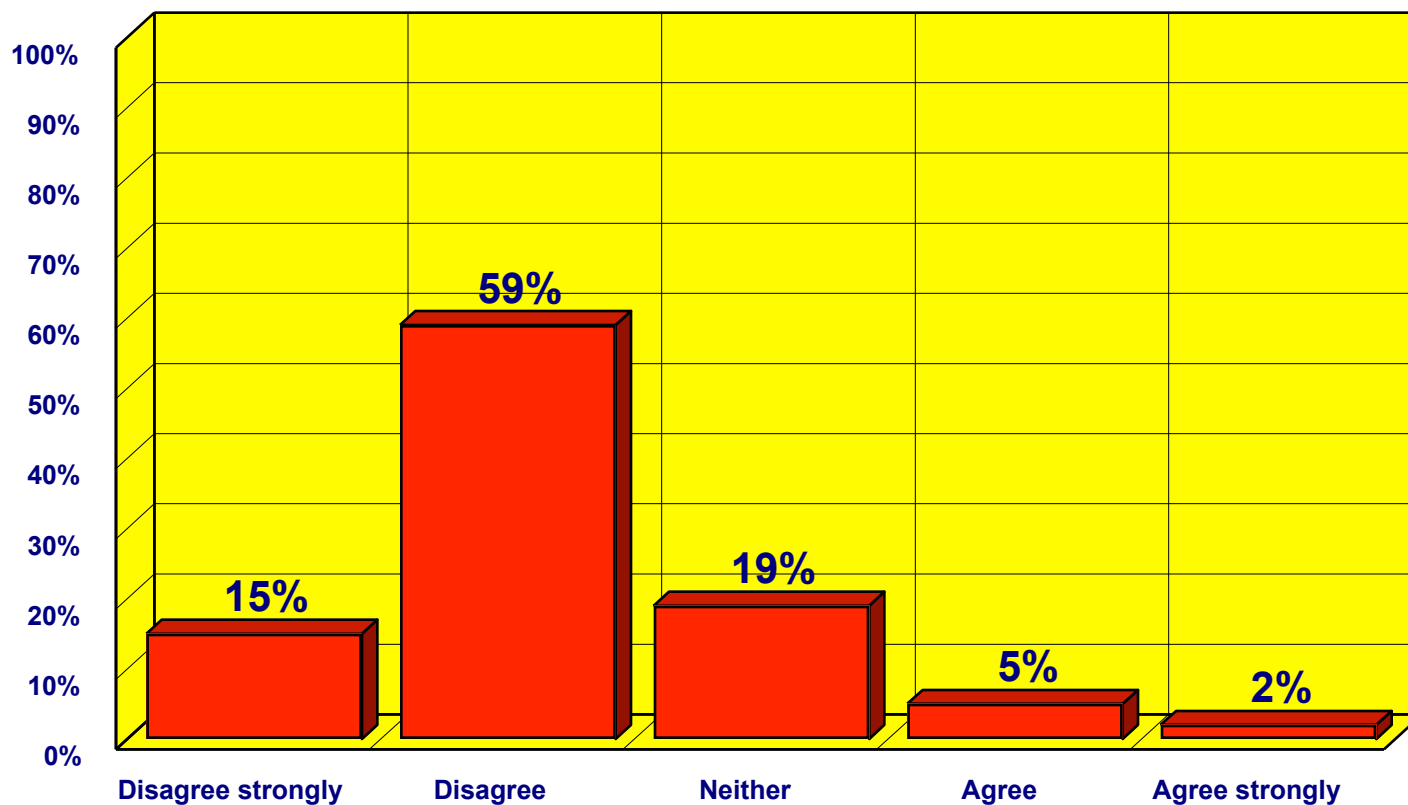
A million dollar award against a large company would not even be noticed by senior management.



**If a company is found to be negligent,
that company should pay punitive damages.**



Companies who are forced to pay damages have learned their lesson and should not be forced to pay punitive damages.



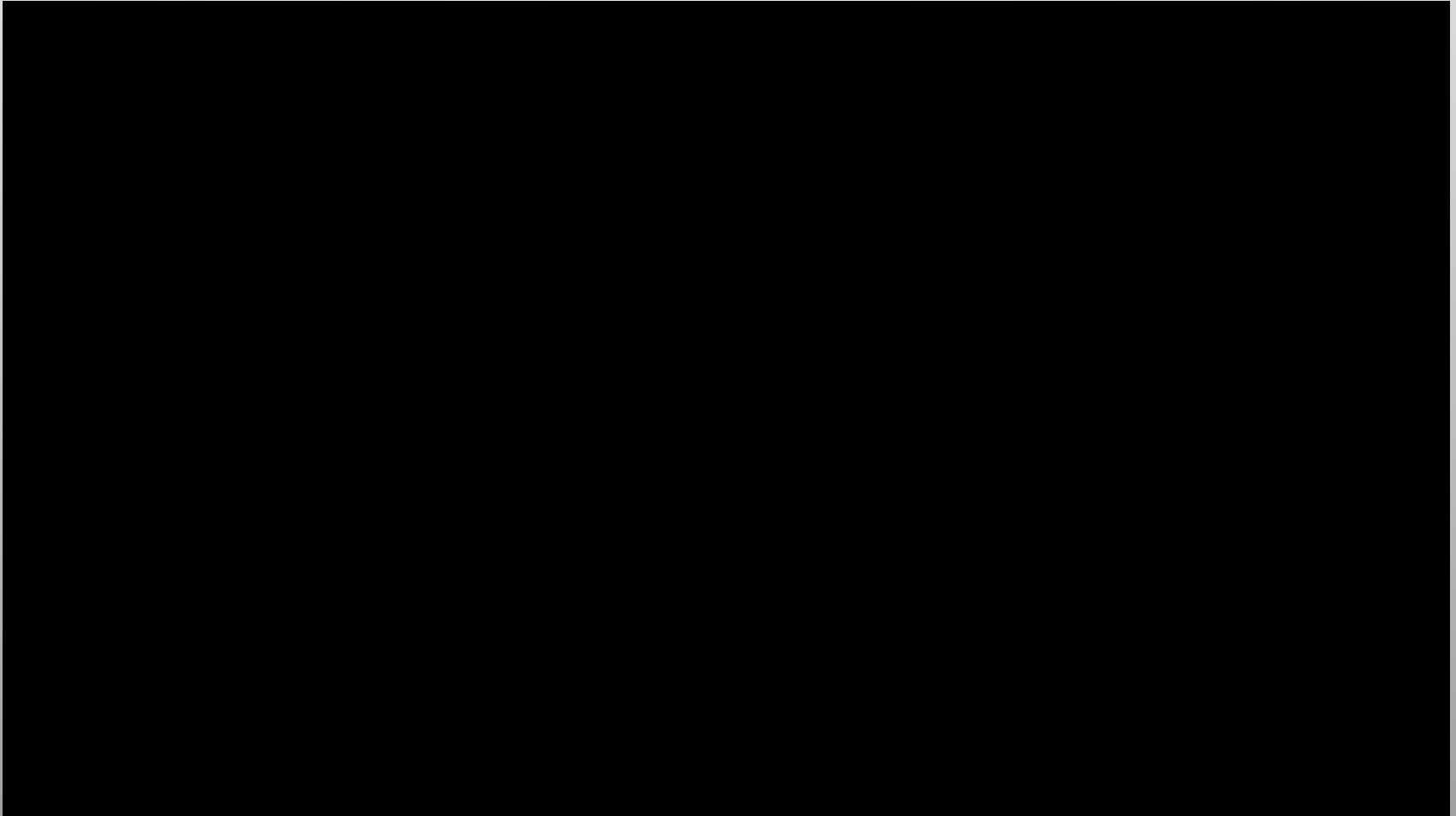
Lessons From Jurors in Evaluating Cases- Checklist for Our Defense

1. Fair Is as Important as the Law-Have we addressed Fairness of Situation?
2. Let the Jury Know You Already Have Received the Message And Don't Need Money Damages Awarded to Hear Message
3. Accept Responsibility for Employees
4. Do Not Lie, Be Candid, Apologize if needed
5. Have Non-supervisors Testify for You
6. Show We Are Ethical and Care
7. Explain Impact of Liability and Damages!
8. We Already Have Learned Our Lesson and Have Fixed the Problem/Improved

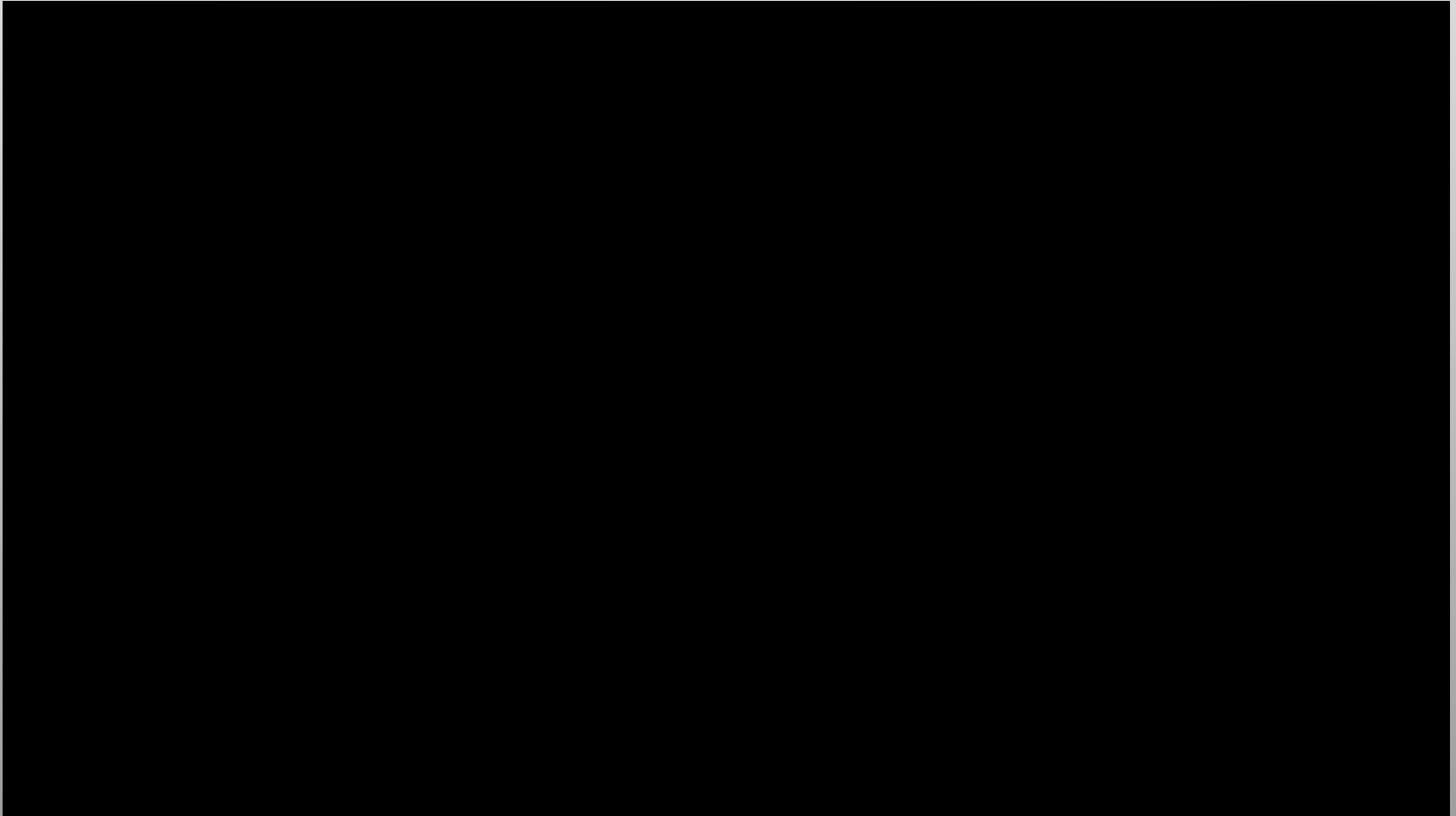
What Are Most Important Factors In Liability and Variable Damages?

- Jurisdiction/Venue**
- Judge**
- Plaintiff**
- Type of Company**
- Corporate Witnesses**
- Plaintiff's Lawyer**
- Defense Lawyer**
- Expert**
- Economic Damages**
- Emails**
- Documents**
- Third Party Witnesses**
- Applicable Law**

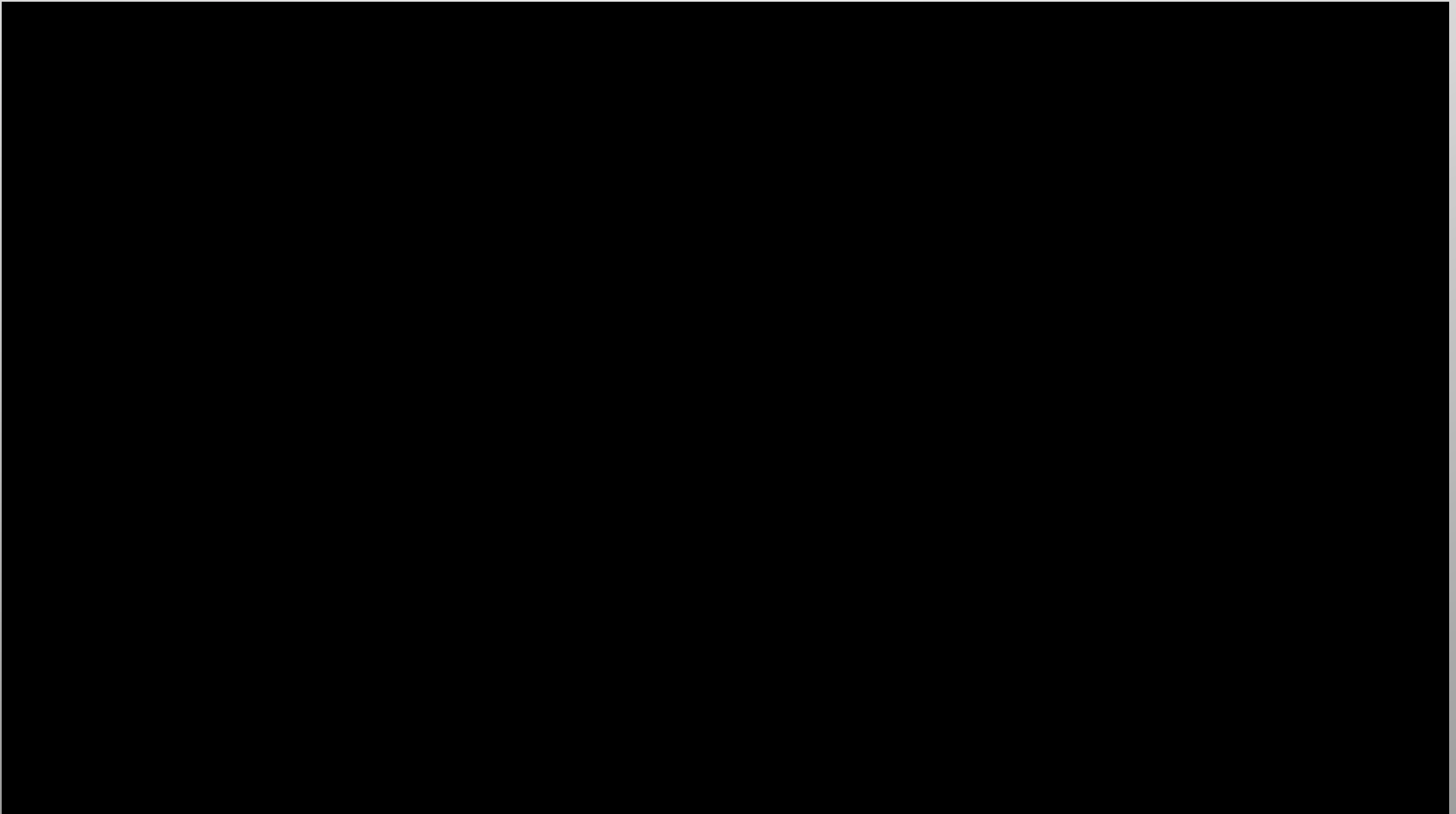
It's About the Witnesses, Stupid



How Does Our Key Witness Present?



Just Because You are Rich Doesn't Make You Nice



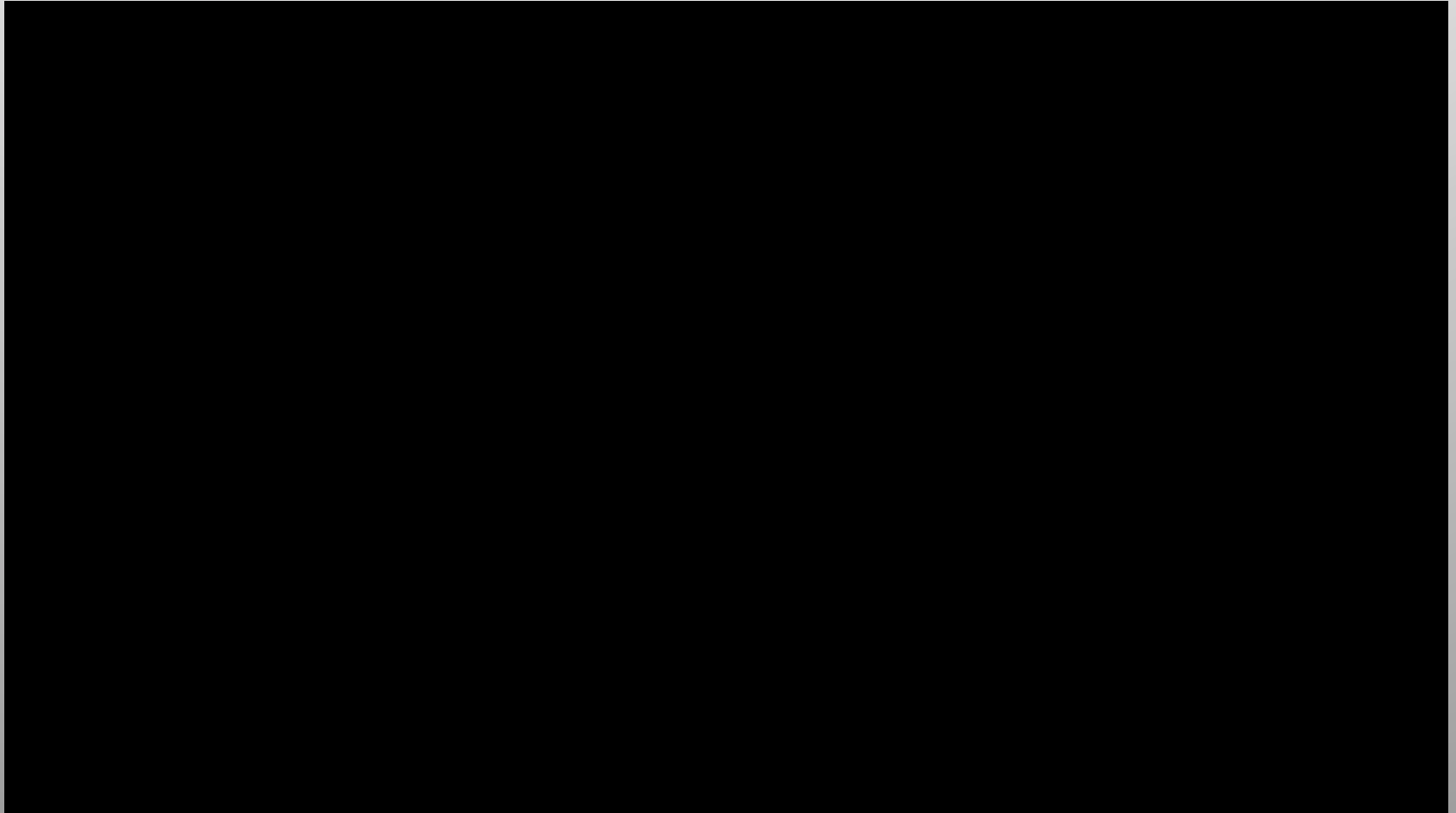


"No, it's still perjury, we don't make exceptions for 'white lies'."

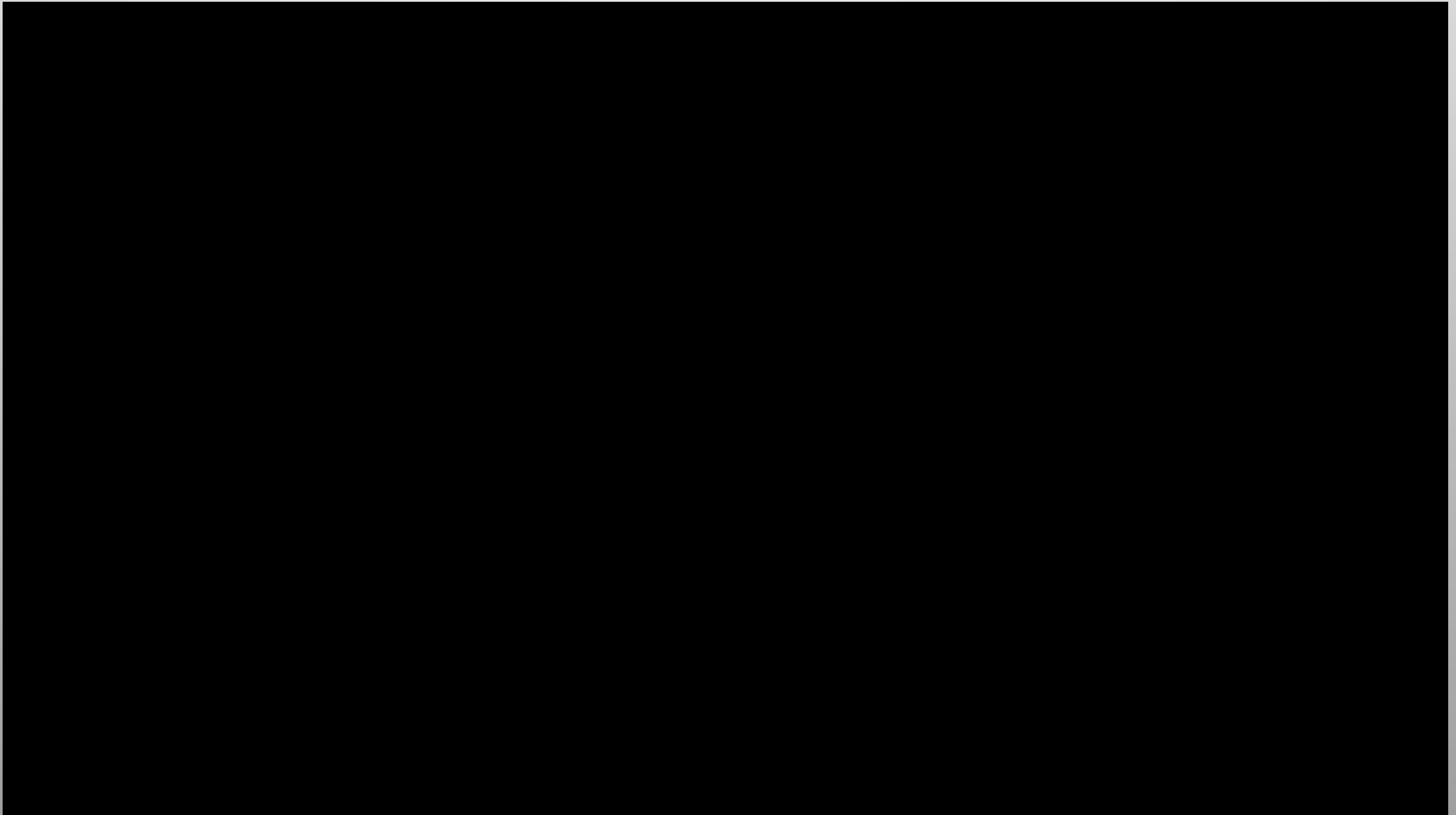
Evaluating Our Witnesses

1. It Is Not All About the Plaintiff!!
2. Who Will Tell Our Story?- Litigation is not a Narrative- it is Our Side v. Them
3. Are Our Key Witnesses Likeable?
 - Likeability is key to liability and damages!
4. Use Videos to Evaluate Witnesses, Not Reports
5. Make DA Adequately Prepare Our Witnesses
6. Consider Investigator Testimony to Summarize Our Case

Evaluating the Plaintiff: What Do You Think?



Evaluating the Plaintiff: What Do You Think?



Evaluating Plaintiffs

1. Accept It-- If You Have Eggshell Plaintiff
2. Ask DA to Explain to You Plaintiff's Theory of Both Liability and Damages-- Cases are about Presentations, Not Narratives
3. Read the Complaint
4. Encourage P and P's counsel to Put on Best Case in Mediation (and don't be offended)
5. Recognize Strong Legal Defense is Irrelevant to Plaintiff's Damage Claims at Trial (and often irrelevant to liability- e.g. *Farragher* defense)

Witness Evaluations-Five Important Lessons

1. Likability, As In Life, Is Key

- Defendant -Third Party Witnesses
- Plaintiff -Experts
- Attorneys

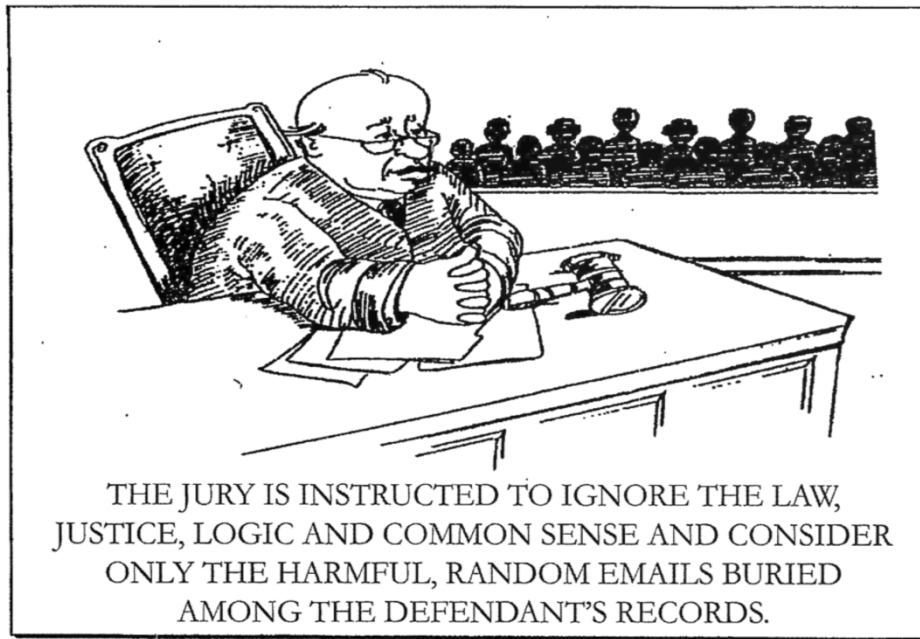
2. Credibility- Most Critical Component of Likability

3. Leading Defendant- How Strong is Primary Witness(es) Telling of Defendant's Story?

4. Fairness- Always Address (or lack of)

5. Plaintiff- One Size Does Not Fit All- Develop Strategy for Handling Plaintiff

Documents (Especially Emails) Are Witnesses, Too



www.fmglaw.com

E-Discovery

- **Litigation Hold**
- **Document IT Search**
- **Document Key Player Search**

Settle (Reasonably), Win & Control Damages Convince Them, Not You- Ten Strategies

Show *You* Understand and Will Counter
Plaintiff's Damages: Result--Better Outcome

1. Plaintiffs Always Focus on Damages (e.g. \$\$ per minute or day)-
Address their Theory
2. Understand Change in Economic Circumstances
Often Is/Should Drive Emotional Damages!
3. Make DA Focus on Alternative Damage Theory--Use
Depositions and Discovery to Build Your Case
4. Defendant Must Explain Dollars in Meaningful Way and avoid
Plaintiff/Jury "*Monopoly*" Mentality)

Getting The Best Resolution- Ten Strategies (continued)

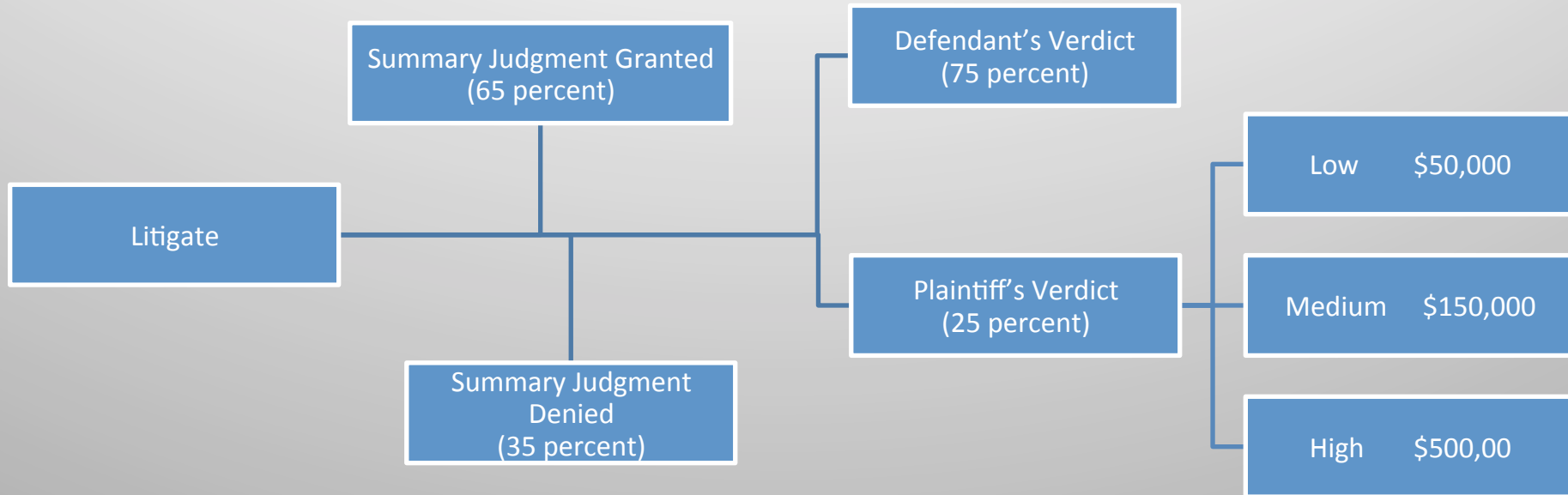
- 5. Explain Caps & Immunities**
- 6. Explain Pertinent Case Law**
- 7. Present at Mediation or During the Case
Defendant's View of Damages (Verdicts,
Outcomes, Focus Group Results)**
- 8. Use Rule 68 Offers of Judgment**
- 9. Use State Law Offers of Settlement**
- 10. High/Low Agreements**

Lessons Plaintiffs Learn Too Late

- 1. Plain Talk & Common Sense Still Work**
- 2. Defendants Who Juries Like Will Win**
- 3. Alternative Damages Explained Can Prevail**
- 4. Decisions Are Made By Good People and Not Corporations (If We Tell Them)**

The Final Decision Tree

Estimate of Outcome If You Don't Settle



Assumptions

SJ Cost - \$75,000

All Defense Fees - \$150,000

Plaintiff's Fees - \$200,000

Settlement

All Fees - \$182,967

No Defendant Fees - \$96,718

No Plaintiff Fees - \$79,218

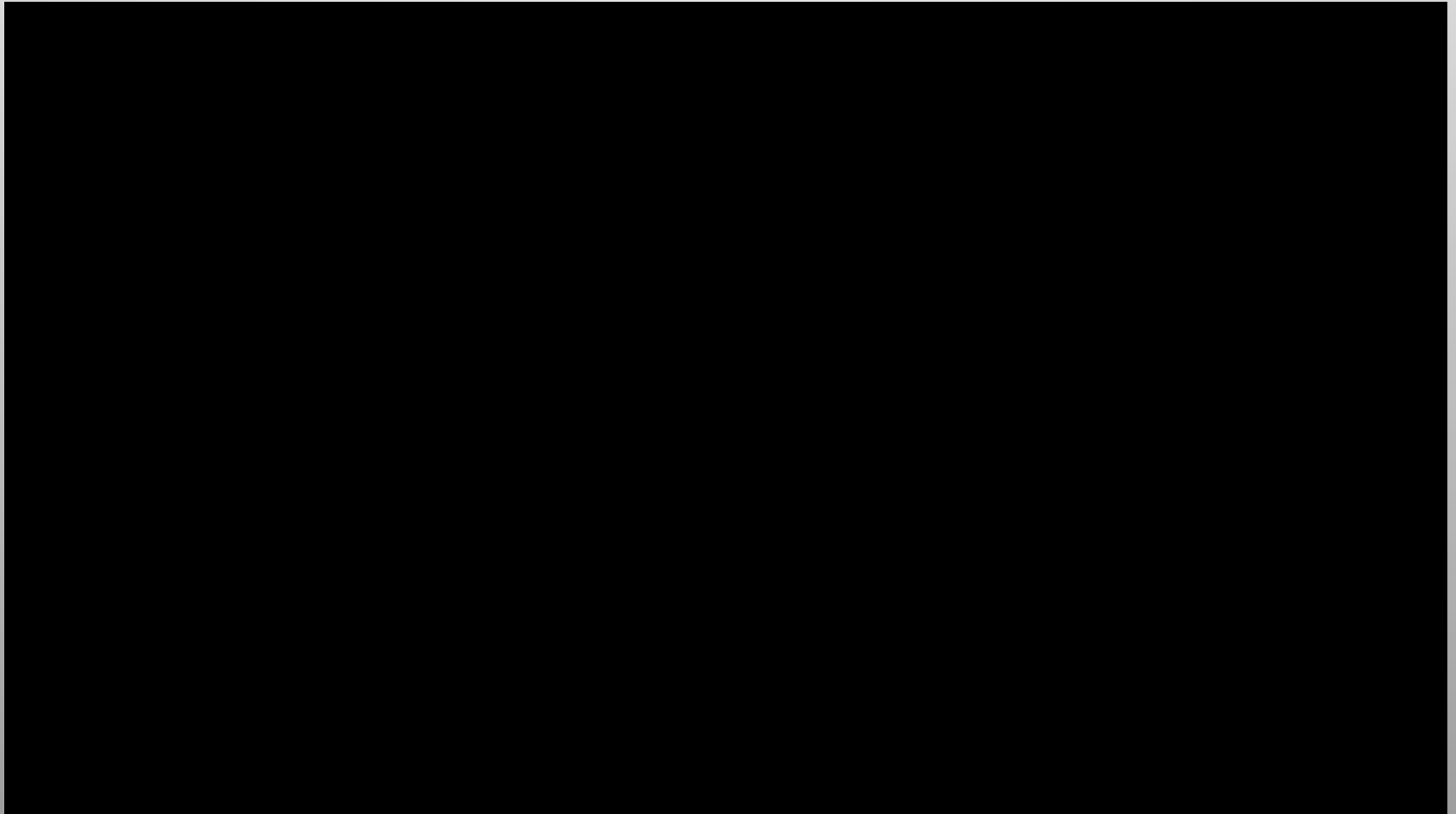
No Fees - \$14,218

Only Plaintiff Fees - \$31,718

If Ben and Brett Were In Charge...

- 1. Try a Few Cases Each Year Based on frivolous, Particular Product, Jurisdiction and/or Plaintiff's Lawyer**
- 2. Analyze How Much We Are "Overpaying" In Indemnity to Avoid Defense fees, Risk of Next Step in Litigation or Trial**
- 3. Bank of Experts, Consultants, Trial Materials, Video, Openings, Closings, Other Forms**
- 4. Share More Information (Results, Motion Wins, Defense Costs, Length of Cases)**
- 5. Panel Counsel Academy**

Best Answer is Not Always Yes or No



Thank You!

Thank you for your time this afternoon!