<u>Running Scared? Are we settling too many cases because of risk fear?</u>

I. Introduction: Are We Making Decisions – Or Reacting to Fear?

Over the past decade, the defense bar has been operating in a materially different environment. Jury verdicts - particularly in personal injury, product liability, and mass tort litigation in United States - have not only increased in size, but in their perceived unpredictability. That perception alone has changed behavior.

We now routinely see:

- Earlier settlement discussions
- Increased reserves driven by worst-case scenarios
- A noticeable hesitation to take cases to verdict

That shift raises a critical question:

Are we exercising judgment - or defaulting to fear?

Fear is not irrational. It is grounded in real outcomes - runaway verdicts, social inflation, and juror skepticism toward corporate defendants. But when fear becomes the primary driver, it distorts analysis.

It leads to:

- Overvaluation of weak claims
- Undervaluation of strong defenses
- Strategic decisions made prematurely

The role of trial counsel is not to eliminate fear - it is to **discipline it**. To separate signal from noise. To ensure that decisions are based on **evidence, law, and strategy**, not headlines or anecdotes.

This presentation is not anti-settlement. It is anti-**unexamined settlement**.

II. The Rise of Nuclear Verdicts: Reality or Overcorrection?

There is no question that “nuclear verdicts” exist. But the legal community’s response to them has, in some instances, created its own distortion.

A. Understanding the Data vs. the Narrative

While high-value verdicts are increasing, they still represent a **small percentage of overall outcomes**. However, they dominate discussion, CLE programming, and internal risk assessments.

This creates:

- A cognitive bias toward worst-case thinking
- A tendency to evaluate every case as if it carries extreme exposure
- A shift away from probabilistic analysis toward anecdotal fear

B. Plaintiff Strategies Have Evolved

Plaintiffs’ counsel are more sophisticated than ever:

- Anchoring damages at high levels early and often
- Framing cases around community safety and corporate accountability

- Using simplified narratives that resonate with jurors emotionally

But sophistication on one side does not mandate retreat on the other.

C. The Defense Overcorrection

The real issue is not the existence of large verdicts - it is how we respond to them.

When every case is evaluated through the lens of the worst possible outcome, we stop practicing law and start practicing risk avoidance.

That is not sustainable - and it is not effective advocacy.

III. The Cost Of "Playing It Safe"

Settling to avoid perceived risk often feels prudent in the moment. But the long-term consequences can be significant - and frequently overlooked.

A. Economic Consequences

- Paying inflated settlements drives up overall litigation costs
- It impacts insurance premiums and reserve strategies
- It creates internal expectations that cases will resolve at elevated values

B. Behavioral Consequences

- Plaintiffs' counsel identify repeat players who are inclined to settle
- Those defendants become targets for future litigation
- Settlement posture becomes part of the plaintiff's strategy

C. Strategic Consequences

- Avoiding trial eliminates opportunities to:
  - Establish favorable precedent
  - Challenge weak liability theories
  - Deter future claims

D. Organizational Impact

Clients often express frustration when:

- Cases are settled despite strong defenses
- They feel pressured into resolution without full evaluation
- Their desire to defend business practices is subordinated to risk avoidance

The irony is that “playing it safe” can create a more dangerous long-term environment.

IV. The Trial Vs. Settlement Decision: A Real Analysis

A defensible decision requires a structured, disciplined analysis that goes beyond surface-level risk assessment.

A. Business Reputation

Reputation cuts both ways:

- Trial may expose internal practices - but it may also demonstrate accountability and confidence
- Settlement may resolve quietly - but can be interpreted internally or externally as concession

Counsel must evaluate not just public perception, but internal business impact.

B. Precedent and Litigation Landscape

- Is this case part of a broader trend?
- Will resolution influence future filings or settlement expectations?
- Does the defense need a trial win to reset the playing field?

C. Admissions and Collateral Exposure

- Does settlement language create exposure in parallel litigation?
- Are there regulatory, contractual, or indemnity implications?

D. Damages Analysis

- Are damages supported by objective evidence - or driven by narrative?
- What is the gap between provable damages and arguable damages?
- How vulnerable is the case to emotional inflation?

E. Venue and Jury Pool

Venue analysis must be data-driven, not reputation-driven:

- Historical verdict data
- Jury composition and demographics
- Judicial tendencies

Not every “bad venue” is unwinnable.

F. Opposing Counsel

Reputation matters - but it must be contextualized:

- Trial experience
- Case-specific strengths and weaknesses
- Ability to execute, not just posture

G. Client Objectives and Risk Tolerance

Clients vary significantly:

- Some prioritize certainty and cost control
- Others prioritize principle, deterrence, or reputation

The lawyer’s role is to align legal strategy with client-defined objectives, not impose a default approach.

V. The Ethical Obligation: Counsel, Not Conduit

Lawyers are not risk reporters. We are risk interpreters and advisors.

A. The Duty of Independent Judgment

Professional responsibility requires:

- Candid, objective advice
- Avoidance of bias driven by fear, experience, or anecdote
- Clear communication of both risks and opportunities

B. The Danger of Overcorrection

It is just as problematic to:

- Overstate risk to push settlement

  as it is to

- Understate risk to push trial

Both undermine client decision-making.

C. Insurer–Insured Dynamics

In many cases, counsel must navigate:

- Coverage limitations
- Settlement authority disputes
- Diverging incentives

Best practices include:

- Transparent communication with all stakeholders
- Documentation of recommendations
- Clear explanation of potential conflicts

D. Ethical Decision-Making Under Pressure

Deadlines, mediation pressure, and escalating costs can distort judgment.

The ethical lawyer slows the process down just enough to ensure the decision is reasoned - not reactive.

VI. A Practical Framework: How To Counsel Through Risk

Effective counseling requires structure, discipline, and clarity.

A. Develop a Decision Matrix

Present the client with:

- Best-case, worst-case, and most likely outcomes
- Quantified exposure ranges
- Non-economic considerations (reputation, precedent, business impact)

B. Stress-Test the Case

- Conduct internal “attack your own case” sessions
- Use mock trials or focus groups when appropriate
- Identify vulnerabilities early

C. Dynamic Risk Assessment

Risk is not static:

- Reassess after key depositions, rulings, or expert disclosures
- Adjust strategy accordingly

D. Clear, Documented Communication

- Provide written recommendations
- Outline reasoning and assumptions

- Ensure alignment before major decisions

E. Trial Readiness as Leverage

Preparing for trial does more than prepare you for verdict - it:

- Strengthens negotiation posture
- Signals confidence
- Forces the opposition to evaluate their own risk realistically

VII. The Trial Lawyer’s Perspective

After trying more than 100 cases across diverse jurisdictions in United States, several observations stand out:

A. Juries Value Credibility

- Consistency, transparency, and authenticity matter more than perfection
- Weaknesses can be managed if addressed directly

B. Not All Risk Is Equal

- Some cases carry high theoretical exposure but low practical risk
- Others appear defensible but contain hidden vulnerabilities

C. Fear Changes Performance

When a case is approached with fear:

- Themes become defensive
- Presentation loses clarity

- Decision-making becomes reactive

Jurors can sense hesitation. Confidence - grounded in preparation - matters.

D. Trial Still Matters

Trying cases:

- Establishes credibility with courts and opposing counsel
- Creates leverage in future negotiations
- Provides clients with a true defense - not just a resolution

VIII. Balancing Courage and Prudence

This is not about rejecting settlement. It is about refining decision-making.

The effective lawyer:

- Recognizes real risk
- Resists exaggerated risk
- Aligns strategy with long-term objectives

Courage without analysis is reckless.

Caution without analysis is paralysis.

The goal is disciplined judgment - not default behavior.

IX. Conclusion: Stop Running – Start Deciding

We are practicing in an environment where:

- Stakes are higher

- Outcomes are less predictable
- Pressure to settle is constant

But the core responsibility remains unchanged.

To advise. To analyze. To advocate.

The next time a case approaches resolution, the question should not be:

- *What is the safest move?*

But rather:

- *What is the right move—based on the facts, the law, and the client's objectives?*

Because if the answer is driven primarily by fear:

Then we are not making decisions - we are running scared.