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Frivolous Defenses

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FRIVOLOUS DEFENSES

THOMAS D. RUSSELL *

ABSTRACT

This Article is about civil procedure, torts, insurance, litigation, and professional ethics. The Article is the opening article in a conversation with Stanford Law Professor Nora Freeman Engstrom, who has written about the plaintiffs' bar and settlement mill attorneys.

The empirical center of this piece examines 356 answers to 298 car crash personal injury cases in Colorado's district courts. The Article situates these cases within dispute pyramid elements including the total number of miles-traveled within Colorado and the volume of civil litigation.

The Article then analyzes the defense attorneys' departures from the Colorado Rules of Civil Procedure, especially Rule 8. In particular, I count and analyze lawyers' claims that they need not answer because an allegation calls for a legal conclusion; is directed at a co-defendant; or that a statute or document "speaks for itself."

The Article also generally discusses the failure to investigate claims before answering, which, in my opinion, violates Rule 11 and the Code of Professional Conduct.

Last, the title derives from the final empirical section, which examines the pleading of laundry lists of so-called "affirmative defenses." The Article shows that on average, each defense attorney includes nine items within a list of defenses. Few are true affirmative defenses. For 90 percent of the lists of defenses, there is no factual support whatsoever. On average, insurance defense attorneys plead 0.14 facts in support of each list of affirmative defenses.

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I. INTRODUCTION

Sometime after the first-year civil procedure course, insurance defense lawyers learn to ignore the rules of civil procedure when filing answers to lawsuits. First-year law students in the United States study the Federal Rules of Civil Procedure.¹ Their professors teach that for each allegation in plaintiffs' complaints, the Rules require defendants to answer by admitting, denying, or stating that they do not have sufficient information to form a belief about the allegation, which Rule 8 then deems denied.² Most states have patterned their rules of civil procedure after the Federal Rules—including Colorado, which is the subject of this study.³ In most state courts, then,

¹ FED. R. CIV. P.

² JOSEPH W. GLANNON ET AL., *CIVIL PROCEDURE: A COURSEBOOK* 23 (3d ed. 2017); GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: CASES AND MATERIALS* 590–91 (11th ed. 2015); BROOKE D. COLEMAN ET AL., *LEARNING CIVIL PROCEDURE* 310–14 (3d ed. 2018); STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, *CIVIL PROCEDURE* 427 (10th ed. 2018); GENE R. SHREVE ET AL., *UNDERSTANDING CIVIL PROCEDURE* § 8.08 (6th ed. 2019); RICHARD D. FREER, *CIVIL PROCEDURE* § 7.3.4 (4th ed. 2017); HOWARD M. ERICHSON, *INSIDE CIVIL PROCEDURE* 118–19 (3d ed. 2018); THOMAS A. MAUET & DAVID MARCUS, *PRETRIAL* § 5.5, at 160 (9th ed. 2015).

³ For a survey of each jurisdiction accompanying Colorado in the extent to which they reflect a similarity to the Federal Rules of Civil Procedure, see John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1370 & n.21 (1986), which found that twenty-two states (along with the District of Columbia) replicate the Federal Rules and that ten others are similar but lack at least one of the strict requirements necessary to be considered a replica. However, the most recent trend is away from conformity with the federal rules. See John B. Oakley, *A Fresh Look at the Federal*

defense lawyers are to admit, deny, or say that they have insufficient information or knowledge to form a belief.⁴ Defense lawyers can also admit part of an allegation while denying the remainder.⁵ After answering plaintiffs' allegations, lawyers for defendants may append affirmative defenses that purport to defeat the plaintiffs' entire claims.⁶

This Article presents original empirical data concerning the legal system in action. I first describe the broader context of automobile travel, crashes, and litigation that sociological scholars refer to as the "dispute pyramid," although I suggest that a salmon run might be a more apt metaphor for the difficulty navigating from car crash through claims and litigation toward compensation.⁷ I examine the total number of miles traveled, the number of crashes, and the number of crashes causing injuries.⁸ People generally think there is too much litigation, a claim that means nothing without actual data as to how many suits could exist relative to how many actually do exist.⁹ These data about injury and litigation rates are not central to my argument, but given the paucity of data concerning the actual operation of the legal system, I felt some obligation to collect and present these data.

Next, I establish the proportion of all personal injury litigation that is car crash lawsuits.¹⁰ The single-event tort world—as opposed to mass torts or class actions—is really about car crashes and not about slip-and-falls, dog bites, train injuries, and, especially, not about medical malpractice.

After situating automobile travel, crashes, injuries, and litigation within broader empirical contexts, I get down to the business of analyzing the answers themselves.¹¹ This study examines answers that insurance defense lawyers filed in automobile car

Rules in State Courts, 3 NEV. L.J. 354, 383 (2003) ("Even among states that fifteen years ago could be counted as substantially conforming to the federal model of procedure, recent significant amendments have been more frequently rejected or ignored than adopted.").

⁴ COLO. R. CIV. P. 8(b) ("A party shall state in short and plain terms his defenses to each claim asserted and shall *admit* or *deny* the averments of the adverse party. *If he is without knowledge or information sufficient* to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial." (emphasis added)).

⁵ *Id.* ("When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.").

⁶ COLO. R. CIV. P. 8(c).

⁷ *See infra* Part II.

⁸ *See infra* Part II.

⁹ *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1095 (1996) (explaining the commonly held view about tort claims that "Americans sue too readily, 'at the drop of a hat;' egged on by avaricious lawyers, they overwhelm our congested courts with mounting numbers of suits, including many frivolous claims"); Thomas D. Russell, *Blood on the Tracks: Turn-of-the-Century Streetcar Injuries, Claims, and Litigation in Alameda County, California* (Oct. 23, 2019) (unpublished manuscript) (on file with the author).

¹⁰ *See infra* Part II.

¹¹ *See infra* Part III.

crash cases in Colorado. I analyze 356 answers. The first part of an answer consists of the defense attorney's responses to the plaintiff's allegations. The first part of my analysis catalogs defense departures from the Rules when responding to the allegations of complaints.¹² This part of the analysis is empirical but only lightly quantitative.

After admitting or denying allegations, lawyers for defendants have an opportunity to include affirmative defenses in sections of answers usually titled "Affirmative Defenses" or simply "Defenses." My method is very simple and easily reproduced: I count the total number of defenses and then I count the defenses that the insurance defense lawyers have supported with at least one fact.¹³

This Article shows that the insurance defense attorneys generally engage in routinized practices; conduct little to no pre-answer factual investigation themselves and ignore any factual investigation that claims agents have already conducted; ignore the rules of civil procedure; take purposive, obstructive actions that defeat the fact-finding goals of pleading; likely delegate legal work to paralegals; and, in my opinion, violate the Rules of Professional Conduct.¹⁴

Criticizing lawyers, judges, and the legal system is a responsibility of law professors.¹⁵ For law professors, law reviews are like letters to the editor except longer and with lots of footnotes.¹⁶ In this Article, I communicate my professional opinions¹⁷ on matters of public interest and general concern¹⁸ including the behavior of some

¹² See *infra* Part III.

¹³ See *infra* Part IV.

¹⁴ See Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1538–39 (2009) [hereinafter Engstrom, *Run-of-the-Mill Justice*] (describing anecdotal evidence that settlement mills sacrifice client recoveries for speed and efficiency); see also Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 841 (2011) [hereinafter Engstrom, *Sunlight*] (“[S]ome settlement mills . . . have non-attorneys negotiate settlements of third-party personal injury claims in apparent violation of Model Rule of Professional Conduct 5.5.”).

¹⁵ Deborah L. Rhode, *The Professional Responsibilities of Professors*, 51 J. LEGAL EDUC. 158, 166 (2001) (“Law professors have unique opportunities and corresponding obligations. Time and tenure give us the luxury of directing our attention to matters that matter to us. But with that privilege comes a responsibility to focus at least some of our efforts on what also matters to the public—on how well law and lawyers are serving its interests.”).

¹⁶ *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1360 (Colo. 1983) (“Allegedly defamatory language must be examined in the context in which it is uttered.”).

¹⁷ Because the opinions in this Article are mine as a law professor, they are not the opinions of any other person or entity including the student editors of this journal; the *Cleveland State Law Review*; Cleveland-Marshall College of Law; Cleveland State University; nor, least of all, the University of Denver.

¹⁸ *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (requiring plaintiffs in defamation actions to prove falsity and fault in matters of public interest and general concern); *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1110 (Colo. 1982) (“We now believe that the robust debate on public issues that we were seeking to protect in *Walker* is better protected by using the *St. Amant* definition of ‘reckless disregard’ in cases involving matters of public or general concern, as well as in cases involving public officials and public figures.”);

insurance defense attorneys in car-crash litigation, deviations from the rules of civil procedure by some defense attorneys, departures by some insurance defense lawyers from the legal profession's ethical rules, and the complicity of some members of the plaintiffs' bar and bench in allowing these declines of legal professionalism. These matters are of general concern because how our courts adjudicate civil actions involving car crashes, insurance, tort law, and other litigation are important to the public interest. Systematic, rigorous investigation of publicly filed answers and complaints supports my factual analysis and opinions, as do academic freedom, tenure, and the First Amendment to the United States Constitution.¹⁹ I welcome competing argument.²⁰ Within the Article, the fair report or fair presentation privilege protects my recounting of the claims plaintiffs make in their public complaints and of the defenses that defendants offer in return, even though the lawsuits are, at that point, unresolved.²¹ As for the lawyers, my expert legal opinion as an academic who practices law is that lawyers who present arguments in publicly filed pleadings, motions, and other documents consent to their use by scholars in precisely the same

id. at 1106 (“[F]irst amendment values would be better honored by adopting the same definition of ‘reckless disregard’ in cases involving public officials, public figures, and matters of public or general concern.”); COLO. COMM. ON PATTERN CIV. JURY INSTRUCTIONS, CIVIL JURY INSTRUCTION 22:3 (Reckless Disregard Defined—Where the Plaintiff Is a Public Official or Public Person or, If a Private Person, the Statement Pertained to a Matter of Public Interest or General Concern) (“A statement is published with reckless disregard when, at the time of publication, the person publishing it believes that the statement is probably false or has serious doubts as to its truth.”).

¹⁹ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press”); *see also* COLO. CONST. art. II, § 10 (“[E]very person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.”); OHIO CONST. art. I, § 11 (“Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.”).

²⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

²¹ OHIO REV. CODE ANN. § 2317.05 (West 2020); *Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 964 (Colo. App. 2000) (“[U]nder the common law doctrine of fair report, reports of in-court proceedings containing defamatory material are privileged if they are fair and substantially correct, or are substantially accurate accounts of what took place.”); RESTATEMENT (SECOND) OF TORTS § 611 (AM. L. INST. 1977) (“The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.”); *see also* *Catalanello v. Kramer*, 18 F. Supp. 3d 504, 509 (S.D.N.Y. 2014) (granting a law professor’s motion to dismiss a defamation complaint after the professor “accepted an offer from the *Washington University Law Review* to publish the article and, during that same month, posted the article to the Social Science Research Network (SSRN), an online repository of academic research”); *Zachary A. Kramer, Of Meat and Manhood*, 89 WASH. U. L. REV. 287 (2011).

way that advocates who argue before the United States Supreme Court agree to engage not just the Justices but the entire world—including law professors—in argument.²²

Another aim of this study is to begin to engage the work of Stanford Law School's Professor Nora Freeman Engstrom.²³ Professor Engstrom has written a series of fascinating articles about what she and others call “settlement mills.”²⁴ Settlement mills are law firms that represent personal injury claimants.²⁵ The lawyers in Professor Engstrom's settlement mills never, or at most rarely, file lawsuits.²⁶ Instead, they churn their clients' smallish claims and achieve even smaller settlements with insurance companies.²⁷ Professor Engstrom interviewed many settlement-mill lawyers and combined her qualitative research with other scholars' quantitative research.²⁸ The settlement-mill lawyers' efforts fascinate Professor Engstrom even as their means of achieving settlement at times appears to horrify the Stanford professor.²⁹ I read part of

²² *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (“In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.”); see also *Gertz*, 418 U.S. at 344 (“An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.”).

²³ *Nora Freeman Engstrom*, STAN. L. SCH., <https://law.stanford.edu/directory/nora-freeman-engstrom/> [<https://perma.cc/NQR6-XQZT>] (describing Professor Engstrom's work as a nationally recognized expert in both tort law and legal ethics, her written work on various subjects including settlement mills, and her memberships in the American Law Institute and World Tort Law Society).

²⁴ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14; Engstrom, *Sunlight*, *supra* note 14; Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 AM. U. J. GENDER SOC. POL'Y & LAW 1083 (2011) [hereinafter Engstrom, *Legal Access*]; Nora Freeman Engstrom, *Shining a Light on Shady Personal Injury Claims*, 2 J. INS. FRAUD AM. 13 (2011).

²⁵ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1486 (“[H]igh-volume personal injury law practices that aggressively advertise and mass produce the resolution of claims”); Engstrom, *Sunlight*, *supra* note 14, at 807 (defining settlement mills as personal injury firms that advertise aggressively, settle a high volume of low-stakes claims, engage in little attorney-client interaction, and rarely take claims to trial).

²⁶ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1487–88 (describing “conventional” personal injury lawyers as those who litigate cases and appear in court and settlement-mill attorneys as those who have a larger client base, aggressively advertise, contract a higher percentage of those who call as potential clients, delegate more tasks to non-attorneys, file fewer lawsuits, and take even fewer or no cases to trial).

²⁷ *Id.* at 1535–42.

²⁸ See, e.g., *id.* at 1527–28 (providing a quote from a Garnett & Associates attorney saying that “the smaller cases are better off settled” to show that the average amount paid by a tort defendant compared to settlement mills' average gross recovery (adjusted for inflation) incentivizes a preference among both plaintiffs and defendants to settle).

²⁹ See, e.g., *id.* at 1505 (explaining how Sledge, a.k.a. “the hammer,” would use his office manager to negotiate and settle with insurance adjusters, and then evaluate her performance based on the number of files settled and amount of money collected).

her message as being “Don’t Let Your Babies Grow Up to Be Settlement-Mill Personal Injury Lawyers.”³⁰

My remix: “Don’t Let Your Law Students Grow Up to Be Insurance Defense Mill Lawyers.” In her research, Professor Engstrom conducted confidential telephone interviews with personal injury lawyers who had worked in settlement mills.³¹ In contrast, this Article looks at the filed, public work of lawyers who defend personal injury lawsuits on behalf of insurance companies.³² Adapting Professor Engstrom’s nomenclature, I refer to these lawyers—working on the other side of the industry from the lawyers whom Professor Engstrom interviewed and studied—as insurance defense mill lawyers.³³ My conclusions parallel those of Professor Engstrom.

Insurance defense mill lawyers do not work directly opposite Professor Engstrom’s settlement-mill lawyers. Rather, they work on the opposite side of the *versus* in the lawsuit’s caption—the insurance and defense side. However, the defense lawyers are one step further along in the litigation process than their plaintiff-side counterparts. Insurance defense mill lawyers answer complaints, which by Professor Engstrom’s definition, the settlement-mill lawyers almost never file.³⁴ The lawyers who actually file complaints—as opposed to settle cases without filing—Professor Engstrom calls “conventional” lawyers.³⁵ Insurance defense mill lawyers answer the complaints of these conventional lawyers.

A generation ago, Kent Syverud, then a Michigan and Vanderbilt law professor and now chancellor of Syracuse University, made the point that personal injury lawyers and liability insurers live symbiotically. “The insurance industry and the trial lawyers may take potshots at each other in attempts to reform aspects of the

³⁰ See ED BRUCE, *Mammas Don’t Let Your Babies Grow up to Be Cowboys*, on ED BRUCE (United Artists Records 1975); see also WAYLON JENNINGS & WILLIE NELSON, *Mammas Don’t Let Your Babies Grow up to Be Cowboys*, on WAYLON AND WILLIE (RCA Records 1978).

³¹ See, e.g., Engstrom, *Sunlight*, *supra* note 14, at 819 & nn.51–57 (maintaining the anonymity of settlement-mill attorneys who prioritized speed and settlements and referred cases to other firms when a suit proceeded to litigation). Professor Engstrom’s prodigious research also included the review of thousands—maybe tens of thousands—of pages of documentary evidence including records of disciplinary proceedings and attorney malpractice actions. Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1488 n.13.

³² The data are from lawsuits filed during the first six months of 2015. The complaints, answers, and most of the filings in each case are open, public records. They are available for a fee through Colorado Courts E-Filing, the entity that handles electronic filing in Colorado, or they are available for free (though only as printed documents) through the Colorado Supreme Court, which is where my research assistant and I collected them. See *infra* Part III.

³³ Engstrom, *Sunlight*, *supra* note 14, at 855 (describing how settlement-mill lawyers rarely file lawsuits and, as a result, rarely interact with insurance defense attorneys or judges).

³⁴ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1502–03 (describing the difference between the settlement mills she researched that file suit at rates between 5% and 15% and their conventional counterparts, which file suit approximately 50% of the time).

³⁵ See Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1487–88.

relationship,” Syverud explained, “but they cannot afford to shoot to kill.”³⁶ Syverud understands that, like the relationships between clownfish and sea anemones and between African oxpeckers and giraffes, plaintiffs’ lawyers and the insurance industry rely upon each other.³⁷ Perhaps symbiosis is not a sufficient description, as plaintiffs’ lawyers do not merely sustain liability insurers as if chasing away butterfly fish and flies: plaintiffs’ lawyers expand the demand for liability insurance.³⁸ The reverse is also true. Liability insurers supply plaintiffs and their lawyers with the money that keeps the plaintiffs’ bar in business.³⁹

Although the insight about symbiosis is not fresh, empirical scholars, including Professor Engstrom, have focused their gaze mostly on the plaintiff side of the relationship. Few empirical scholars have looked into the defense side of the mutualistic relationship.⁴⁰ When referring to the work of the claims agents—the insurance industry employees who work opposite the settlement mills—scholars tend to rely on the excellent though somewhat stale insights that H. Laurence Ross first articulated in his 1970 book *Settled Out of Court: The Social Process of Insurance Claims Adjustment*.⁴¹ Professor Ross, of what was then SUNY Buffalo but is now the

³⁶ Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114 (1990).

³⁷ See Daphne Gail Fautin, *The Anemonefish Symbiosis: What Is Known and What Is Not*, 10 SYMBIOSIS 23, 38–40 (1991) (explaining how anemonefishes, commonly known as clownfish, rely on anemones, inter alia, for protection, habitat stability for laying eggs, and the benefit of eating anemone waste and tentacles); see also FINDING NEMO (Walt Disney Pictures, Pixar Animation Studios 2003); TANYA ANDERSON, GIRAFFE EXTINCTION: USING SCIENCE AND TECHNOLOGY TO SAVE THE GENTLE GIANTS 55 (2020) (describing the reliance phenomenon by discussing how “[t]icks burrow into a giraffe’s skin and . . . Oxpeckers walk all over a giraffe’s body inspecting for ticks to grab with their yellow bills,” and then some oxpeckers spend the night “hanging out (literally) in [the] giraffe’s armpit”).

³⁸ Syverud, *supra* note 36, at 1114 (“[W]e tend to place insurance in the reactive role: tort litigation expands, liability insurance adjusts; courts create a new type of tort, insurance companies respond with a new type of policy; juries award larger verdicts, insurance companies raise their premiums. We look to changes in tort law and civil procedure for the causes of changes in liability insurance. Tort litigation, not liability insurance, dominates the relationship.”).

³⁹ *Id.* (“Without liability insurance, most tort suits would be significantly less attractive to plaintiffs and their attorneys, and a large fraction of the lawsuits and the tort law bar would fade away.”).

⁴⁰ Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2053, 2054 (“[T]here is relatively little research, either empirical or theoretical, focused specifically on the lawyers who routinely stand opposite the plaintiffs’ bar: the insurance defense bar.”). When Professor Engstrom started her research, there had been little systematic study of the plaintiffs’ bar, either. Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1487 n.7.

⁴¹ H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (2d ed. Routledge 1980) (1970); see Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543, 555 (2013) (noting that H. Laurence Ross provided “considerable empirical data about how claims adjusters actually work.”); see also Syverud, *supra* note 36, at 1138 (referring to H. Laurence Ross’s finding that in settlement negotiations with attorneys, claims adjusters use the bargaining tactic of asking a supervisor to allow a high

University at Buffalo, studied insurance claims adjusters and their supervisors.⁴² “The adjuster,” Ross explained, “is, then, the key man in the handling of most automobile injury claims.”⁴³ Even Ross’s gender-specific language—empirically accurate at the time—dates his work. Today, a majority of insurance claims agents are women.⁴⁴

This Article crosses from the plaintiffs’ side to look at the work of insurance defense lawyers. When not extrapolating from Ross’s old conclusions about “claims men,” Professor Engstrom and others mostly leave to their readers’ imaginations the inner workings of insurance claims handling and insurance defense.⁴⁵ Professor Engstrom shows how plaintiffs’ lawyers in settlement mills engage in routinized practices, conduct very little factual investigation, and take shortcuts to achieve the quick settlement of small cases.⁴⁶

Which side’s questionable practices came first is an anemone-and-clownfish type of question that this Article does not seek to answer. The simple insight is that, titillating as studies of plaintiffs’ lawyers may be, additional study of the plaintiffs’ side without a correlative look into defense work perpetuates a distorted view of tort litigation. Personal injury claims and litigation are, obviously, dualistic with the opposing sides forming dialectically. My hunch is that the imbalance of research—the sustained focus on the plaintiffs’ bar rather than a multi-perspectival approach—reflects a Mugwumpish worldview of elite law professors who want to distance themselves—and their students—from the business practices and zealous representation of personal injury lawyers.

settlement amount only to be denied and forced to return to the attorney claiming that a lower agreement must be reached).

⁴² Ross, *supra* note 41.

⁴³ Ross, *supra* note 41, at 25.

⁴⁴ Women account for 82% of “[i]nsurance claims and policy clerks” and about 60% of the insurance industry’s total workforce. *Facts + Statistics: Careers and Employment*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-careers-and-employment> [https://perma.cc/3H99-5WJ2].

⁴⁵ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1508 (describing negotiations between non-lawyer employees at settlement-mill firms and insurance claims adjusters that were fairly brief and rarely included the discussion of any legal issues such as comparative negligence).

⁴⁶ *Id.* at 1494 (“[E]ven the initial client interview was mechanized: clients were shown a video of their attorney explaining the case settlement process, rather than having a real-live attorney provide that information.”); *see also id.* at 1494–95 (“[G]roup settlement meetings with claims adjusters were conducted, and numerous clients’ claims were resolved at one sitting.”); Engstrom, *Sunlight*, *supra* note 14, at 850 (“Settlement mills do not typically engage in a fine-grained assessment of fault; they invest little in each case’s factual and legal development; and they sometimes delegate ‘legal work’ to non-lawyer personnel.”).

II. CAR CRASHES AND PERSONAL INJURY LITIGATION IN COLORADO

Torts is about car crashes.⁴⁷ When I tell people outside of law schools that I teach torts, I say the subject is car crashes. There are all sorts of other types of cases included in torts textbooks.⁴⁸ In this way, the torts course misrepresents the actual work of personal injury claiming and litigation. Car crashes are not sexy.

Car crashes are the paradigm single-event torts.⁴⁹ Single-event means an individual incident that leads to an injury of, typically, one or a few people.⁵⁰ A car speeds, runs a stop sign, fails to signal while changing lanes, or does not stop in time and—boom!—crashes into another. Maybe the drivers share some comparative fault. Their combined crash is a single-event tort. Likewise, when the Amazon delivery person slips and falls on icy front steps; the dog bites the neighbor kid; a doctor misdiagnoses a patient; or a lawyer misses the statute of limitations for a client, we refer to these incidents as single-event torts. One person is injured, maybe several. The injury arises from a single event—one crash, one fall, one bite, or one professional error. Plane crashes are single-event torts with more injuries.⁵¹

Single-event tort litigation differs from other realms. Mass torts, for example, deal with many different injuries to masses of people by similar but maybe not identical mechanisms.⁵² With mass torts, there are multiple parties and lawsuits in multiple

⁴⁷ See Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 22 WAKE FOREST L. REV. 293, 295 (2009) [hereinafter Engstrom, *When Cars Crash*] (“Of those hurt in auto accidents, roughly half seek third-party compensation. These compensation attempts are the 800-pound gorilla of the tort liability system, accounting for more than half of all trials, nearly two-thirds of all injury claims, and three-quarters of all damage payouts.”).

⁴⁸ RICHARD EPSTEIN & CATHERINE SHARKEY, *CASES AND MATERIALS ON TORTS* (12th ed. 2020); MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* (10th ed. 2016); DAVID W. ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* (5th ed. 2017); VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE, AND SCHWARTZ'S TORTS CASES AND MATERIALS* (14th ed. 2020).

⁴⁹ Engstrom, *When Cars Crash*, *supra* note 47, at 299 (quoting scholars who have observed that automobile claims are the paradigm for individualized dispute resolution in the tort system).

⁵⁰ Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 854 (1990) (referring to “single-event incidents of negligence (such as car accidents)”).

⁵¹ Mass tort scholars also use the term “single-event” to refer to mass accidents. Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 125 (2002) (“The events that occurred on September 11, 2001 encompass certain characteristics typical of mass accident cases, such as a single site, single event disaster; a large number of claimants; little geographical dispersion of claimants; and combined claims for personal injury, wrongful death, and property damage.”); see also § 1783 Class Actions in Which Common Questions Predominate Over Individual Questions—Mass-Accident Cases, 7AA WRIGHT & MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1783 (3d ed. 2005) (referring to “mass-accident or single-event cases” of mass torts).

⁵² MANUAL FOR COMPLEX LITIGATION § 22.2 (4th ed. 2004); see NOLO'S PLAIN-ENGLISH LAW DICTIONARY, <https://www.nolo.com/dictionary/mass-tort-term.html> [<https://perma.cc/NY2J-A3PX>]; see also 28 U.S.C. § 1407; Linda S. Mullenix, *Practical Wisdom and Third-Generation*

jurisdictions.⁵³ Litigation against Monsanto or Bayer over the weed-killer Roundup causing non-Hodgkin's lymphoma is a good example of a mass tort.⁵⁴ When a TV commercial asks, "Injured by [insert drug name here]?" mass tort lawyers are advertising for clients.⁵⁵ "Injured in a car crash?" A single-event tort lawyer wants your business.⁵⁶

Class actions, when torts at all, are also not usually single-event torts.⁵⁷ Class actions are about multiple parties injured in pretty much the same way by pretty much

Mass Tort Litigation, 31 LOY. L.A. L. REV. 551, 553 (1998). See generally LINDA S. MULLENIX, *MASS TORT LITIGATION, CASES AND MATERIALS* (3d ed. 2017).

⁵³ MANUAL FOR COMPLEX LITIGATION § 22.3 (4th ed. 2004).

⁵⁴ See *Agricultural Management*, 2018 A.B.A. SEC. ENV'T ENERGY & RES. COMM. REP. 1, 1–2 (reporting on the first cancer patient, Dewayne Johnson, to take Monsanto to court because of California's trial accessibility for dying plaintiffs, which lead the way for what was over 10,000 pending cases against Bayer at the time); Kate Halloran, *A Holistic Approach to Pesticide Litigation*, TRIAL, May 2020, at 28, 29–34 (interviewing Jennifer A. Moore and Aimee Wagstaff who led the plaintiff's team that tried the initial bellwether case for federal multidistrict litigation involving Monsanto's Roundup and allegations that it causes non-Hodgkin's lymphoma); see also Ruth Bender et al., *Bayer to Pay up to \$10.9 Billion to Settle Lawsuits over Roundup Weedkiller*, WALL ST. J. (June 24, 2020, 6:39 PM), <https://www.wsj.com/articles/bayer-reaches-10-5-billion-settlement-over-weedkiller-roundup-11593017309> [<https://perma.cc/3H99-5WJ2>]; see also Laura Kusisto et al., *Bayer Strives to End Lawsuits Over Roundup—While Still Selling It*, WALL ST. J. (Feb. 12, 2020, 6:57 PM), <https://www.wsj.com/articles/bayer-strives-to-end-lawsuits-over-roundupwhile-still-selling-it-11581535816> [<https://perma.cc/BGG6-UPFY>]; Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, WALL ST. J. (Nov. 25, 2019, 11:48 AM), <https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480> [<https://perma.cc/2TAY-4AWA>].

⁵⁵ *Clifford Symposium on Tort Law and Social Policy*, 65 DEPAUL L. REV. 251 (2016); Symposium, *The Changing Landscape of the Practice, Financing and Ethics of Civil Litigation in the Wake of the Tobacco Wars*, 51 DEPAUL L. REV. 183 (2001); Symposium, *Judges as Tort Lawmakers*, 49 DEPAUL L. REV. 275 (1999); MASS TORTS MADE PERFECT, <https://mtmp.com/> [<https://perma.cc/5F77-MRXM>].

⁵⁶ Engstrom, *Legal Access*, *supra* note 24, at 1089–90 (describing how, in the years after the *Bates v. State Bar of Arizona* decision, advertisements for legal services, and specifically personal injury legal services have increased significantly); Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 734 (2015) ("Readers who watch contemporary commercial television will be familiar with advertisements for personal-injury attorneys. These ads often focus on a specific problem—a disease, an injury due to an accident, an injury caused by a medical device—and they explain to the viewer that compensation may be available for them if they have that problem, and that the advertiser may be able to provide help in getting that compensation.").

⁵⁷ MANUAL FOR COMPLEX LITIGATION § 22.2 (4th ed. 2004); Linda S. Mullenix, *Practical Wisdom and Third-Generation Mass Tort Litigation*, 31 LOY. L.A. L. REV. 551, 553 (1998); see also Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 371 (2012); Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 501 (1991); Charles E. Reuther, *Class Actions and the Quest for A Fair Resolution in Mass Tort Litigation*, N.J. LAW. MAG., Aug. 2011, at 33.

the same mechanism but often at different times.⁵⁸ A single plaintiff or small group of plaintiffs represents the entire class of injured parties in one big lawsuit.⁵⁹ The best version of class actions brings about social justice on a large scale.⁶⁰ Too commonly in the past, the attorneys took huge fees and injured consumers got a coupon of some sort.⁶¹ Federal legislation, the Class Action Fairness Act, addressed the coupon issue.⁶²

Workers' compensation cases fall outside the single-event tort system too.⁶³ An employee may suffer a discrete injury in a single event, but for about the last century,

⁵⁸ The federal rules require that “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class.” FED. R. CIV. P. 23(a). The Colorado rules replicate the federal rules. COLO. R. CIV. P. 23(a) (“(1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class.”); see also Oakley & Coon, *supra* note 3 (discussing state replication of federal rules); MANUAL FOR COMPLEX LITIGATION § 21.22 (4th ed. 2004).

⁵⁹ FED. R. CIV. P. 23(a); COLO. R. CIV. P. 23(a).

⁶⁰ Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 402 (2014) (“During th[e] so-called golden age of class litigation [in the late 1960s and early 1970s], public interest lawyers used the class action mechanism to integrate school systems, deinstitutionalize mental health facilities, reform conditions of confinement for inmates in prison systems, challenge discriminatory housing and public accommodation laws, and address various types of employment discrimination.”). For Professor Mullenix’s examples of social justice victories through class actions, see *id.* at 402 n.7 (first citing *Soc’y for the Good Will to Retarded Child, Inc. v. Cuomo*, 572 F. Supp. 1300, 1302–03 (E.D.N.Y. 1983) (ordering corrective measures to residents at a state institution for constitutional violations, beginning an eleven-year litigation saga culminating in a settlement), *vacated*, 737 F.2d 1239, 1242 (2d Cir. 1984); then citing *Manicone v. Cleary*, No. 74 C 575, slip op. (E.D.N.Y. June 30, 1975) (allowing prisoners to access telephones, subject to certain limitations); then citing *United States v. Kahane*, 396 F. Supp. 687, 689 (E.D.N.Y.) (requiring the government to provide kosher food to an Orthodox Jewish prisoner), *modified sub nom. Kahane v. Carlson*, 527 F.2d 492, 493 (2d Cir. 1975); then citing *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699, 706–07 (E.D.N.Y. 1974) (ordering integration of a Coney Island middle school as the proper relief for racial segregation), *aff’d*, 512 F.2d 37 (2d Cir. 1975); and then citing *Wilson v. Beame*, 380 F. Supp. 1232, 1244, 1248–52, (E.D.N.Y. 1974) (granting preliminary injunction allowing Muslim pretrial detainees to participate in religious services)).

⁶¹ Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck “Side Saddle” Fuel Tank Litigation*, 31 LOY. L.A. L. REV. 409, 411 (1998) (discussing General Motors settling a class action by providing each member of the class with a \$1,000 coupon for a future General Motors vehicle purchase while paying the plaintiffs’ attorneys \$9.5 million in fees).

⁶² 28 U.S.C. § 1712; Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1632–33 (2006).

⁶³ LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 352–55 (2002).

an administrative law system has handled these claims separately from the tort system.⁶⁴

A. The Dispute Pyramid or Salmon Run

To understand whether there are many or few personal injury lawsuits requires empirical knowledge concerning how many people are injured.⁶⁵ Sociolegal scholars refer to the “dispute pyramid” when situating the number of lawsuits or trials within a broader context.⁶⁶ The dispute pyramid tries to settle the litigation process within the context of injuries, claims, visits to lawyers, and demands.⁶⁷ An important effect of the dispute pyramid analysis is to show that a small proportion of injuries leads to lawsuits.⁶⁸ Some people never even know they are injured; most know of the injury but lump it—that is, they blame no one and make no claim; some people do blame someone else or complain; as the number dwindles, some file grievances of some sort; a hardy few see lawyers; and lawyers, who have businesses to run, select only some of those cases for the filing of litigation.⁶⁹

Elsewhere, I have argued that the architectural or geometric metaphor of a pyramid misleadingly suggests smooth decline from one level to another.⁷⁰ A better metaphor would be a salmon run in which thousands of eggs yield very, very few fish that return upstream to spawn because during their life cycles they encounter all sorts of lethal, natural, and human-made obstacles with, sometimes, the final obstacle being an upstream leap out of the water right into the mouth of a big ol’ bear.⁷¹ As the

⁶⁴ *Id.*; G. EDWARD WHITE, *AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION* 104–05 (2013).

⁶⁵ See Galanter, *supra* note 9, at 1099 (describing the “Dispute Pyramid” as the standard way scholars visualize tort litigation and noting that the layer formed by *injuries* is below the level of *claims*).

⁶⁶ *Id.* (“In order to understand the system of tort litigation, it is useful to visualize it, in the standard way that legal studies scholars do, as a ‘pyramid’ made up of successive layers.”); see William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming* . . . , 15 L. & SOC’Y REV. 632 (laying out a framework for the emergence and transformation of disputes including before a dispute has reached the legal system).

⁶⁷ Galanter, *supra* note 9, at 1099; Felstiner et al. *supra* note 66.

⁶⁸ Russell, *supra* note 9.

⁶⁹ Galanter, *supra* note 9, at 1099–1102; Felstiner et al. *supra* note 66, at 636.

⁷⁰ Russell, *supra* note 9.

⁷¹ MARK KURLANSKY, *SALMON: A FISH, THE EARTH, AND THE HISTORY OF A COMMON FATE*, 51, 63 (2020) (illustrating bears in the process of catching salmon); *id.* at 61 (describing salmon’s urge to return to the river and reproduce even though in the end it will be the death for most of the salmon); *id.* at 70 (discussing that half of the salmon’s fertilized eggs will die or be eaten and roughly eight percent will survive the journey back and reach the ocean).

demotivational poster of despair.com notes: “The journey of a thousand miles sometimes ends very, very badly.”⁷²

B. The Denominator Problem

Empirical researchers ought to collect and not just imagine data for what Professor Marc Galanter, of the University of Wisconsin, called the “bottom layer.”⁷³ Empirical scholars should make an effort when presenting the dispute pyramid or salmon run to start at least one level before injuries.⁷⁴ Researchers should describe the underlying activity in empirical terms to provide context for the number of injuries.⁷⁵ The raw number of people injured at McDonald’s will doubtless sound very high, but in the context of billions and billions served, the number injured may be less startling. I call this the denominator problem.

To say there are a lot of lawsuits can only make sense if one knows the denominator. Consider medical malpractice.⁷⁶ Lawsuits concerning the negligent errors of doctors require a denominator, which could be the number of patients, the number of radiological studies read, or perhaps the total number of patient-related decisions. As I show below, there are very few medical malpractice lawsuits in Colorado, and those suits are a small part of all personal injury litigation. Placing the small number of medical malpractice lawsuits on top of a denominator of opportunities for doctor error makes clearer just how scarce medical malpractice claims are.

For car crashes, there are any number of possible denominators. The Federal Highway Administration of the United States Department of Transportation produces a Highway Statistics Series⁷⁷ with aggregate data for each state.⁷⁸ This series includes a number of different variables against which one might reasonably compare to the number of car crashes.⁷⁹ For example, one might compare the number of crashes to

⁷² *Ambition*, DESPAIR.COM, <https://despair.com/collections/posters/products/ambition?variant=2457295747> [<https://perma.cc/4ZL5-CWJ8>].

⁷³ Galanter, *supra* note 9, at 1099 (“We can imagine a bottom layer consisting of all the events in which, for example, a particular product was used or encountered.”).

⁷⁴ *Id.* at 1101 (beginning dispute pyramids with the “grievances” layer).

⁷⁵ *Id.* at 1099.

⁷⁶ See TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* (2006) (explaining that medical malpractice litigation is the exception, rather than the norm, when doctors injure patients).

⁷⁷ *Highway Statistics 2018*, FED. HIGHWAY ADMIN. [hereinafter *FHWA Stat.* 2018], <https://www.fhwa.dot.gov/policyinformation/statistics/2018/> [<https://perma.cc/TP9G-VFPN>].

⁷⁸ *Highway Statistics Series: State Statistical Abstracts 2012—Colorado*, FED. HIGHWAY ADMIN. [hereinafter *FHWA Colo. Abstract* 2012], <https://www.fhwa.dot.gov/policyinformation/statistics/abstracts/2012/co.cfm> [<https://perma.cc/543S-H9HG>].

⁷⁹ *Id.*

the state's population or the number of driving licenses in the state.⁸⁰ The more drivers a state has, the more crashes there would likely be. Likewise, the number of vehicle registrations in the state would seem to correlate with how often drivers crash cars.⁸¹ However, neither the number of licenses nor the number of cars would take into account visitors from outside the state, which could make a difference in Colorado, which has a substantial tourism industry.⁸²

Another possible denominator might be the length of roadways. The Highway Administration collects data on "public road length," which measures just how much road there is.⁸³ Even more specific, "functional system length" also includes the total length of all lanes, so that a four-lane road measures twice what a two-lane road measures.⁸⁴ But, does more road lead to more or fewer crashes?

The National Highway Traffic Safety Administration uses all these variables as denominators. In the series titled "Traffic Safety Facts," NHTSA reported traffic fatality and injury rates per population, licensed drivers, registered motor vehicles, and, finally, vehicle-miles traveled.⁸⁵ Doubtless, a complex multiple regression study incorporating all the different data is possible, though likely not comprehensible.

Vehicle-miles traveled is the best broadest denominator for use with the number of car crashes as the numerator. Transportation engineers and highway departments use vehicle-miles traveled ("VMT") to measure annual traffic.⁸⁶ NHTSA reports fatalities and injuries per million VMT.⁸⁷ Intuitively, the more miles cars travel, the more crashes one would expect. Whether creeping along in rush-hour traffic on the 405 in Los Angeles somehow alters the correlation between crashes and miles traveled is not a question I am prepared to answer.

Furthermore, VMT is the best datum for the additional layer that I propose for dispute pyramids generally. To understand whether many or just a few people are suing Walmart, one needs to know how many customers there are. The number of Walmart customers multiplied by their time inside the store is a better analogy to

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See generally DEAN RUNYAN ASSOCS., THE ECONOMIC IMPACT OF TRAVEL ON COLORADO 2000–2018P (June 2019), <https://industry.colorado.com/sites/default/files/COImp%20-%20with%20National.pdf> [<https://perma.cc/XXP6-E544>].

⁸³ FHWA Colo. Abstract 2012, *supra* note 78.

⁸⁴ *Id.*

⁸⁵ NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 812806, TRAFFIC SAFETY FACTS 2017 (2019) [hereinafter NHTSA REPORT 2017], <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812806> [<https://perma.cc/Q2RE-MC7Z>].

⁸⁶ See FHWA Stat. 2018, *supra* note 77 ("The FHWA uses daily vehicle-miles of travel . . . as the primary measure of travel activity on the Nation's highway systems."). See generally NHTSA REPORT 2017, *supra* note 86 (using VMT to measure vehicle-accident rates).

⁸⁷ NHTSA REPORT 2017, *supra* note 86, at 84.

VMT. Do law students often sue their law schools?⁸⁸ The number of suits means nothing without the number of students and law schools. Likewise, with doctors sued for malpractice: how many patients do they treat? For every claim about the frequency of litigation that includes a temporal marker like “often,” “frequently,” or “increasingly,” an appropriate denominator is crucial. That is, researchers need to compute injury rates and not just the number of injury cases.

Plaintiffs filed the lawsuits that this Article analyzes in 2015.⁸⁹ Mostly, the crashes did not happen in 2015. Because the statute of limitations for filing an automobile-related personal injury lawsuit is three years in Colorado,⁹⁰ most of the driving that led to the crashes took place in 2012 and 2013. More specific detail on the time between injury and the filing of lawsuits is below.⁹¹ In 2012, Colorado saw 46,769 million VMT with 46,968 million the following year.⁹² Averaging the two yields 46,868 million vehicle-miles. This denominator is, of course, imperfect. Some plaintiffs filed their 2015 lawsuits within months of their injuries (data for time of filing are below), so I might instead vary the calculation of the denominator in some fussier way that would add nothing to the analysis.

C. Number of Injury Crashes in Colorado

The next empirical step is to join the roughly 46,868 million VMT to the dispute pyramid using the number of injury crashes. When law enforcement officers—police, highway patrol, sheriffs—respond to a car crash, they fill out a document called, until 2019, a Traffic Accident Report (“TAR”).⁹³ The report calls for a variety of

⁸⁸ For examples of law students suing their law schools, see *Gomez-Jimenez v. N.Y.L. Sch.*, 943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012), *aff'd*, 956 N.Y.S.2d 54 (N.Y. App. Div. 2012); *Harnish v. Widener Univ. Sch. of L.*, 931 F. Supp. 2d 641 (D.N.J. 2013); *Austin v. Albany L. Sch. of Union Univ.*, 957 N.Y.S.2d 833 (N.Y. Sup. Ct. 2013); *Casey v. Fla. Coastal Sch. of L., Inc.*, No. 3:14-CV-01229, 2015 WL 10818746 (M.D. Fla. Sept. 29, 2015); Sixth Amended Complaint, *Alburda v. Thomas Jefferson Sch. of L.*, No. 37-2011-00091898, 2015 WL 10634633 (Cal. Super. Oct. 20, 2015); Complaint at 4–5, *Barkhordar v. Harv. Univ.*, No. 1:20-CV-11203, 2020 WL 3444027 (D. Mass. June 22, 2020); *Rojas v. Fla. Bd. of Governors Found., Inc.*, Filing No. 107008592 (Fla. Leon Cnty. Ct. May 4, 2020); Nathan Hale, *Fla. Sued for Campus Fees During COVID-19 Shutdown*, LAW360 (May 4, 2020), <https://www.law360.com/articles/1270285/fla-sued-for-campus-fees-during-covid-19-shutdown> [<https://perma.cc/ST7Z-XWUE>].

⁸⁹ The data for car crash complaints and answers are from January through June of 2015. I analyzed 298 complaints and 356 answers.

⁹⁰ COLO. REV. STAT. § 13-80-101(1)(n)(I) (2016).

⁹¹ See *infra* Section III.D.

⁹² *Highway Statistics 2013*, FED. HIGHWAY ADMIN. [hereinafter *FHWA Statistics 2013*], <https://www.fhwa.dot.gov/policyinformation/statistics/2013/> [<https://perma.cc/8DLB-BWVK>]; *Highway Statistics 2012*, FED. HIGHWAY ADMIN. [hereinafter *FHWA Statistics 2012*], <https://www.fhwa.dot.gov/policyinformation/statistics/2012/> [<https://perma.cc/86C9-3C2D>].

⁹³ See COLO. STATE TRAFFIC RECS. ADVISORY COMM., INVESTIGATING OFFICER’S TRAFFIC ACCIDENT REPORTING MANUAL 14–15 (2006) [hereinafter *COLORADO TRAFFIC ACCIDENT REPORTING MANUAL*], <https://www.colorado.gov/pacific/sites/default/files/Accident%20Reporting%20Manual%20R>

information about the vehicles involved, the drivers, the road conditions, indications of alcohol or drug use, and, of course, the injuries.⁹⁴ Like most law enforcement agencies in the United States and many throughout the world, Colorado uses a five-point scale to code the severity of injuries.⁹⁵ The National Safety Council (“NSC”) established the KABCO scale, as it is called, in 1966.⁹⁶ For crashes with a fatality, police use a 4 or K for Killed; Colorado police use the numbers not the letters. Next is an incapacitating injury, which the police code as 3 or A. Non-incapacitating injuries are 2 (B); possible injuries are 1 (C); and no injury is 0 (O). Since 2012, something called the Minimum Model Uniform Crash Criteria (“MMUCC”) of the Federal Highway Administration has shifted the standard for A from “incapacitating [injury]” to “suspected serious injury” and for B from “non-incapacitating [injury]” to “suspected minor injury.”⁹⁷

With regard to statewide reporting of motor vehicle injuries, an interesting bit of data selection and bias by the state of Colorado emerges. The actual form that Colorado law enforcement officials used from 2006 to 2019 differed from the MMUCC and NSC language.⁹⁸ Colorado’s Traffic Accident Report identified 3 (A) as “evident – incapacitating injury”; 2 (B) as “evident – non-incapacitating injury”; and 1 (C) as “complaint of injury.”⁹⁹ The chief engineer for the Colorado Department of Transportation aggregates data from the TARs and, annually, provides monthly data by county for the number of fatalities, injuries, and property damage-only (“PDO”) accidents.¹⁰⁰ The first category includes the 4s; the second includes 3s, 2s, and 1s, and the last category, with no personal injuries and damage only to property are the 0s.¹⁰¹ For the period from July of 2012 through June of 2013, the chief engineer reported 103,687 crashes for this period with 25,760 injury accidents; 438 fatalities; and 77,489

ev%2007-06.pdf [https://perma.cc/W36Y-UFL9]. In 2019, the Colorado Department of Transportation updated the form and renamed it the Traffic *Crash* Report. COLO. DEP’T OF REVENUE, STATE OF COLORADO TRAFFIC CRASH REPORT (2019) [hereinafter COLORADO TRAFFIC CRASH REPORT], <https://www.codot.gov/about/committees/strac/dr3447-folder/dr3447-crash-report-official-released-form> [https://perma.cc/C3WE-47UQ].

⁹⁴ See COLORADO TRAFFIC ACCIDENT REPORTING MANUAL, *supra* note 93, at 14, 37, 45.

⁹⁵ *Id.* at 49.

⁹⁶ Beau Burdett et al., *Accuracy of Injury Severity Ratings on Police Crash Reports*, TRANSP. RSCH. REC. 58, 58–59 (2015).

⁹⁷ *Id.* at 59.

⁹⁸ COLORADO TRAFFIC ACCIDENT REPORTING MANUAL, *supra* note 93, at 14.

⁹⁹ *Id.* at 49.

¹⁰⁰ The data flow from the TARs to the Department of Revenue and thence to the Colorado Department of Transportation. For a description of the process for handling and cleaning the data, see OFF. OF THE CHIEF ENGINEER, COLO. DEP’T OF TRANSP., ANNUAL TRAFFIC ACCIDENT REPORT (2018) [hereinafter CDOT ANNUAL ACCIDENT REPORT], <https://www.codot.gov/safety/traffic-safety/assets/crash-data/county-crashes-by-severity> [https://perma.cc/6M9S-4GXN].

¹⁰¹ *Id.*

non-injury or PDO crashes.¹⁰² The proportion of injury crashes, at 24.8% of all crashes, is roughly consistent with the national figure of just under 30% of crashes being injury crashes.¹⁰³ PDO crashes are about 70% of all crashes nationally and just about 75% in Colorado.¹⁰⁴

A different division of the Colorado Department of Transportation reported lower figures for car crash injuries in the state: just 9,900 injury crashes for 2012 and a slightly lower number, 9,649, for 2013.¹⁰⁵ The average of these two figures, 9,775, is just 37.9% of the Chief Engineer's figure for injury crashes.¹⁰⁶ The reason for the difference is that a Colorado Department of Public Health and Environment injury epidemiologist writes the report on annual injuries for the Colorado Department of Transportation, and she disregards injuries that law enforcement officers code as 1 or C on the KABCO scale.¹⁰⁷ "Yes, that is correct," the epidemiologist explained to me, "I do not count the 'complaint of injury' as an injury. Only evident injuries (both incapacitating and non-incapacitating)."¹⁰⁸ Her published reports of just the 3s and 2s sometimes call these "serious injuries" and other times misleadingly suggest the 3s and 2s constitute all the injuries.¹⁰⁹

There are numerous studies comparing the KABCO evaluations of police officers with those of medical personnel.¹¹⁰ These studies confirm, unsurprisingly, that

¹⁰² *Id.* at 7–8.

¹⁰³ There were roughly 5,615,000 crashes in the United States in 2012. There were 31,006 fatal crashes. 1,634,00 or 29.1% were injury crashes, and 3,950,000 or 70.3% were PDO crashes. FED. HIGHWAY ADMIN. & FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., 2015 STATUS OF THE NATION'S HIGHWAYS, BRIDGES, AND TRANSIT: CONDITIONS AND PERFORMANCE ES-8 (2015) [hereinafter FHWA 2015 STATUS REPORT], <https://www.fhwa.dot.gov/policy/2015cpr/pdfs/2015cpr.pdf> [https://perma.cc/33MA-VGPR]; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS, DOT HS 811 856, at 4 (2013) [hereinafter NHTSA 2013 TRAFFIC SAFETY FACTS], <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811856> [https://perma.cc/44KN-FQR4].

¹⁰⁴ CDOT ANNUAL ACCIDENT REPORT, *supra* note 100, at 7–8; NHTSA 2013 TRAFFIC SAFETY FACTS, *supra* note 103, at 4; accord FHWA 2015 STATUS REPORT, *supra* note 103, at ES-8.

¹⁰⁵ COLO. DEP'T OF TRANSP., PROBLEM IDENTIFICATION REPORT 10 (2018) [hereinafter CDOT PROBLEM REPORT], <https://www.codot.gov/safety/safetydata/colorado-problem-identification-id-reports/archived-problem-id-reports/2018-problem-id-report> [https://perma.cc/58ZS-T7YZ].

¹⁰⁶ *Id.*; CDOT ANNUAL ACCIDENT REPORT, *supra* note 100, at 7–8.

¹⁰⁷ Email on file with the author. In her report, the epidemiologist refers to and conflates injuries and what she calls serious injuries. CDOT PROBLEM REPORT, *supra* note 105, at 10–12.

¹⁰⁸ Email on file with author. The language concerning incapacitating and non-incapacitating is from earlier versions of the KABCO scale.

¹⁰⁹ CDOT PROBLEM REPORT, *supra* note 105.

¹¹⁰ See, e.g., Cynthia Burch et al., *A Comparison of KABCO and AIS Injury Severity Metrics Using CODES Linked Data*, 15 TRAFFIC INJ. PREVENTION 627, 627–30 (2014); *id.* at 630 ("A[bbreviated] I[injury] S[cale] codes are determined by clinical personnel who have access to

physicians and medical personnel do a better job at diagnosis than police, but the studies also show no basis for excluding KABCO Cs from the count of those injured.¹¹¹ This Article therefore uses the chief engineer's totals for car crash injuries and not the lower figure of the injury epidemiologist.

D. Number and Type of Personal Injury Lawsuits in Colorado

During 2012–13, there were 25,760 motor vehicle crashes with injuries and 46,868 million vehicle-miles traveled.¹¹² This is 0.55 injury crashes for each million VMT. Car crash lawsuits may follow injury crashes. Do they usually?

Car crash lawsuits dominate the various categories of personal injury litigation in Colorado.¹¹³ The same is true in other states.¹¹⁴ Lawyers file lawsuits online in

all medical records for the individual, whereas KABCO is determined by police officers at the scene of the crash based on appearance and circumstances, not clinical evaluation.”); *see also* Burdett et al., *supra* note 96 (comparing accuracy of KABCO evaluations by law enforcement officers to actual health outcomes as rated by medical practitioners); Charles P. Compton, *Injury Severity Codes: A Comparison of Police Injury Codes and Medical Outcomes as Determined by NASS CDS Investigators*, 36 J. SAFETY RSCH. 483, 483–84 (2005) (same); Charles M. Farmer, *Reliability of Police-Reported Information for Determining Crash and Injury Severity*, 4 TRAFFIC INJ. PREVENTION 38, 38–44 (2003) (same); K.L. Tsui et al., *Misclassification of Injury Severity Among Road Casualties in Police Reports*, 41 ACCIDENT ANALYSIS & PREVENTION 84, 84–89 (2009) (same).

¹¹¹ Burch et al., *supra* note 110, at 629.

¹¹² CDOT ANNUAL ACCIDENT REPORT, *supra* note 100, at 7–8; *FHWA Statistics 2013*, *supra* note 92, at VM-2 (5.4.1, vehicle miles of travel by functional system), <https://www.fhwa.dot.gov/policyinformation/statistics/2013/vm2.cfm> [<https://perma.cc/E4RT-7ADZ>]; *FHWA Statistics 2012*, *supra* note 92, at VM-2 (same), <https://www.fhwa.dot.gov/policyinformation/statistics/2012/vm2.cfm> [<https://perma.cc/FP3K-4PPS>].

¹¹³ COLO. JUD. BRANCH, ANNUAL STATISTICAL REPORT: FISCAL YEAR 2015, at 29 (2015) [hereinafter COLORADO JUDICIAL STATISTICS 2015], https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2015/FY2015%20Annual%20Statistical%20Report.pdf [<https://perma.cc/X6JK-DFFQ>].

¹¹⁴ *See* CT. STAT. PROJECT, STATE COURT CASELOAD DIGEST: 2018 DATA 10 (2020), http://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf [<https://perma.cc/AL5L-465T>] (“In the 16 states who provided a composition of tort case types . . . most are dominated by automobile accident cases.”); *see also* CHIEF ADM’R OF THE CTS., NEW YORK STATE UNIFIED COURT SYSTEM: 2019 ANNUAL REPORT 36 (2019), https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf [<https://perma.cc/935L-V7Y2>] (reporting that of 452,414 civil filings in N.Y. State Supreme Courts in 2019, 16% were motor vehicle related, third to uncontested matrimonials (20.5%) and residential foreclosures (22%)); JUD. COUNCIL OF CAL., 2019 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2008–09 THROUGH 2017–18, at 112 (2019), <https://www.courts.ca.gov/documents/2019-Court-Statistics-Report.pdf> [<https://perma.cc/92S8-HJRK>] (reporting 41,839 motor vehicle related civil filings in California Superior Courts, compared to 23,402 filings of all other personal injury claims); OFFICE OF CT. ADMIN. & TEX. JUD. COUNCIL, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2019, at 5 (2019) <https://www.txcourts.gov/media/1445760/fy-19-annual-statistical->

Colorado, and when e-filing, the lawyer must select a case type or category for the litigation.¹¹⁵ Filing clerks sometimes confirm that the lawyer picked the right case type.¹¹⁶ Some of the non-tort case types are, for example, breach of contract, declaratory judgment, goods sold and delivered, note, replevin, and sexual harassment.¹¹⁷ The state's category titles for personal injury and other tort lawsuits include personal injury, personal injury–motor vehicle, wrongful death, and wrongful death–motor vehicle.¹¹⁸ A separate case type called, simply, negligence, might be about personal injury or could be property damage.¹¹⁹ There is also a case type called property damage.¹²⁰ Finally, there is a category titled malpractice, which includes claims against medical providers who cause personal injuries but also includes claims against lawyers, accountants, and architects—claims that may be solely for economic or property damage.¹²¹

Because my subthesis is that car crashes dominate personal injury litigation, I have aggregated all the various categories of tort claims that do or *might* include personal injuries for comparison with car crash cases. The six case types in alphabetical order are malpractice, negligence, personal injury, personal injury–motor vehicle, wrongful death, and wrongful death–motor vehicle. I have not included the case types of fraud, property damage, or public nuisance.¹²² My selection of categories against which I compare car crash cases is overbroad or overinclusive, though not, I think, by much.

The six categories of case types comprise Colorado's personal injury lawsuits. For 2015, Colorado District Courts saw total filings of 224,591 new cases of all types with civil filings being the largest category (101,112), followed by criminal (40,903), domestic relations (34,841), juvenile (24,681), and probate (15,728).¹²³

report.pdf [<https://perma.cc/2244-M4QW>] (reporting that in all Texas courts in 2019, 55,300 personal injury or property damage cases filed involved a motor vehicle, compared to 13,622 injury or damage cases not involving a motor vehicle).

¹¹⁵ COLO. JUD. BRANCH, ATTORNEY TRAINING MANUAL: COLORADO COURTS E-FILING 76 (2017), https://www.courts.state.co.us/userfiles/file/Administration/ITS/EFiling/Training_Manual_Attorney.pdf [<https://perma.cc/6DC3-ACQL>].

¹¹⁶ *Id.* at 72.

¹¹⁷ *See generally* COLORADO JUDICIAL STATISTICS 2015, *supra* note 113.

¹¹⁸ *Id.* at 25, 27.

¹¹⁹ *Id.* at 25.

¹²⁰ *Id.* at 26.

¹²¹ *Id.* at 25.

¹²² Fraud, though a tort, does not likely lead to personal injury. Property damage is what it says. And public nuisance is special—it may include personal injury but has comparatively few cases. *Id.* at 24–27.

¹²³ *Id.* at 17.

Personal injury lawsuits were just shy of five percent of the total number of new civil filings.¹²⁴ The distribution of new personal injury cases in 2015 was:

Table 1: 2015 Colorado Personal Injury Cases Filed

Personal Injury Case Types	2015 Cases Filed	Percentage
Malpractice	212	4.3%
Negligence	450	9.1%
Personal Injury	1,217	24.6%
Personal Injury–Motor Vehicle	2,974	60.2%
Wrongful Death	64	1.3%
Wrongful Death–Motor Vehicle	27	0.5%
Total ¹²⁵	4,944	100.0%

As I noted above, the number of malpractice cases is tiny. My best estimate, based on prior research, is that roughly two-thirds of the malpractice lawsuits are filed against physicians—around 140 cases—hardly the reign of terror that physicians fear and not really enough lawsuits to allow for tort law’s regulatory function.¹²⁶

Motor vehicle injuries dominate the personal injury category with 60.2% of all filings. This case type, personal injury–motor vehicle, is the category of answers that I analyze. Wrongful death cases involving motor vehicles, which I have not included in my sample of answers, totaled just 27 for the year and amounted to 0.5% of all personal injury filings.

The 2,974 car crash lawsuits of 2015 amounted to 2.9% of all the new civil actions in 2015.¹²⁷ Personal injury litigation is but a small component of all civil litigation in Colorado—not a flood and certainly not enough to overwhelm the courts.

Comparing the filed lawsuits with the number of injury crashes, Colorado had 2,974 motor vehicle injury lawsuits filed in 2015 from a total of 25,760 injury car crashes. That is, 11.5% of injury car crashes or just under one in nine resulted in a

¹²⁴ *Id.* at 25–29.

¹²⁵ *Id.*

¹²⁶ BAKER, *supra* note 76, at 23.

¹²⁷ COLORADO JUDICIAL STATISTICS 2015, *supra* note 113, at 29.

personal injury lawsuit. Every million vehicle-miles in Colorado yielded 0.061 personal injury lawsuits.¹²⁸

For ease of reference, then, Colorado had about 100,000 civil lawsuits in 2015 with 5% of those being personal injury lawsuits of some sort.¹²⁹ Sixty percent of all personal injury suits or 3% of all civil suits were car crash injury lawsuits. Coincidentally, the state also had just over 100,000 motor vehicle crashes with roughly one-quarter having injuries.¹³⁰ For 88.5% of the injury car crashes, no litigation ensued. To be sure, there were insurance claims without litigation for an uncertain number of these injury car crashes, and the settlement of many of these insurance claims—without litigation—is the subject of Professor Engstrom’s studies.¹³¹

Only one in nine injury car crashes yields a lawsuit. Once filed, insurance defense lawyers answer the complaints on behalf of the insured defendants. Parts III and IV of this Article discuss the work of these lawyers, nearly all of whom fall into the category of insurance defense mill lawyers.

III. ANSWERS TO CAR CRASH COMPLAINTS

The real empirical focus of this Article is on the work of insurance defense mill lawyers in answering complaints that lawyers file on behalf of people injured in car crashes. I have already shown that only about one-quarter (24.8%) of Colorado’s car crashes result in personal injuries.¹³² There is roughly one injury car crash for every two million VMT.¹³³ If while biking with your friends, you pass an injury car crash on the highway or street in Colorado, I have shown that you can authoritatively say to your friends that there is just a one in nine chance that there will be a lawsuit in connection with the crash.¹³⁴ But, what about insurance claims, your friends will ask? There, you can say that the data are as yet unclear.¹³⁵

¹²⁸ This figure is consistent with Engstrom’s summary of existing empirical research. Engstrom, *When Cars Crash*, *supra* note 47, at 299–300 (“[O]f those who initiate claims for compensation, roughly half hire lawyers, while only a small proportion (11%, by one estimate) actually file lawsuits.”).

¹²⁹ *See supra* Table 1 and text accompanying notes 124–25.

¹³⁰ *See supra* text accompanying note 102.

¹³¹ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1487 (“The settlement of routine personal injury claims, especially when no lawsuit is initiated and trial is not a realistic alternative, remains poorly understood.”).

¹³² *See supra* note 103 and accompanying text.

¹³³ *See supra* text accompanying note 113.

¹³⁴ *See supra* text accompanying note 128.

¹³⁵ Engstrom, *When Cars Crash*, *supra* note 47, at 299–300 (reporting, based upon data that an insurance industry research group sells, that roughly half of those injured in motor vehicle accidents make an informal or formal attempt to collect from another party to the accident, and of those who initiate claims, roughly half hire lawyers, and only 11% actually file lawsuits).

In the first half of 2015, plaintiffs' lawyers filed 1,538 civil lawsuits of the case type "personal injury–motor vehicle" in Colorado.¹³⁶ I sampled enough of these lawsuits to achieve a margin of error of five percent. I aimed for 300 lawsuits, which I selected using a random number generator from all car-crash lawsuits filed. After the counting was done, two suits turned out to have answers missing from the case files, so the sample includes 298 different lawsuits. There were two defendants in forty-eight suits, three in nine suits, and five in one more suit, so the total number of answers for the 298 suits could have been as high as 357, but one answer was missing from the case files. This Article therefore presents an analysis of 356 answers to 298 different lawsuits. The 298 lawsuits are 19.4% of the total of 1,538 suits filed during the first six months of 2015.

The margin of error is 5% with a 95% confidence level for this sample.¹³⁷ When I present a number that is a description of some aspect of the answers using a percentage, I intend that descriptive percentage to represent the answers filed to all of the 1,538 lawsuits filed during the same time period. The reader, however, should know that my percentages should be read as plus or minus five percent. Note, however, that this sampling error applies only to this section of the Article. The numbers before this point in the Article, concerning the total number of crashes, represent the entire universe or population of crashes. For total miles traveled, I adopted the state of Colorado's figures.

Regarding answers, Colorado Rules of Civil Procedure 8(b) directs that "[a] party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments of the adverse party."¹³⁸ As I noted in the introduction, Colorado Rule 8(b) offers three clear options to a defendant answering the averments of a complaint.¹³⁹ The defendant may admit or deny the averments or state that he is "without knowledge or information sufficient to form a belief as to the truth of an averment," which statement "has the effect of a denial."¹⁴⁰ For each allegation, then, the answer is yes, no, or I don't know.

The late Judge Milton Shadur, Federal District Court Judge for the Northern District of Illinois, is the hero of this story.¹⁴¹ Discussing Rule 8(b) of the Federal Rules of Civil Procedure, Judge Shadur noted:

¹³⁶ See COLORADO JUDICIAL STATISTICS 2015, *supra* note 113, at 29.

¹³⁷ *Margin of Error*, STAT TREK, <https://stattrek.com/statistics/dictionary.aspx?definition=margin%20of%20error> [<https://perma.cc/NVS3-63SD>].

¹³⁸ COLO. R. CIV. P. 8(b). Similarly, FED. R. CIV. P. 8(b)(1) directs that "[i]n responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party." Colorado uses the term averment while the federal rules use allegation and claim.

¹³⁹ See *supra* text accompanying notes 3–4.

¹⁴⁰ COLO. R. CIV. P. 8(b). FED. R. CIV. P. 8(b)(5) directs that "[a] party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial."

¹⁴¹ Thomas D. Russell, *Disrupting Frivolous Defenses*, 52 LOY. U. CHI. L. J. 911 (2021) (Article at Part II), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805181; Tony

Even though the second sentence of Rule 8(b) marks out an unambiguous path for any party that seeks the benefit of a deemed denial when he, she or it can neither admit outright nor deny outright a plaintiff's allegation (or plaintiff's "averment," the word used in Rule 8(b)), too many lawyers, feel a totally unwarranted need to attempt to be creative by straying from that clear path.¹⁴²

Judge Shadur's order and accompanying appendix in *State Farm v. Riley* are the models that I hope the state court judges in Colorado and other states will adopt regarding answers by insurance defense mill lawyers.¹⁴³

Of course, Judge Shadur wrote regarding the Federal Rules of Civil Procedure. Colorado's Rule 8 is essentially identical to Federal Rule of Civil Procedure 8, though slightly different in form and organization. As noted above, Colorado still uses the word "averment," but Federal Rule of Civil Procedure 8 now uses "allegation" or "claim."¹⁴⁴ These words are interchangeable. Colorado's Rule of Civil Procedure directs the defendant to "admit or deny the averments of the adverse party,"¹⁴⁵ and Federal Rule of Civil Procedure 8 directs that the "party must . . . admit or deny the allegations asserted against it by an opposing party."¹⁴⁶ Notably, Colorado's Rule 8 does not limit the averments to which a defendant must respond to only those "asserted against it."¹⁴⁷ The federal rule creates a separate subsection (b)(5) for what a party lacking knowledge or information should do: "[a] party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial."¹⁴⁸ Colorado's Rule 8(b) uses "shall" instead of "must" in a sentence that immediately follows the direction to admit or deny averments: "If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial."¹⁴⁹ One difference between the rules is that the Colorado rule puts the "effect of failure to deny" in a separate section (d) rather than within (b), whereas the federal rule includes the "Effect of Failing to Deny" in 8(b)(6). Perhaps the most meaningful distinction between Colorado's Rule 8(b) and the corresponding federal rule concerns general

Briscoe, *Milton Shadur, Federal Judge Who Oversaw Key Cases Involving Chicago Schools, Cook County Jail, Dies*, CHI. TRIB. (Jan. 16, 2018), <https://www.chicagotribune.com/news/obituaries/ct-met-milton-shadur-obituary-20180116-story.html>; *Shadur, Milton I.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/shadur-milton-irving> (last visited May 26, 2021).

¹⁴² *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 278 (N.D. Ill. 2001).

¹⁴³ See generally *id.*; Russell, *supra* note 141.

¹⁴⁴ COLO. R. CIV. P. 8(b); FED. R. CIV. P. 8(b)(1).

¹⁴⁵ COLO. R. CIV. P. 8(b).

¹⁴⁶ FED. R. CIV. P. 8(b)(1)(B).

¹⁴⁷ *Id.*

¹⁴⁸ FED. R. CIV. P. 8(b)(5).

¹⁴⁹ COLO. R. CIV. P. 8(b).

denials. Both rules allow but do not encourage general denials. Colorado's rule specifically points to Rule 11 as a sanction for a party improperly pleading a general denial.¹⁵⁰

Colorado appellate courts repeatedly have acknowledged that “when the Colorado and Federal Rules of Civil Procedure are essentially identical, case law interpreting the federal rule is persuasive in analysis of the Colorado rule.”¹⁵¹ Because Colorado's Rule 8(b) is largely identical to corresponding federal rule, Colorado judges might readily adopt Judge Shadur's view that lawyers for defendants should answer according to the federal rules. And, because thirty or more states pattern their rules of civil procedure after the federal rules, the same principles apply in most states.¹⁵²

In an appendix to his Memorandum Opinion and Order in *State Farm v. Riley*, Judge Shadur singled out for criticism several different patterns of answer abuse that he observed.¹⁵³ Judge Shadur complained that “too many lawyers” strayed from Rule 8(b)'s “unambiguous path” for deemed denials.¹⁵⁴ “[S]ome members of the same coterie of careless defense counsel,” Judge Shadur noted, demand “strict proof,” whatever that may mean.¹⁵⁵ “Strict proof,” the judge noted, “is nowhere to be found in the Rules (or to this Court's knowledge in any other set of rules or in any treatise on the subject of pleading).”¹⁵⁶ Judge Shadur also singled out in his appendix the refusal to respond to “legal conclusions”;¹⁵⁷ the claim that a document “Speaks for Itself”;¹⁵⁸ and any other failure or refusal to answer an allegation.¹⁵⁹ Judge Shadur also addressed Rule 8(c) and the topic of affirmative defenses in his appendix, which issue I address below.

¹⁵⁰ If the pleader “does . . . intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.” COLO. R. CIV. P. 8(b). *But see* Lewis v. Buckskin Joe's, Inc., 396 P.2d 933, 939 (Colo. 1964) (“Rule 8(b), [COLO. R. CIV. P.] 8(b), outlines procedures to be followed in pleading defenses. Needless to say, the rule contemplates an answer that speaks the truth. The record here clearly demonstrates that none of the eleven above-mentioned denials has any foundation in fact. Compliance with Rule 11, [COLO. R. CIV. P.] 11, should be had in all pleadings. The general denial should not have been filed.”).

¹⁵¹ *See, e.g.*, Forbes v. Goldenhersh, 899 P.2d 246, 249 (Colo. App. 1994).

¹⁵² *See supra* note 3 and accompanying text.

¹⁵³ *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 278–80 (N.D. Ill. 2001). For an extensive analysis of the appendix, see Russell, *supra* note 141, at 922.

¹⁵⁴ *State Farm*, 199 F.R.D. at 278.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 279.

¹⁵⁹ *Id.*

A. Legal Conclusions

In nearly one-third (32.6%) of the answers (116 of 356), Colorado's insurance defense lawyers claimed that they need not respond to any allegation that called for a legal conclusion. Judge Shadur would be angry.¹⁶⁰

There is no basis in either the Colorado Rules of Civil Procedure or the Federal Rules of Civil Procedure for the defense attorneys' refusal to reply to an allegation by claiming that it calls for a legal conclusion.¹⁶¹ Once again, Rule 8(b) provides the option of admitting or denying.¹⁶² The defendant may also state that he or she lacks sufficient information—if that's the truth, and the rules deem the allegation denied. Judge Shadur explained that:

Another regular offender is the lawyer who takes it on himself or herself to decline to respond to an allegation because it “states a legal conclusion.” That of course violates the express Rule 8(b) requirement that *all* allegations must be responded to. But perhaps even more importantly, it disregards established law from the highest authority on down that legal conclusions are an integral part of the federal notice pleading regime¹⁶³

Judge Shadur's point concerning legal conclusions is distinct from the well-known *Iqbal* and *Twombly* issues.¹⁶⁴ Together, *Iqbal* and *Twombly* make clear that a plaintiff's allegations may not be purely conclusory. A car crash plaintiff may not simply plead that the defendant was negligent. The plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”¹⁶⁵ However, along with those facts, the plaintiff may plead legal conclusions.

Colorado's insurance defense mill lawyers fall into Judge Shadur's category of “regular offender” with their answers to allegations that include legal conclusions. A good example of the nearly one-third of answers that include such a claim is defense attorney Andrew LaFontaine, Esq., of the firm of Stuart S. Jorgensen & Associates, in his answer in a simple, one-plaintiff, one-defendant car crash claim.¹⁶⁶ Jorgensen & Associates are employees of State Farm Insurance and defend State Farm insureds.¹⁶⁷

¹⁶⁰ See Russell, *supra* note 141, at Sections VII.B, VIII.B, and IX.B.

¹⁶¹ *State Farm*, 199 F.R.D. at 278.

¹⁶² FED. R. CIV. P. 8(b).

¹⁶³ *State Farm*, 199 F.R.D. at 278.

¹⁶⁴ See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (discussing federal pleading requirements); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (discussing federal pleading requirements).

¹⁶⁵ *Twombly*, 550 U.S. at 570.

¹⁶⁶ Answer and Jury Demand at 1, para. 5, *Witman v. Kraus*, No. 2015CV30800 (Colo. Dist. Ct. May 28, 2015) (Denver Cnty.) [hereinafter *Witman Answer*].

¹⁶⁷ *Stuart Jorgensen & Associates: State Farm Insurance*, BUZZFILE, <http://www.buzzfile.com/business/State-Farm-Insurance-303-657-2078> [https://perma.cc/3ZGQ-RN9K]. The Rules of Professional Conduct require firms in which the

Jorgensen & Associates answered 6.8% (25 of the 356) complaints in this study's sample. In response to one plaintiff's allegation that "[j]urisdiction and venue are appropriate pursuant to C.R.S. § 13-1-124 and C.R.C.P., Rule 98(c)(5)," Mr. LaFontaine answered: "[c]alls for a legal conclusion."¹⁶⁸ This response has no meaning or utility even to Mr. LaFontaine. The defense mill attorney then stated that "[j]urisdiction and venue are not presently disputed."¹⁶⁹ That being so, why comment on the legal conclusion? For good measure, Mr. LaFontaine then added "[d]enied in all other respects."¹⁷⁰ But there's nothing left to deny. Mr. LaFontaine might have simply answered "Admit" in response to the plaintiff's pleading of jurisdiction and venue.

Other insurance defense mill lawyers offer more extensive objections to the pleading of legal conclusions. Nina Hammon Jahn, Esq., is a senior trial attorney for American Family Insurance.¹⁷¹ Like the attorneys at Jorgensen & Associates, Ms. Jahn is an employee of the insurer—an in-house attorney for American Family.¹⁷² Her answer includes her email address using the amfam.com domain.¹⁷³ Her office answered 4.9% of this study's complaints. There is no pretense, as with the firm name Stuart S. Jorgensen & Associates, to being anything other than an insurance defense mill lawyer. In her three-page answer to a relatively simple four-page complaint against two defendants, Ms. Jahn amply refuses to respond to allegations that she identifies as including legal conclusions.¹⁷⁴ In her answer, which she filed on behalf of a driver for a transport firm, Ms. Jahn states that "[w]ith regard to paragraphs 4, 5, 8, 12, 13, 14, 15, 17, 18, 19, 20, 22, 23, 26 and 27 of the Plaintiff's Complaint, Defendant does not respond as the allegations contained in these paragraphs calls [sic]

insurance defense lawyers are employees of the insurers to be clear about their "captive" status. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 59.15 (4th ed. Supp. 2020-2) ("Although the majority of courts addressing the issue agree that 'captive law firm' arrangements are not per se improper, there is almost universal agreement that the law firms may not hold themselves out as 'normal' law firms, but must indicate on their letterhead and other professional designations that the lawyers practicing in the firm are employees of the carrier, not partners or members of an independent law firm.").

¹⁶⁸ *Witman* Answer, *supra* note 166, at 1, para. 5; Complaint for Damages and Jury Demand para. 5, at 1, *Witman v. Kraus*, No. 2015CV30800 (Colo. Dist. Ct. Mar. 5, 2015) (Denver Cnty.).

¹⁶⁹ *Witman* Answer, *supra* note 166, at 1, para. 5.

¹⁷⁰ *Id.*

¹⁷¹ *Nina Hammon Jahn*, LINKEDIN, <https://www.linkedin.com/in/nina-hammon-jahn-2646a14a/> (last visited Mar. 9, 2021).

¹⁷² *Id.*

¹⁷³ Answer to Complaint and Jury Demand at 1, *Anthony v. Transport Oh*, No. 2015CV30639 (Colo. Dist. Ct. Sept. 8, 2015) (Boulder Cnty.), Filing ID No. 8016DD52BB577 [hereinafter *Malvaes-Ortiz Answer to Anthony Complaint*].

¹⁷⁴ *Id.* at 1, para. 4.

for a conclusion of law.”¹⁷⁵ The complaint included thirty-one allegations.¹⁷⁶ American Family’s attorney refused to answer fifteen of them because the allegations called, she claimed, for “a conclusion of law.”¹⁷⁷ What is Ms. Jahn complaining about?

American Family’s lawyer first objected to a simple allegation about venue. Plaintiff alleged that “Venue is proper in Boulder County, the county of residence of Defendant Transport Oh.”¹⁷⁸ Ms. Jahn is correct that venue is a legal conclusion, though she is incorrect that she need not respond to legal conclusions.¹⁷⁹ Colorado Rule of Civil Procedure 98(c)(1) specifies that “an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action.”¹⁸⁰ The plaintiff therefore properly and crisply pleaded the residence of the defendant transport company.¹⁸¹ Ms. Jahn regarded the entire allegation as tainted by the legal conclusion of venue and simply ignored the factual allegation that “Transport Oh” resided in Boulder County.¹⁸² By failing to deny that or any part of an allegation, Ms. Jahn admitted the allegation, as Rule 8 makes clear that “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.”¹⁸³ But one doubts that the defense lawyer would agree that she had admitted anything.

Ms. Jahn next refused to answer the plaintiff’s allegation that “Jurisdiction is proper in District Court, a court of general jurisdiction.”¹⁸⁴ This is folly. A judge who cared might take offense.

After refusing to respond to the legal conclusions that the plaintiff pleaded regarding venue and subject matter jurisdiction, Ms. Jahn refused to respond to the plaintiff’s paragraph eight that “[a]t all relevant times hereto, Mr. Malvaes-Ortiz was operating the International [truck] in the course and scope of his employment and for the benefit of his employer, Transport Oh.”¹⁸⁵ Without using the legal words vicarious liability nor the Latin words respondeat superior, the plaintiff’s attorney was properly pleading facts sufficient to establish that the plaintiff was on the job when the crash

¹⁷⁵ *Id.*

¹⁷⁶ See generally Complaint and Jury Demand, *Anthony*, No. 2015CV30639 [hereinafter *Anthony* Complaint and Jury Demand].

¹⁷⁷ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

¹⁷⁸ *Anthony* Complaint and Jury Demand, *supra* note 176, para. 4, at 1.

¹⁷⁹ See *supra* text accompanying note 158.

¹⁸⁰ COLO. R. CIV. P. 98(c)(1).

¹⁸¹ *Anthony* Complaint and Jury Demand, *supra* note 176, at 1, para. 4.

¹⁸² Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

¹⁸³ COLO. R. CIV. P. 8(d).

¹⁸⁴ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4; *Anthony* Complaint and Jury Demand, *supra* note 176, at 1, para. 5.

¹⁸⁵ *Anthony* Complaint and Jury Demand, *supra* note 176, at 2, para. 8.

involving the International truck happened. As above, Ms. Jahn throws the “legal conclusion” blanket over the entire allegation.¹⁸⁶ She does not stop to admit, for example, that the plaintiff worked for Transport Oh. But of course, what is an allegation of employment if not a “legal conclusion?”

Ms. Jahn next objected to a trio of allegations that the plaintiff’s lawyer set forth in an effort to establish the defendant driver’s negligence per se. First, the plaintiff’s lawyer alleged that “[a]t the time of the collision, C.R.S. § 42-4-1008 was in full force and effect.”¹⁸⁷ Ms. Jahn refused to answer this allegation because, she claimed, it’s a legal conclusion.¹⁸⁸ Parsing the language, is the legal conclusion “at the time of the collision,” “full force,” or full “effect”?

There was a legitimate basis on which Ms. Jahn might complain about the plaintiff’s attempt to invoke section 1008 of the Motor Vehicle Code. Section 1008, which is titled “following too closely,” specifies that “[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent.”¹⁸⁹ As I teach my torts students, statutes that prescribe “reasonable” behavior are not candidates for plaintiffs’ lawyers pleading negligence per se.¹⁹⁰ A panel of Colorado’s Court of Appeals had made this exact point with regard to section 1008 just four months before Ms. Jahn filed her answer. For the court of appeals, Judge Hawthorne held that “[w]here, as with sections 42-4-1008 and 42-4-1101, the statutory standard of care codifies common law negligence, a negligence per se instruction is redundant when given alongside a common law negligence instruction.”¹⁹¹ The attorney for the plaintiff had been careless, in my view, in pleading a statute that prescribed “reasonable” conduct in order to establish negligence per se. Rather than take advantage of this pleading error, the defense mill attorney simply refused to respond to an allegation she (or perhaps her paralegal) saw as calling for a legal conclusion.

Ms. Jahn next refused to respond at all to allegations that included facts the plaintiff’s lawyer presented in order to prove, however misguidedly, the elements of negligence per se.¹⁹² The plaintiff’s lawyer pleaded that the driver of the International truck had “breached the duty of care” that section 1008 imposed “by following [the plaintiff] Mr. Anthony too closely so as to be unable to stop, by colliding into Mr. Anthony, by failing to recognize and adjust for the speed of vehicles ahead, and by failing to slow and stop for traffic stopped upon the roadway.”¹⁹³ The defense mill

¹⁸⁶ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

¹⁸⁷ *Anthony* Complaint and Jury Demand, *supra* note 176, at 2, para. 12. Other insurance defense mill attorneys would avoid answering by claiming that the statute speaks for itself. See *infra* Section III.C.

¹⁸⁸ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

¹⁸⁹ COLO. REV. STAT. § 42-4-1008(1) (1995).

¹⁹⁰ ROBERTSON ET AL., *supra* note 48, at 100; JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 82 (6th ed. 2018).

¹⁹¹ *Winkler v. Shaffer*, 356 P.3d 1020, 1024 (Colo. App. 2015).

¹⁹² Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

¹⁹³ *Anthony* Complaint and Jury Demand, *supra* note 176, at 2, para. 14.

attorney simply brushed away all these factual allegations because she spotted an embedded legal conclusion that apparently tainted the entire allegation. Likewise, Ms. Jahn refused to answer the next allegation, which stated that the plaintiff “was a member of the class the statute was intended to protect, and suffered the type of harm the statute was intended to prevent.”¹⁹⁴

As should be becoming clear, the plaintiff’s claim was for having been rear-ended by Mr. Malvaes-Ortiz, who was driving the International truck for Transport Oh.¹⁹⁵ In Colorado, as elsewhere, the law presumes a driver who rear-ends another vehicle to be at fault. Colorado’s jury instruction is:

When a driver of a motor vehicle hits another vehicle in the rear, the law presumes [, and you must find,] that the driver was negligent.¹⁹⁶

Ms. Jahn repeats the claim that a legal conclusion allows her not to answer another four allegations related to a separate negligence per se claim.¹⁹⁷ She refuses to admit the existence of the statute, ignores facts the plaintiff alleges about the crash, and refuses to admit either that the plaintiff or his injuries fell within the ambit of the statute’s protection.¹⁹⁸ Again, in my view, and I believe that of the court of appeals, the plaintiff’s lawyer’s use of a statute concerning “following too closely”¹⁹⁹ would not support negligence per se.²⁰⁰ That does not mean, however, that Ms. Jahn was free to ignore the pleaded facts as she did.

Continuing, American Family Insurance’s lawyer deploys the “calls for a legal conclusion” claim an additional four times in her answer in order to avoid answering the plaintiff’s allegations.²⁰¹ In paragraph twenty-two, the plaintiff’s lawyer properly pleaded that “[a]t all times relevant hereto, [Defendant] Mr. Malvaes-Ortiz had a common law duty to act with reasonable care.”²⁰² Ms. Jahn’s refusal to answer this allegation is a good example of the silly wastefulness of the “calls for a conclusion of law” claim.²⁰³ The allegation properly calls for a legal conclusion, and the simple proposition that the defendant, while driving a truck, had a duty of reasonable care is

¹⁹⁴ *Id.* at 3, para. 20; Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

¹⁹⁵ *Anthony* Complaint and Jury Demand, *supra* note 176, at 2, para. 10.

¹⁹⁶ COLO. JURY INSTRS. FOR CIV. TRIALS 11:12 (bracketed text in original).

¹⁹⁷ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

¹⁹⁸ *Id.*

¹⁹⁹ COLO. REV. STAT. § 42-4-1008 (1995).

²⁰⁰ *Winkler v. Shaffer*, 356 P.3d 1020, 1024 (Colo. App. 2015).

²⁰¹ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

²⁰² *Anthony* Complaint and Jury Demand, *supra* note 176, at 3, para. 22.

²⁰³ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

indisputable under Colorado law.²⁰⁴ Anyone driving a car has at least a duty of reasonable care to others on the road; this is not even an interesting—let alone disputable—issue.²⁰⁵ There is not only no basis under Rule 8 to refuse to respond to this allegation asking the defendant to admit the existence of a duty of reasonable care, there is no good faith legal argument against the existence of a duty.²⁰⁶

The insurance defense mill lawyer extends her refusal to answer because the plaintiff alleges a legal conclusion following the allegation about duty. As noted, the plaintiff's lawyer pleaded negligence per se using two different Colorado statutes—one for following too closely and the other for careless driving. Leaving aside the unsuitability of those two statutes as a basis for negligence per se claims, the plaintiff's lawyer pleads the same factual predicates in his straight negligence claim.²⁰⁷ For my students, I call this wearing suspenders and a belt—one pleads negligence together with negligence per se in order to be sure that one's pants stay up should either the belt or suspenders fail.²⁰⁸ So, the lawyer pleaded that the defendant driver breached his duty of care “by following Mr. Anthony too closely so as to be unable to stop, by colliding into Mr. Anthony, by failing to recognize and adjust for the speed of vehicles ahead, and by failing to slow and stop for traffic stopped upon the roadway.”²⁰⁹ Personally, I would have separated the factual claims into individual allegations. Ms. Jahn answered by claiming that the allegation of the legal conclusion gave her license to refuse to answer and thereby ignore the factual claims of the remainder of the allegation.²¹⁰

Continuing, the defense lawyer twice more spotted a call for a legal conclusion and refused to answer the allegations at all.²¹¹ The plaintiff's lawyer again sought to establish vicarious liability and pleaded that “[a]t all relevant times, Jesus Malvaes-Ortiz was acting in the course and scope of his employment and for the benefit of Transport Oh.”²¹² This is nearly a word-for-word repetition of paragraph 8. “Acting in the course and scope” does indeed call for a legal conclusion. For that matter, so does the word “employment.” If there existed an actual factual dispute about whether the driver was working for the company or on the job at the time of the crash, then of

²⁰⁴ *Hesse v. McClintic*, 176 P.3d 759, 762 (Colo. 2008) (“McClintic, like all drivers, was under a duty to drive with reasonable care under the circumstances. This is the duty that attaches to every driver when he or she goes on the road, and we have so held for almost half a century.”).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Anthony Complaint and Jury Demand*, *supra* note 176, at 3, para. 23.

²⁰⁸ *See, e.g.*, *ONCE UPON A TIME IN THE WEST* (Paramount Pictures 1968) (“How can you trust a man that wears both a belt and suspenders? Man can't even trust his own pants.” (Henry Fonda as Frank)).

²⁰⁹ *Anthony Complaint and Jury Demand*, *supra* note 176, at 3, para. 19.

²¹⁰ *Malvaes-Ortiz Answer to Anthony Complaint*, *supra* note 173, at 1, para. 4.

²¹¹ *Id.*

²¹² *Anthony Complaint and Jury Demand*, *supra* note 176, at 3, para. 26.

course the defense lawyer should object. In this instance, though, Ms. Jahn was doing nothing more than being obstructive in claiming that the allegation called for a legal conclusion that she need not answer. Likewise, in the next paragraph, the Plaintiff's lawyer pleaded that "Transport Oh, as master, bears liability for the acts of Jesus Malvaes-Ortiz, its servant."²¹³ Plaintiff having sought a legal conclusion, the insurance defense mill lawyer refused to answer just as she had for half of the allegations in the complaint.²¹⁴

Professor Engstrom identifies interview sources at the settlement mill law firms using only initials to preserve their confidentiality, and she uses real initials only with permission of the interviewees.²¹⁵ This shrouds her articles in cloak-and-dagger secrecy, as if she is concealing the identity of CIA assets. Professor Engstrom discovered that settlement mill attorneys often were hesitant to speak with her, which she attributed partially to their fear that they had violated professional standards.²¹⁶ In this piece, I do not hide or anonymize the names of the insurance defense mill lawyers who sign their names to and file pleadings that often ignore the Colorado Rules of Civil Procedure, that may also contravene the Colorado Rules of Professional Conduct, and that ultimately, in my opinion, serve neither the interests of their clients nor justice. Their answers are public records.²¹⁷ If I had interviewed informants, I adopt Professor Engstrom's approach.

Ms. Jahn's use of the "legal conclusion" canard is extreme and very tedious for this Article's gentle reader. Consider how much more tedious and aggravating encountering such obstructive answers is for the plaintiff's lawyer! The fundamental purpose of complaints is to establish the facts and arguments that are in dispute.²¹⁸ Defense obfuscation frustrates the purpose of pleading, increases the cost of litigation, and slows resolution—which is the defense's goal. This tactic serves the interest of the insurance company. Insureds—who pay premiums in order to have the insurer handle claims against them—might prefer a different approach.

More typical of the way insurance defense mill lawyers used the "legal conclusion" shield in nearly one-third of their answers is the refuse/deny strategy. Aliseda & Associates, on behalf of Fred Loya Insurance, answered 4.1% of the complaints in this

²¹³ *Id.* at 3, para. 27.

²¹⁴ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

²¹⁵ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1488 n.13 (using initials to maintain the anonymity of settlement mill attorneys who admitted to spending little time and effort on the cases they resolved); Engstrom, *Sunlight*, *supra* note 14, at 810 (again, using initials to maintain the anonymity of settlement mill attorneys who were expected to quickly settle cases).

²¹⁶ Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1515.

²¹⁷ *See supra* notes 22–23 and accompanying text.

²¹⁸ CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE & PROCEDURE § 1202, Westlaw FPP (database updated April 2021) ("Historically, pleadings have served four major functions: (1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses.").

sample.²¹⁹ Robert Holcomb, Esq., an Aliseda lawyer, has a pattern with regard to legal conclusions. First, he notes that “Paragraph [] of the Complaint contains a legal conclusion to which no response is required.”²²⁰ Next, Mr. Holcomb states that “To the extent a response is required, Defendant denies the allegations contained in paragraph [] of the Complaint.”²²¹ He deployed this formulation in response to allegations concerning mixed pleading of conclusions and law concerning jurisdiction, venue, breach, and negligence per se in a rear-end crash lawsuit that Steven Zapiler, Esq., filed.²²² He uses this language in his other answers as well.²²³

The exact language that Mr. Holcomb uses in his refuse/deny responses is common in answers. The Law Office of Chad A. Atkins, a Liberty Mutual Insurance defense mill whose answers were 4.4% of the sample, responds: “The allegations contained in paragraphs 17 and 22 of Plaintiff’s Complaint call for a legal conclusion and, therefore, no response is required. To the extent a response is required, Defendant denies the allegations.”²²⁴ The firm of Harris, Karstaedt, Jamison & Powers, P.C., responds to allegations that include a legal conclusion by answering “The allegations contained in paragraph [] of Plaintiffs’ Complaint seek a legal conclusion to which Defendants are not required to respond. To the extent a response is necessary, Defendants deny the allegations contained in paragraph of Plaintiffs’ Complaint.”²²⁵ Harris, Karstaedt, a firm that defends on behalf of several different insurers, answered 2.2% of the complaints in the sample.²²⁶ Lasater & Martin uses nearly identical language.²²⁷

²¹⁹ See *supra* text accompanying notes 136–137.

²²⁰ Answer and Jury Demand at 1, paras. 1–2, *Gilady v. Rodriguez*, No. 2015CV31311 (Colo. Dist. Ct. June 10, 2015) (Denver Cnty.).

²²¹ *Id.*

²²² *Id.*

²²³ Answer to Complaint and Jury Demand at 3, paras. 19–20, *Faris v. Rubio*, No. 2015CV32115 (Colo. Dist. Ct. June 30, 2015) (Denver Cnty.); Answer and Jury Demand at 3, paras. 22–25, *LaMaster v. Lopez-Saucedo*, No. 2015CV31948 (Colo. Dist. Ct. July 14, 2015) (Denver Cnty.); Answer and Jury Demand at 2, paras. 15, 17–18, *Vargas v. Villaobos-Rodriguez*, No. 2015CV31503 (Colo. Dist. Ct. June 15, 2015) (El Paso Cnty.); Answer and Jury Demand at 3, paras. 19–[23], *Sanchez v. Johnson*, No. 2015CV31337 (Colo. Dist. Ct. Sept. 18, 2015) (Denver Cnty.) (paragraph 23 misnumbered as 20).

²²⁴ Answer to Complaint and Jury Demand at 1, para. 5, *Lor v. Cano*, No. 2015CV30992 (Colo. Dist. Ct. Aug 3, 2015) (Adams Cnty.).

²²⁵ Defendants Clyde Coffman and Rocky Top Resources, Inc.’s Answer to Complaint by Aaron Wedemeyer and Darin Wedemeyer and Request for Trial by Jury at 3, paras. 19–20, 25–26, *Wedemeyer v. Coffman*, No. 2015CV31363 (Colo. Dist. Ct. July 10, 2015) (El Paso Cnty.) [hereinafter *Wedemeyer Answer*].

²²⁶ See *supra* text accompanying notes 136137.

²²⁷ Defendant Sergio Delarosa Moreno’s Answer and Jury Demand para. 8 at 2, *Marshall v. Moreno*, No. 2015CV31358 (Colo. Dist. Ct. July 17, 2015) (Denver Cnty.).

Only one defense lawyer offers any explanation as to why he believes there is no need to answer an allegation calling for a legal conclusion, and his explanation is laughable. On behalf of Joseph Conway, a GEICO insured, Robert Ingram, Esq., answered.²²⁸ Mr. Ingram is an insurance mill defense lawyer who included a geico.com email address on his answer.²²⁹ He works for Elizabeth A. Kleger & Associates, which is in-house counsel for GEICO.²³⁰ The plaintiff's lawyer, Chad Hemmat, Esq., from Anderson, Hemmat & McQuinn, LLC, attempted to establish the predicate for negligence per se by pleading both the existence of several statutes and that these statutes were in effect at the time of the crash.²³¹ Mr. Ingram answered that "[w]ith respect to the allegations contained in paragraphs 14 and 15 of the plaintiff's Complaint, they contain legal conclusions, which the Defendant Joseph A. Conway is neither qualified, nor required to respond to."²³² There is a strange fiction in pleading, in writing and responding to motions, and also in writing orders and opinions, in which lawyers and judges write that "the Plaintiff" or "the Defendant" argues various points, but of course the lawyers, not the parties, are the one doing the arguing. The plaintiff, for example, never argues *res ipsa loquitur*; her lawyer does. In answering on behalf of Mr. Conway, though, Mr. Ingram took that fiction a bit too far and forgot that though his client was not qualified to respond, Mr. Ingram was. And, Rule 8 required an answer.

Why the refuse/deny answer is aggravating may not be evident. Refusing to answer because an allegation asks for a legal conclusion is, first, contrary to the rules. Second, defense lawyers sometimes couple their refusal to answer with a declaration that, if forced to answer, the allegation is denied. This answer is useless to the plaintiff unless the judge forces the defense lawyer to answer, which will happen only if the plaintiff files a motion with the court, awaits the defendant's counsel response, and then files a reply. Then, after some waiting, maybe the lawyers attend a hearing. All of this is costly in money and time to everyone, plus judges get mad about this sort of thing. The simplest solution is for defense attorneys to keep doing what they are doing because they are getting away with it, or they could follow the rules and simply deny, admit, or say that they have insufficient information on which to form a belief. Defeating frivolous defenses takes considerable effort.

B. Directed at Codefendant

Another tactic that the insurance defense mill lawyers learn after law school is to not admit information concerning a defendant other than their client. No rule or privilege authorizes this evasion.

²²⁸ Answer to Complaint and Jury Demand at 1, *Baca v. Conway*, No. 2015CV31119 (Colo. Dist. Ct. May 5, 2015) (Denver Cnty.) [hereinafter *Baca Answer*]. *But see* Answer to Amended Complaint and Jury Demand at 1, *Baca*, No. 2015CV31119. Plaintiff later filed an amended complaint to which a different attorney responded.

²²⁹ *Baca Answer*, *supra* note 228, at 1.

²³⁰ *Id.*

²³¹ Complaint and Jury Demand at 3, paras. 13–15, *Baca*, No. 2015CV31119.

²³² *Baca Answer*, *supra* note 228, at 2, para. 5.

In 54 of the 356 answers, the insurance defense lawyers refused to answer allegations because they claimed the plaintiffs directed the allegations at another defendant. Of course, not every answer was to a complaint with multiple defendants. One hundred twelve of the answers were in lawsuits that included multiple defendants. The fifty-four refusals to respond to allegations directed at other defendants amounted to 48.2% of all the answers in multidefendant cases. Regarding the slightly more than half of answers that did not include a refusal to answer an allegation directed at a codefendant, I did not code these complaints to determine whether there were allegations directed at more than one defendant.

There is no basis in the Colorado Rules of Civil Procedure for the refusal to reply to an allegation because the insurance lawyer answering for a defendant believes that the allegation was not directed at his or her client. Indeed, as noted above, Colorado's Rule 8 does not limit the allegations to which a defendant must respond to only those "asserted against it." This is a slight difference from the federal rule.²³³ Once again, Rule 8(b) provides the option of admitting or denying.²³⁴ With regard to any allegation about which an individual defendant has no knowledge, Rule 8(b) provides that the defendant may say that he or she lacks sufficient information or knowledge to form a belief.²³⁵ However, Rule 8(b) does not include the option of a defendant saying: "I don't think you directed your question at me, and so I will not answer even though I may have sufficient information or knowledge to admit or deny." If the plaintiff alleges something about another defendant, then the answering defendant can admit, deny, or say he or she does not know. Rule 8, as Judge Shadur noted, is simple.

Just as a defendant cannot refuse to respond to an allegation because the allegation concerns another party, there is also no basis to refuse to answer if the allegation concerns a nonparty.

Plaintiffs are entitled to use the complaint to explore what a defendant knows in order to "narrow[] the issues that must be litigated" and to "provid[e] a means for speedy disposition of sham claims and insubstantial defenses."²³⁶ That's the whole idea! Any defendant may have information concerning what other people or companies involved were doing. Of course, the plaintiff gets to explore that information.

Smart plaintiffs' lawyers properly use complaints to exploit conflicts between defendants. A plaintiff's lawyer who knows or suspects that one defendant knows incriminating information about a codefendant should seek to gain admissions concerning that information with the complaint. For example, one defendant may have been driving a car while pulling on a bottle of Jack Daniels, and the second defendant may have been riding shotgun and perhaps adding to the negligence by encouraging the driver to speed. The lawyer for the plaintiff may of course expect both the driver and the passenger to admit that the driver had been drinking Jack Daniels while driving. The passenger does not get to squirm away from answering. Pitting the defendants against each other is a basic and acceptable tactic in multiple-defendant

²³³ See *supra* notes 147–48 and accompanying text.

²³⁴ COLO. R. CIV. P. 8(b).

²³⁵ *Id.*

²³⁶ WRIGHT & MILLER, *supra* note 218, § 1202.

cases. The plaintiff should not be put to the expense of written discovery or a deposition to gain the passenger's admission of this elementary detail.

A defense mill attorney's use of the evasive claim that she or he need not answer when the plaintiff's lawyer directs an allegation at another person is puzzling at best but more often infuriating. The lawsuit that emerged from a multivehicle crash on December 17, 2012, offers a good example.²³⁷ Wayne Jacobs was a Colorado Department of Corrections prisoner.²³⁸ Michael Klinger, a Department of Corrections employee, was transporting Mr. Jacobs in a van.²³⁹ Juan Cardenas, an employee of Superior Sheet Metals Corporation, crashed his employer's 2004 International Truck into a different driver's 2000 Ford pickup, and then Mr. Klinger crashed the prison van into the truck Mr. Cardenas was driving.²⁴⁰ The prisoner, Mr. Jacobs, sued Mr. Cardenas, his employer Superior Sheet Metals, Mr. Klinger, and the Department of Corrections.²⁴¹

The law firm of Senter Goldfarb & Rice, LLC, filed the answer for Mr. Cardenas and Superior Sheet Metals.²⁴² Senter Goldfarb, which filed 2.5% of the answers in the sample,²⁴³ deflected the allegations the prisoner's attorney directed at the Department of Corrections and its van driver. Why? Senter Goldfarb's attorneys, Billy-George Hertzke, Esq., and Jessica R. Schultz, Esq., answered that "[t]he allegations in paragraphs 16, 17, and 18 of Plaintiff's Complaint are not directed at Defendants; therefore, no response is required."²⁴⁴ There being no law supporting their claim that "no response is required," the insurance defense mill attorneys cited no law. The allegations they claimed not to have to answer included all the elements of the plaintiff's case against the codefendant. The plaintiff's lawyer pleaded that Mr. Klinger and the Department of Corrections had a duty "to operate the DOC vehicle in a safe and prudent manner," that Mr. Klinger failed to keep "an eye for problems around him," that Mr. Klinger "failed to slow down with due regard to traffic conditions," and that "he failed to keep a look out."²⁴⁵ The allegations further claimed that Mr. Klinger breached the duty of care and caused the plaintiff's injuries.²⁴⁶ The

²³⁷ Complaint at 1, para. 1, *Jacobs v. Superior Precision Sheet Metal Corp.*, No. 2015CV31295 (Colo. Dist. Ct. May 6, 2015) (El Paso Cnty.) [hereinafter *Jacobs* Complaint].

²³⁸ *Id.* at 1, para. 2.

²³⁹ *Id.* at 1, para. 3.

²⁴⁰ *Id.* at 2, paras. 4–6.

²⁴¹ *Id.* at 1.

²⁴² Answer of Defendants Micro Metals, Inc. and Juan Cardenas at 1, *Jacobs*, No. 2015CV31295, Filing ID No. 930145EB80411 [hereinafter *Jacobs* Answer].

²⁴³ See *supra* text accompanying notes 136137.

²⁴⁴ *Jacobs* Answer, *supra* note 242, at 2, para. 6.

²⁴⁵ *Jacobs* Complaint, *supra* note 237, at 3, para. 16.

²⁴⁶ *Id.* at 3, para. 17.

allegations then listed, in a very general way, some of the injuries.²⁴⁷ Instead of the general denial of the plaintiff's allegations against the codefendant, the Senter Goldfarb attorneys might have used the answer to support the codefendant's liability. They might have simply admitted the undisputable matter of law that the Department of Corrections driver had a duty of reasonable care, and Senter Goldfarb might also have admitted Mr. Klinger's breach of duty and that his breach of duty caused harm. Denying the extent of the injuries perhaps made sense, as the insurance company that paid Senter Goldfarb to defend the case might be on the hook for those damages. However, admitting the codefendant's duty, breach, and causation of damages could have helped the insurance company that paid Senter Goldfarb to represent its insured. Pointing the plaintiff toward the codefendant Department of Corrections would have pointed the plaintiff away from Senter Goldfarb's client.

After claiming no requirement that they answer an allegation directed at a codefendant, the insurance defense mill lawyers of Senter Goldfarb heaped more nonsense into their answer. The lawyers added this sentence: "To the extent that a response is required, Defendants are without sufficient information and knowledge to form a belief as to the truth and veracity of the allegations contained in paragraphs 16, 17, and 18 of Plaintiff's Complaint."²⁴⁸ There are at least three problems with this sentence. First, Rule 8 requires a response. Second, if the defendants truly were without "sufficient information and knowledge," then Colorado Rule 8(b) makes clear that the lawyer need only say so. Honestly, why answer with "we do not have to answer, but if we did we know nothing?"²⁴⁹ Third, one doubts that the insurance defense mill lawyers had so little information.²⁵⁰ The crash happened in December 2012.²⁵¹ The plaintiff's lawyers filed the complaint on May 6, 2015, and the insurance defense mill lawyers filed their answer more than two months later on July 14, 2015.²⁵² As I will discuss below, insurance claim agents investigate crashes and compile claim investigation files.²⁵³ The insurance defense mill lawyers answered more than two and a half years after the accident. If we are to believe the defense firm's answer, the insurance company's claim representatives found no facts—no "sufficient information and knowledge"—that would allow the Senter Goldfarb attorneys to admit the "truth and veracity" of a single fact among those the plaintiff's lawyers alleged regarding the Department of Corrections and its officer.

²⁴⁷ *Id.* at 3, para. 18.

²⁴⁸ *Jacobs Answer, supra* note 242, at 2, para. 6.

²⁴⁹ *Hogan's Heroes* (CBS Prods. 1965–1971) ("I know nothing!" (John Banner as Sergeant Hans Schultz)).

²⁵⁰ Fourth, "truth and veracity" is redundant. COLO. R. CIV. P. 8(b) refers to "the truth of an averment" not "truth and veracity." *See id.* ("If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.").

²⁵¹ *Jacobs Answer, supra* note 242, at 1, para. 1.

²⁵² *Id.* at 4; *Jacobs Complaint, supra* note 237, at 1.

²⁵³ *See infra* Section III.D.

Additional examples of insurance defense mill lawyers refusing to answer allegations about codefendants abound. A four-car collision from June 2014 provides more.²⁵⁴ The plaintiff, Aracely Wineman-Warehime was driving in afternoon traffic on West Sixth Avenue in Denver.²⁵⁵ She stopped. The defendant Suan Bonine rear-ended Ms. Wineman-Warehime and pushed her car into the car in front.²⁵⁶ Then, predictably, Vernon Anderson rear-ended Ms. Bonine, which pushed Ms. Bonine's car again into the plaintiff's car, which then crashed again into the car ahead: a four-car collision with two vehicles rear-ending the cars just in front.²⁵⁷ This is not rocket science; it's bumper cars.

Two lawyers from Franklin D. Azar and Associates, P.C., filed the lawsuit on behalf of Ms. Wineman-Warehime.²⁵⁸ Frank Azar, Esq., is among the television advertisers whom Professor Engstrom characterizes as a "settlement mill lawyer," although this case makes clear his firm files lawsuits and does not rely on settlements alone.²⁵⁹ The Azar and Associates lawyers presented negligence and negligence per se claims against the two defendants.²⁶⁰ For Ms. Bonine, the driver who rear-ended the plaintiff Ms. Wineman-Warehime, Janet Spies, Esq., answered.²⁶¹ Ms. Spies's firm, Spies, Powers & Robinson, P.C., filed 1.6% of the answers in the sample.²⁶² Helpfully, Ms. Spies admits in the answer that her client rear-ended the plaintiff—"admits that the front of the vehicle she was driving collided with the rear of the vehicle being driven by the Plaintiff"—and also that Mr. Anderson "struck from

²⁵⁴ Complaint at 2, para. 7, *Wineman-Warehime v. Bonine*, No. 2015CV32084 (Colo. Dist. Ct. June 11, 2015) (Denver Cnty.) [hereinafter *Wineman-Warehime* Complaint].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1.

²⁵⁹ See Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1497 n.47 ("Frank Azar & Associates fulfilled most settlement mill factors. First, the firm operated in extremely high volumes, handling about 3,000 claims a year Second, the firm engaged in aggressive 'in your face' television advertising Like other settlement mills, the firm only '[v]ery, very rarely' got referrals from other law firms or lawyers Third, in typical cases, Azar had a routinized claim settlement process characterized by a number of discrete steps or 'phases.'" (internal citation omitted)); *id.* at 1496–97 ("At Frank Azar & Associates, described in the press as 'Denver's best-known personal injury law practice,' it appears that trials were conducted to resolve only about 0.3% of claims."); *id.* at 1527 ("At Azar & Associates, cases 'often' settled for as little as \$2,000.").

²⁶⁰ *Wineman-Warehime* Complaint, *supra* note 254, at 2, para. 7.

²⁶¹ Defendant Suan Bonine's Answer and Jury Demand at 1, *Wineman-Warehime v. Bonine*, No. 2015CV32084 (Colo. Dist. Ct. July 6, 2015) (Denver Cnty.), Filing ID No. 7D45C5F6277C0 [hereinafter *Bonnie Answer to Wineman-Warehime* Complaint].

²⁶² See *supra* text accompanying notes 136–137.

behind” Ms. Bonine’s vehicle, which then hit the plaintiff’s car again.²⁶³ However, Ms. Spies eschews the opportunity to pile on Mr. Anderson and instead answers allegations directed at him by stating seven different times that the allegations “are not directed against this Defendant and therefore require no response.”²⁶⁴ Again, Rule 8(b) disallows this response, and although admission of claims of negligence against a codefendant might be of little marginal value, such admissions would be at least slightly more valuable than no answer at all; plus, of course, actually answering would comport with the Rules.

Mr. Anderson’s lawyer, Matthew Baukol, Esq., filed an even less helpful answer.²⁶⁵ Mr. Baukol admitted only that his client was an individual who resided in Colorado, that the incident took place in Denver, and that Denver County District Court had jurisdiction and was the right venue.²⁶⁶ Mr. Baukol denied everything else in the complaint or claimed to lack sufficient information and therefore denied the allegations.²⁶⁷ As with Ms. Spies, his solidarity with codefendants overcame any strategic advantage he might have gained by aligning against the codefendant; he denied all the allegations against his client’s codefendant, Ms. Bonine.²⁶⁸ Where Ms. Spies had agreed that both defendants rear-ended the cars in front of them, Mr. Baukol found nothing to agree with in the narrative that the Azar lawyers included in the complaint:²⁶⁹

On or about June 25, 2014 at approximately 3:49 p.m., Plaintiff was traveling eastbound on West 6th Avenue and came to a stop in traffic. Defendant Bonine was traveling eastbound on West 6th Avenue as well, behind Plaintiff. Defendant Bonine struck the rear of Plaintiff’s vehicle, pushing Plaintiff’s vehicle into the vehicle in front of her. After this collision occurred, Defendant Bonine was struck by a fourth vehicle driven by Defendant Vernon Anderson, which pushed Defendant Bonine into Plaintiff’s vehicle a

²⁶³ Bonnie Answer to *Wineman-Warehime* Complaint, *supra* note 261, at 2, para. 10.

²⁶⁴ *Id.* at 2–3, paras. 11–12, 20–24.

²⁶⁵ Answer to Complaint and Jury Demand at 1, *Wineman-Warehime*, No. 2015CV32084, Filing ID No. 1066A9A627EA6 [hereinafter Anderson Answer to *Wineman-Warehime* Complaint].

²⁶⁶ *Id.* at 1, para. 1.

²⁶⁷ *Id.* at 1, paras. 2–3, 5, 7, 10. Denying an allegation for which a defense lawyer has insufficient information to admit or deny makes no sense as a matter of logic. As Judge Shadur asked: “how can a party disclaim knowledge or information even to form a belief as to the truth of an allegation and then go on to deny it?” *Webb v. Mediacredit, Inc.*, No. 16-C-11125, 2017 WL 74854, at *1 (N.D. Ill. Jan. 9, 2017). *See* Russell, *supra* note 141, at 940, 947, 949; *id.* at 144 (“Judge Shadur’s colleagues in the Northern District of Illinois also cited the appendix when confronting defendants’ formulaic claims regarding their lack of knowledge of information.”).

²⁶⁸ Anderson Answer to *Wineman-Warehime* Complaint, *supra* note 265, at 1, para. 3.

²⁶⁹ *Id.* at 1, para. 2.

second time. This second impact pushed Plaintiff's vehicle into the vehicle in front of her a second time as well.²⁷⁰

Rule 8(b) states that “[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.”²⁷¹ Ms. Spies parsed this paragraph, agreed that her client had rear-ended the plaintiff, agreed that Mr. Baukol's client had rear-ended her own client, and agreed that there were secondary collisions.²⁷² By contrast, Mr. Baukol denied the entire paragraph; not even the date, time, or location were “true and material.”²⁷³

Azar and Associates received a similar insurance defense mill runaround in a suit the firm filed in June 2015 on behalf of Jose Reyes.²⁷⁴ The Azar firm's clever first allegation in the amended complaint's first claim for relief lays out the needed facts to understand this story of negligence:

On or about September 16, 2013 at approximately 10:35 a.m., Plaintiff Jose Reyes was injured when Defendant Tony Zulu's motor vehicle, a 2005 Ford Crown Victoria, (taxi cab) when Defendant [sic] drove into the living room of the Plaintiff. The accident took place at the private property at 245 N. Sable Blvd., Unit 9105, Aurora, Colorado in Arapahoe County, Colorado.²⁷⁵

On behalf of Reyes, Azar and Associates filed suit against the taxi driver, Tony Zulu; the company for which Mr. Zulu drove, Metro Taxi; and also against Mr. Zulu's uninsured/underinsured motorist coverage carrier alleging that the carrier had failed to pay benefits to which Mr. Zulu was entitled.²⁷⁶

Torts professors and civil procedure professors might expect the codefendants to deny their own liability but point the finger of blame at each other in order to reduce their own liability; that's not at all what happened. White and Steele, P.C., which filed 3.0% of the answers in the sample,²⁷⁷ represented the uninsured/underinsured motorist carrier Ameriprise Auto & Home Insurance.²⁷⁸ For the insurer, White and Steele admitted only four of the twenty-four paragraphs in the Azar firm's complaint—the

²⁷⁰ *Wineman-Warehime* Complaint, *supra* note 254, at 2, para. 7.

²⁷¹ COLO. R. CIV. P. 8(b).

²⁷² Bonnie Answer to *Wineman-Warehime* Complaint, *supra* note 261, at 1–2, para. 7.

²⁷³ Anderson Answer to *Wineman-Warehime* Complaint, *supra* note 265, at 1, para. 2.

²⁷⁴ Amended Complaint at 1, *Reyes v. Zulu*, No. 2015CV31509 (Colo. Dist. Ct. June 13, 2016) (Arapahoe Cnty.) [hereinafter *Reyes* Amended Complaint].

²⁷⁵ *Id.* at 2, para 6.

²⁷⁶ *Id.* at 4, para. 24; *see infra* p. 71 (explaining UM/UIM cases).

²⁷⁷ *See supra* text accompanying notes 136137.

²⁷⁸ Defendant, IDS Property Casualty Insurance Company d/b/a Ameriprise Auto & Home Insurance, Answer to Complaint and Jury Demand at 1, *Reyes*, No. 2015CV31509, Filing ID No. C04CC0C3B0939 [hereinafter *Ameriprise Auto & Home Ins. Answer, Reyes*].

insurance firm's name and address, that venue in Arapahoe County was proper, that Reyes had an Ameriprise policy with coverage of \$100,000 per person and \$300,000 per accident, and that Mr. Reyes was an "insured person" under the policy entitled to uninsured motorist benefits.²⁷⁹ One way or another, White and Steele denied or refused to answer all the other Azar allegations. Twelve different times, White and Steele's answer intones:

With respect to the allegations contained in paragraph [] of the Complaint, these allegations are not directed to this defendant. As such, no responsive pleading is required by this defendant. To the extent that any allegations contained therein may be construed to be asserted against this defendant, the allegation shall be taken as denied or avoided.²⁸⁰

Leaving aside what the passive formulation "taken as denied or avoided" even means, White and Steele deployed the "not directed to this defendant" gambit to avoid commenting on the factual allegations that describe Mr. Zulu crashing his Crown Vic taxi into Mr. Reyes's living room.²⁸¹ The insurance defense mill lawyers avoided admitting or denying the date, time, place, driver's name, type of car, fact that the car was a cab, name of the cab company, property address, and whether the car crashed into the living room.²⁸² Likewise, though, the insurance defense mill lawyers at White and Steele also claimed their insurance company client was "without sufficient information" to admit that Reyes was "an individual and resident of the State of Colorado," even though he was their insured!²⁸³

Azar and Associates fared little better in inducing the other codefendants to blame someone else. Just as the insurance defense mill lawyers representing the insurance company might have wanted to blame the comparatively deep-pocketed cab company or the perhaps judgement-proof cab driver, so too did the defense lawyers representing the driver have every incentive to blame their codefendants. Instead, Mr. Zulu's lawyer, Nick Herrick, Esq., of the firm of Wood, Smith, Henning & Berman, LLP, eleven times chanted that "[a]nswering Paragraph[s] 14–24], Plaintiff's [Third or Fourth] Claim for Relief is not alleged against Tony Zulu and, therefore, does not require a response."²⁸⁴ For good measure, Mr. Herrick also claimed that five

²⁷⁹ *Id.* at 2–3, paras 4–5, 19–20.

²⁸⁰ *Id.* at 2–3, paras. 6–17.

²⁸¹ *Id.* The Azar firm is a dominant television advertiser in the Denver metro area, with Azar (who is a graduate of the law school where the author teaches) calling himself "The Strong Arm." As is typical of urban American television markets, Azar advertises heavily on daytime television. Frank Azar, *I Am Frank Azar*, YOUTUBE (Sept. 18, 2015), <https://www.youtube.com/watch?v=NN7lmqTLT8s>. Perhaps, when Zulu crashed into Reyes's living room at 10:35 a.m., one of Azar's ads was running on the television.

²⁸² Ameriprise Auto & Home Ins. Answer, *Reyes*, *supra* note 278, at 2, para. 6.

²⁸³ *Id.* para. 1, at 1; *Reyes Amended Complaint*, *supra* note 274, at 1, para. 1.

²⁸⁴ Defendant Tony Zulu's Answer to Amended Complaint at 2–3, paras. 14–17, 19–24, *Reyes v. Zulu*, No. 2015CV31509 (Colo. Dist. Ct. July 1, 2016) (Arapahoe Cnty.), Filing ID No. BB3C37E263A9E [hereinafter *Zulu Answer to Reyes Complaint*].

allegations “call for a legal conclusion and therefore do not merit or require a response.”²⁸⁵

For fifteen of the complaint’s twenty-four paragraphs, Mr. Herrick ignored the Colorado Rules of Civil Procedure and refused to answer.²⁸⁶ All that he admitted was that Mr. Zulu was “an individual and resident of the State of Colorado,” that venue in Arapahoe County was proper, and that Mr. Zulu was driving a 2005 Ford Crown Victoria and was involved in an accident at 245 North Sable Blvd.²⁸⁷ Mr. Herrick simply ignored the date and time of the accident, the fact that the Crown Vic was a taxi, and the room in which the crash occurred.

The cab driver’s insurance defense mill lawyer refused to admit very basic facts that his client surely knew and that would have helped his client. Such refusal violates the Colorado Rules of Civil Procedure and likely also the Colorado Rules of Professional Conduct in my opinion. For example, the Azar firm lawyers pleaded that codefendant “MKBS LLC has Metro Taxi as a trade name.”²⁸⁸ Denver cab drivers at the time signed leases as independent contractors with area cab companies, and Mr. Zulu would have of course been familiar with MKBS, LLC, as the entity that operated Metro Taxi.²⁸⁹ Even so, Mr. Zulu’s lawyers claimed insufficient information and so denied the allegation that MKBS, LLC, operated Metro Taxi.²⁹⁰ Similarly, Mr. Zulu’s lawyers denied that their client was “the employee or agent of Defendant MKBS, LLC, and was acting within the scope of his employment and authority”²⁹¹ A truthful answer consistent with Rule 8 might have denied that the cab driver was an employee but admitted that as an independent contractor he acted within the scope of his authority vis à vis Metro Taxi. Such an admission would likely have benefitted Mr. Zulu by bringing him within the scope of Metro Taxi’s insurance coverage. Almost certainly, Mr. Zulu’s Crown Vic was painted in Metro Taxi colors, with the company name and phone number on the vehicle. Playing cat-and-mouse with that admission was untruthful and did not help Mr. Zulu.

Lastly, Azar and Associates fared no better with the answer of the third codefendant, MKBS, LLC, which operated Metro Taxi. Harris, Karstaedt, Jamison &

²⁸⁵ *Id.* at 2, paras. 7–8, 10–12.

²⁸⁶ *Id.* at 2–3, paras. 7–8, 10–12, 14–17, 19–24.

²⁸⁷ *Id.* at 1–2, paras. 2, 5–6; *Reyes* Amended Complaint, *supra* note 274, at 1–2, paras. 2, 5–6.

²⁸⁸ *Reyes* Amended Complaint, *supra* note 274, at 1, para 3.

²⁸⁹ *In re* Application of MKBS, LLC, 11L-374CP, 2011 WL 5100577, at *1 (Colo. Pub. Utils. Comm’n Apr. 27, 2011) (commission order granting tariff changes) (“Metro Taxi states: [its] drivers are independent contractors” (alteration in original)).

²⁹⁰ Zulu Answer to *Reyes* Complaint, *supra* note 284, at 2, para. 3; *Reyes* Amended Complaint, *supra* note 274, at 1, para. 3.

²⁹¹ Zulu Answer to *Reyes* Complaint, *supra* note 284, at 2, para. 14; *Reyes* Amended Complaint, *supra* note 274, at 2, para. 14.

Powers, P.C., admitted two allegations.²⁹² First, the firm admitted that MKBS, LLC, was “a limited liability company in good standing, authorized to do business in the State of Colorado and operate[d] in Aurora, Colorado.”²⁹³ Second, the firm admitted the venue was proper in Arapahoe County.²⁹⁴ The insurance defense mill lawyers pleaded nine times that “paragraph [] does not contain allegations against this Defendant and, therefore no response is required. If any portion of paragraph [] is intended or considered to contain an allegation against this Defendant[,] it is denied.”²⁹⁵ The firm also denied seven paragraphs and claimed there was insufficient knowledge to answer several others.²⁹⁶ Regarding paragraph six, which alleged that one morning in September 2013, a Metro Taxi Crown Vic crashed into the plaintiff’s living room, Metro Taxi’s lawyers denied the entire paragraph.²⁹⁷ Rule 8(b) expects that “[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.”²⁹⁸ Harris, Karstaedt specified nothing as true and answered Reyes’s complaint with a response that effectively meant “none of this happened.”²⁹⁹

Mr. Reyes, who apparently injured his hip rushing from the bathroom after the crash, sued three codefendants.³⁰⁰ Together, these three codefendants claimed thirty-one different times that they could refuse to answer allegations directed at another codefendant. The Colorado Rules of Civil Procedure require an admission or a denial. The codefendants’ evasion advanced nothing at all. Perhaps this sort of nonsense is fun to file, but is this variant of the practice of law what we call professional?

The final illustration of insurance defense mill lawyers’ use of the “not my client, so I don’t have to answer” response returns to Ms. Jahn. As noted above, Ms. Jahn deployed the “calls for a legal conclusion” response to nearly half of a complaint filed in a rear-end collision case.³⁰¹ The American Family Insurance in-house lawyer also used the “not my defendant” claim when answering. Ms. Jahn represented both

²⁹² Defendant MKBS, LLC’s Answer to Amended Complaint at 1, para. 2, *Reyes v. Zulu*, No. 2015CV31509 (Colo. Dist. Ct. June 30, 2016) (Arapahoe Cnty.), Filing ID No. 66839F3D54C78 [hereinafter MKBS Answer to *Reyes* Complaint].

²⁹³ *Id.*; *Reyes* Amended Complaint, *supra* note 274, at 1 para. 3.

²⁹⁴ *Reyes* Amended Complaint, *supra* note 274, at 1, para. 5; MKBS Answer to *Reyes* Complaint, *supra* note 292, at 1, para. 2.

²⁹⁵ MKBS Answer to *Reyes* Complaint, *supra* note 292, at 1–2, paras. 4, 6, 11.

²⁹⁶ *Id.* at 1–2, paras. 1, 3, 7, 9.

²⁹⁷ *Id.* at 1, para. 3; *Reyes* Amended Complaint, *supra* note 274, at 2, para. 6.

²⁹⁸ COLO. R. CIV. P. 8(b).

²⁹⁹ MKBS Answer to *Reyes* Complaint, *supra* note 292, at 1, para. 3.

³⁰⁰ *Reyes* Amended Complaint, *supra* note 274, at 1.

³⁰¹ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 4.

codefendants in a case—the driver of the truck and his employer.³⁰² In Colorado, with sufficient advisement and disclosure, a single attorney may represent codefendants between whom there may be a conflict of interest.³⁰³ Evan Banker, Esq., includes as paragraph three of his complaint that “[u]pon information and belief, Defendant Jesus Malvaes-Ortiz is a citizen of the United States and a resident of Arapahoe County, Colorado.”³⁰⁴ Ms. Jahn, in answering for Mr. Malvaes-Ortiz, admitted the allegation.³⁰⁵ However, in answering for Mr. Malvaes-Ortiz’s employer, she stated that “Defendant does not respond to the allegations contained in paragraph 3 of Plaintiff’s Complaint as they appear to be directed at another party.”³⁰⁶ That is, she admitted the allegation in one answer but refused to answer the same allegation in the other. In fairness, she filed the company’s answer before she filed the driver’s answer, and perhaps she only learned that the driver was a U.S. citizen and an Arapahoe County resident after she answered on behalf of his employer. But wouldn’t his employer have been able to admit that information? Indeed, although the allegation is about the driver, the plaintiff’s lawyer did not specifically direct it at either defendant. He did not, for example, include it within a claim for relief directed at one or the other defendant. Evading the response by claiming not to have to answer makes the employer appear to be hiding something. The insurance defense mill lawyer’s reflexive, determined insistence on not answering thus does just a bit of harm to one of her clients. Plus, being able to answer an allegation for one client but not being willing to answer for another is weird.

Nothing about Colorado’s Rule 8 allows a defense attorney to avoid answering when the plaintiff’s lawyer has directed an allegation at a codefendant, a non-party at fault, or another person. Federal Rule 8 directs that the “party must . . . admit or deny the allegations *asserted against it* by an opposing party”³⁰⁷ Perhaps the phrase “asserted against it” allows codefendants in federal lawsuits to not answer claims against codefendants.³⁰⁸ However, Colorado’s Rule 8 does not limit the allegations to which a defendant must respond to only those “asserted against it.”³⁰⁹ The plain text

³⁰² *Id.* at 1; Answer to Complaint and Jury Demand at 1, Anthony v. Transport Oh, No. 2015CV30639M (Colo. Dist. Ct. Aug. 5, 2015) (Boulder Cnty.), Filing ID No. 9AE3D70546562 [hereinafter Transportation Oh Answer to *Anthony* Complaint].

³⁰³ COLO. R. PRO. CONDUCT 1.7(b).

³⁰⁴ *Anthony* Complaint and Jury Demand, *supra* note 176, at 1, para. 3.

³⁰⁵ Malvaes-Ortiz Answer to *Anthony* Complaint, *supra* note 173, at 1, para. 1.

³⁰⁶ Transportation Oh Answer to *Anthony* Complaint, *supra* note 302, at 1, para. 3.

³⁰⁷ FED. R. CIV. P. 8(b)(1)(B) (emphasis added).

³⁰⁸ Judge Shadur did not allow lawyers to refuse to answer allegations against codefendants. Faced with lawyers who answered on behalf of three codefendants but who capily refused to admit what any single defendant knew about the others, Judge Shadur ordered the lawyers to file a consolidated reply shorn of evasions. *Azza Int’l Corp. v. Gas Rsch. Inst.*, 204 F.R.D. 109, 110 (N.D. Ill. 2001). Russell, *supra* note 141, at 938.

³⁰⁹ COLO. R. CIV. P. 8(b).

of Colorado's Rules of Civil Procedure directs the defendant to "admit or deny the averments of the adverse party."³¹⁰

As with refusals to answer when the defending attorney spots a call for a legal conclusion, the proper path for Colorado defense counsel facing an allegation directed at a codefendant is to admit or deny. For plaintiffs' attorneys, the evasion is maddening. Justice does not advance. Furthermore, defendants, that is, the insureds, should also want answers to develop information concerning the culpability of codefendants who ought to share in the liability. Insurance defense mill lawyers would better serve both the liability insurers and their own clients if they admit information that points to another party for whom a different insurance carrier will have to pay.

C. Document Speaks for Itself

As with legal conclusions and allegations concerning codefendants, insurance defense lawyers also evade Rule 8's clear path when plaintiffs' attorneys refer in complaints to documents or statutes. Insurance defense settlement lawyers typically claim that the "document speaks for itself."³¹¹

Documents never spoke to Judge Shadur during his lifetime. He explained that "[a]nother unacceptable device, used by lawyers who would prefer not to admit something that is alleged about a document in a complaint (or who may perhaps be too lazy to craft an appropriate response to such an allegation), is to say instead that the document 'speaks for itself.'"³¹² Reviewing his years on the bench, Judge Shadur revealed that "[t]his Court has been attempting to listen to such written materials for years (in the forlorn hope that one will indeed give voice)—but until some such writing does break its silence," he continued, "this Court will continue to require pleaders to employ one of the three alternatives that are permitted by Rule 8(b) in response to all allegations about the contents of documents (or statutes or regulations)."³¹³

Colorado insurance defense mill lawyers claim that rules, statutes, and documents speak. For example, one firm's attorney responds to allegations concerning venue by reciting that "[t]o the extent a response is required, Defendant states that C.R.C.P. 98(c) speaks for itself."³¹⁴ In none of the answers from this firm—a bit-player that answered just 1.4% of the cases in the sample—did the firm's lawyer actually admit that the district court in which the plaintiff had filed was the proper venue.³¹⁵ The

³¹⁰ *Id.*

³¹¹ Russell, *supra* note 141, at Sections VII.A., VIII.A., IX.A.

³¹² State Farm Mut. Auto. Ins. Co. v. Riley, 199 F.R.D. 276, 279 (N.D. Ill. 2001).

³¹³ *Id.*

³¹⁴ Answer, Defenses and Jury Demand at 1, para. 3, *Vivar v. Cedillo-Macias*, No. 2015CV30042 (Colo. Dist. Ct. Jan. 27, 2015) (Denver Cnty.) [hereinafter *Vivar Answer*].

³¹⁵ *Id.*; Answer, Defenses and Jury Demand to Plaintiff's Amended Complaint at 1, para. 2, *Roybal v. Barbosa*, No. 2015CV30311 (Colo. Dist. Ct. Sept. 8, 2015) (Weld Cnty.); Answer, Defenses and Jury Demand at 1, para. 3, *Byrne v. Hogue*, No. 2015CV30028 (Colo. Dist. Ct. July 8, 2015) (Lake Cnty.); Defendant Jeffery Jefferson's Answer to Plaintiff's Amended Complaint at 1, para. 2, *Vallejos v. Gallegos*, No. 2015CV30020 (Colo. Dist. Ct. Jan. 29, 2016) (Huerfano Cnty.), Filing ID No. 5CAAB010EBE4E; Answer, Defenses and Jury Demand at 1,

defense lawyer's repeated practice is to respond to allegations concerning venue by first refusing to answer conclusions of law and then by stating the rule speaks for itself:

The allegations set forth in the second paragraph 3 and paragraph 4 of Plaintiff's Complaint concern venue, which are conclusions of law to which this Defendant can neither admit nor deny. To the extent a response is required, Defendant states that C.R.C.P. 98 speaks for itself.³¹⁶

The lawyer claims, contra Colorado Rule 8(b), that his client "can neither admit nor deny" a conclusion of law and then wraps that misstatement in a contingent claim that Rule 98 speaks though the defendant cannot. This lawyer does not merely say that the legal conclusions require no response but that his client, the defendant, *cannot* admit or deny them.

Insurance defense mill lawyers also give voice to statutes in the same way. The same lawyer whose clients cannot admit or deny a legal conclusion notes in response to the defendant's allegation of parts of title 42 of the Colorado Motor Vehicle Code, that "C.R.S. 42-4-1401, 42-4-1402, and 42-4-1101 speak for themselves."³¹⁷ Bruce Shibles, Esq., an in-house attorney for Farmers Insurance, simply notes that the defendant "also states that any statute cited in Plaintiff's Complaint speaks for itself."³¹⁸ This broad brush tactic, which contravenes the Colorado Rules of Civil Procedure, is characteristic of insurance defense mill lawyers. Rather than the lawyer or paralegal responding to each of the eight allegations that include a reference to the Colorado Motor Vehicle Code,³¹⁹ the answer brushes all these allegations away at once, in addition to the reference to Rule 98³²⁰ and the state constitution.³²¹

Other lawyers hedge a bit on just what the statutes have to say for themselves. Take for example, Allstate employee Christopher R. Jones, Esq., who answers on behalf of the in-house firm Temple & Associates. When faced with a statute, Mr. Jones first cites the statute, which he then notes "speaks for itself."³²² Next, Mr. Jones hedges

para. 3, *Smith v. Holmes*, No. 2015CV30780 (Colo. Dist. Ct. May 6, 2015) (El Paso Cnty.) [hereinafter *Smith Answer*].

³¹⁶ *Smith Answer*, *supra* note 315, at 1, para. 3.

³¹⁷ *Vivar Answer*, *supra* note 314, at 2, para. 7.

³¹⁸ Ewing's Answer to Complaint and Jury Demand at 2, *Jensen v. Ewing*, No. 2015CV30096 (Colo. Dist. Ct. Feb. 24, 2015) (Douglas Cnty.).

³¹⁹ Complaint paras. at 3–4, 22–29, *Jensen*, No. 2015CV30096.

³²⁰ *Id.* at 2, para 4.

³²¹ *Id.* at 1, para. 3.

³²² Defendant Kevin A. Cox's Answer and Jury Demand at 2, paras. 16–17, *Clark v. Cox*, No. 2015CV30048 (Colo. Dist. Ct. Mar. 27, 2015) (Douglas Cnty.) [hereinafter *Clark Answer*]; Defendant Alexander Yeros's Answer and Jury Demand at 2, para. 17, *Moore v. Yeros*, No. 2015CV30251 (Colo. Dist. Ct. Apr. 1, 2015) (Douglas Cnty.) [hereinafter *Moore Answer*]; Answer of Defendants Noah T. Depsky and Meghan Beaudion, Incorrectly Identified as Megan Donohue in the Complaint, and Jury Demand at 2–3, paras. 14–16, *Mainridge-King v. Depsky*, No. 2015CV30265 (Colo. Dist. Ct. Apr. 1, 2015) (Douglas Cnty.) [hereinafter *Mainridge-King Answer*]; Defendant Gloria Basquez's Answer and Jury Demand at 2, para. 16, *Martinez v.*

his bet just a bit by adding that he “[d]enied to the extent the allegations are contrary to, inconsistent with, or misstate” Colorado law.³²³ Together, he asserts that a statute speaks for itself—means what it means—but then says that to the extent—an extent that he leaves unexamined—that the plaintiff’s allegations misstate the law, he denies them. That is, if the plaintiff means to say what the statute does not say when speaking for itself, then Mr. Jones, attorney for the defendant, denies. Rule 8(b) does not authorize this evasion.

Other insurance defense mill lawyers hedge the manner in which they avoid answering differently by giving voice to statutes. The Harris, Karstaedt firm, for example, deployed this language: “Defendant maintains that each cited statutory authority or municipal ordinance speaks for itself or is subject to interpretation by the court; therefore,” the firm’s attorneys claim, “these assertions of paragraph [] are not allegations to which a response is owed.”³²⁴ Put differently, the statute means what it means, unless the judge says it means something else, but either way, defense counsel will admit nothing about the statute.

Not only statutes, but also documents, speak for themselves, thereby inspiring insurance defense mill lawyers to evade answering as Colorado Rule 8(b) requires. In answering Elizabeth Nelson’s suit against Dillon Companies, the parent company of the grocery chain King Soopers, Dina Bernardelli, Esq., claimed, in response to an allegation, that “[t]he State of Colorado Traffic Accident Report speaks for itself and does not require a response.”³²⁵ In the original complaint, Richard Kaudy, Esq., had alleged that “as reflected by a State of Colorado Traffic Accident Report, Rhoades failed to yield to the Elizabeth Nelson vehicle while making a left turn at the intersection of Wadsworth Boulevard and Mississippi Avenue in the City of Lakewood.”³²⁶ In a beautiful amended complaint, Mr. Kaudy added a scan of the Traffic Accident Report, photos of the vehicles involved including damage to the plaintiff’s car, copies of the King Soopers incident report, and other graphics documenting his client’s claim.³²⁷ The insurance defense mill lawyer’s answer—that the Traffic Accident Report speaks for itself—seems risky in light of Mr. Kaudy’s factual allegations and other support. However, Ms. Bernardelli added that “[t]o the

Basquez, No. 2015CV30152 (Colo. Dist. Ct. Apr. 3, 2015) (Pueblo Cnty.) [hereinafter *Martinez Answer*].

³²³ *Clark Answer*, *supra* note 322, at 2, paras. 16–17; *Moore Answer*, *supra* note 322, at 2, para. 17; *Mainridge-King Answer*, *supra* note 322, at 2–3, paras. 14–16; *Martinez Answer*, *supra* note 322, at 2, para. 16.

³²⁴ Answer of Earnest T. Prince to Complaint and Jury Demand at 3, para. 13, *Wiley v. Steven-Roberts Originals, LLC.*, No. 2015CV31815 (Colo. Dist. Ct. July 10, 2015) (Denver Cnty.), Filing ID No. 1020648B53936.

³²⁵ Answer and Jury Demand, at 2, para. 16, *Nelson v. Dillon Cos., Inc.*, No. 2015CV30870 (Colo. Dist. Ct. Aug. 10, 2015) (Jefferson Cnty.) [hereinafter *Nelson Answer*]; *see supra* notes 93–112 and accompanying text (providing information on how traffic accident reports are compiled).

³²⁶ Complaint and Jury Demand at 2, para. 15, *Nelson*, No. 2015CV30870.

³²⁷ Plaintiff Elizabeth Nelson Amended Complaint and Jury Demand at 2, 4–12, *Nelson*, No. 2015CV30870.

extent a response is required, all allegations in Paragraph 15 are denied.”³²⁸ The insurance defense mill lawyer’s message? The Traffic Accident Report speaks and means what it means, but when the plaintiff’s lawyer repeats what the report says, the defense denies everything.³²⁹

Ms. Bernardelli’s claim that the Traffic Accident Report speaks for itself is also problematic considering the issue with KABCO data that I described above.³³⁰ A party to a crash may tell the police officer that she is injured. If the injury the party claims is not evident to the officer, the officer may record a 1 (though not a 0) in the Traffic Accident Report. Later the Colorado Department of Transportation’s chief engineer interprets that 1 as an injury, but the state epidemiologist who writes a report using that data declares there was no injury. How has the Traffic Accident Report spoken for itself?

When the police ticket a defendant after a crash, the plaintiff’s lawyers sometimes make reference to that ticket in the complaint. Referring to the ticket leads to several problems. In her answer for Clyde Coffman and Rocky Top Resources, Inc., Jane Bendle Lucero, Esq., had to contend with the plaintiff’s allegation that the Colorado State Patrol had given a ticket to Mr. Coffman after he rear-ended Aaron and Darin Wedemeyer.³³¹ Ms. Lucero admitted that the Colorado State Patrol came to the scene of the “subject accident.”³³² She then correctly noted that “[t]he remainder of the allegations contained in paragraph 13 of Plaintiff’s Complaint reference inadmissible information and/or documentation.”³³³ Ms. Lucero then wrote that “Defendant states that the referenced citation, inadmissible in this lawsuit, speaks for itself.”³³⁴ What a tangle of language!

A simpler approach to the allegation of a traffic ticket exists. Benjamin Wegener, Esq., then an associate at Younge & Hockensmith, P.C., in Grand Junction, Colorado, and now the first named partner at Wegener Scarborough Younge & Hockensmith LLP, responded differently to the plaintiff’s allegation of a ticket. Mr. Wegener simply stated that “[w]ith regard to the allegations contained in Paragraph 19 of Plaintiffs’ Complaint, Defendants admit only that Jackson was issued a citation for following too closely, but deny that the same is relevant or admissible.”³³⁵ Ms. Lucero might have tried this approach rather than awkwardly claiming that the ticket spoke for itself.

³²⁸ *Nelson Answer*, *supra* note 325, at 2, para. 16.

³²⁹ *Id.*

³³⁰ See *supra* text accompanying notes 96–104 (describing KABCO reporting methodology).

³³¹ Complaint at 2, paras. 6, 13, *Wedemeyer v. Coffman*, No. 2015CV31363 (Colo. Dist. Ct. May 12, 2015) (El Paso Cnty.).

³³² *Wedemeyer Answer*, *supra* note 225, at 2, para. 13.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ Defendants’ Answer to Plaintiffs’ Complaint and Jury Demand at 2, para. 13, *McCormick v. Jackson*, No. 2015CV30055 (Colo. Dist. Ct. June 27, 2015) (La Plata Cnty.).

Both Ms. Lucero and Mr. Wegener are right that Colorado makes inadmissible a traffic ticket that a party receives.³³⁶ Allstate's attorney, Christopher Jones, Esq., simply includes a notation that "[r]eference to the citation received by Defendant is inadmissible and should be stricken. *See* C.R.S. § 42-4-1713."³³⁷ Too often, plaintiffs' attorneys seem not to know that records of traffic-ticket convictions are inadmissible, just as too often they cite violations of statutes that will not support negligence per se or the breach of a statutory duty. Properly speaking, Rule 8(b) requires that the defense attorney admit the ticket, as Mr. Wegener did. After that, noting the ticket's inadmissibility, rather than fussing with a Rule 12(f) motion to strike impertinent material,³³⁸ is a perfectly acceptable approach to extinguishing the plaintiff's attorney's improper tactic. Ms. Lucero's alternative approach of simultaneously claiming that the document speaks for itself but should not be admitted as evidence weirdly both gives voice to and muzzles the ticket. As an insurance defense mill attorney, Ms. Lucero reflexively claims that every document speaks for itself and secondarily must clean up any document that speaks out of turn.

Most laughable are claims by two different insurance defense mill lawyers that insurance policies spoke for themselves. In a suit against two insurers, Shelter Insurance's attorney answered three allegations this way: "Shelter asserts that the applicable Shelter auto policy speaks for itself"³³⁹ Anyone who has ever read or tried to read an insurance policy knows that no policy speaks for itself, and policies do not even mean what they seem to mean. Furthermore, if policies spoke for themselves, the need for lawyers and judges would be substantially less. Shelter's attorney, Sophia Tsai, Esq., tacked on another sentence after claiming the policy spoke for itself: "Shelter denies any allegations of said paragraph that are inconsistent with the terms of the policy."³⁴⁰ Ms. Tsai gets the Rule 8(b) process of answering complaints exactly backwards. She claims that the allegations may be factually incorrect, and if so, the self-speaking insurance policy overrules the allegation. However, her answers to these allegations do nothing at all to advance the truth-seeking function and instead claim some other truth may exist within the policy.³⁴¹

³³⁶ COLO. REV. STAT. § 42-4-1713 (2020) ("[N]o record of the conviction of any person for any violation of this article shall be admissible as evidence in any court in any civil action.").

³³⁷ *Clark* Answer, *supra* note 322, at 1, para. 4.

³³⁸ COLO. R. CIV. P. 12(f) ("[T]he court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper.").

³³⁹ Answer and Jury Demand at 2–3, paras. 11–13, *Snyder v. Shelter Mut. Ins. Co.*, No. 2015CV30096 (Colo. Dist. Ct. July 23, 2015) (Broomfield Cnty.), Filing ID No. 34BF0AAA9D2BF.

³⁴⁰ *Id.*

³⁴¹ *Id.* ("Shelter asserts that the applicable Shelter auto policy speaks for itself, and Shelter denies any allegations of said paragraph that are inconsistent with the terms of the policy."); *see also id.* at 4, para. 11 (explaining that the Plaintiff is not the real party of interest); USAA's Answer to Plaintiff's Complaint and Jury Demand, *Austin v. USAA Cas. Ins.*, No. 2015CV30489 (Colo. Dist. Ct. Nov. 16, 2015) (Larimer Cnty.) [hereinafter *Austin* Answer] ("USAA states that the policy speaks for itself.").

Forty-seven of the 356 answers included the nonanswer that a document spoke for itself.³⁴² This is 12.8% of the answers. Here again, I did not tally how many of the complaints included allegations that referred to documents or statutes and thereby created the opportunity for evasion using the claim that the document spoke for itself. As Judge Shadur experienced during his own career on the federal bench in Illinois, statutes and documents do not speak—especially not insurance policies. Insurance defense mill attorneys should instead admit the existence of documents and statutes, admit or deny their applicability, challenge their admissibility where obvious, and then admit or deny the plaintiffs’ lawyers’ construction of those documents and statutes.

D. Inadequate Investigation

Rule 11 of the Colorado Rules of Civil Procedure requires investigation.³⁴³ As is well known, C.R.C.P. Rule 11 states that:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.³⁴⁴

The Colorado Rules of Professional Conduct also require investigation. Rule 3.1, titled Meritorious Claims and Contentions, specifies that:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.³⁴⁵

Comment 2 to Rule 3.1 does allow that “[t]he filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.”³⁴⁶ No one expects discovery to precede answering. “What is required of lawyers, however,” the comment explains, “is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”³⁴⁷ As with Rule 11, Rule 3.1 puts investigation at the representation’s core.³⁴⁸

³⁴² See *supra* text accompanying notes 136–137.

³⁴³ COLO. R. CIV. P. 11(a).

³⁴⁴ *Id.*

³⁴⁵ COLO. R. PRO. CONDUCT 3.1.

³⁴⁶ COLO. R. PRO. CONDUCT 3.1 cmt. 2.

³⁴⁷ *Id.*

³⁴⁸ *Id.* Comment 2 further notes that:

Car crash cases are the model personal injury lawsuit.³⁴⁹ Roughly seven out of eight of Colorado's drivers have car insurance.³⁵⁰ When cars crash and there is an injury, the drivers call their insurance companies.

After learning of car crashes, liability insurers investigate. Car insurance companies are obliged to investigate and generally do so.³⁵¹ An investigator opens a file, collects accident reports and other documents, takes a statement from the insured, calls other witnesses, and assembles a file called the claim file.³⁵² This process is so routine that there are checklists.³⁵³

When lawyers become involved as counsel for injured persons, they contact and negotiate with the other driver's insurance company. If, for whatever reason, there is not already an open claim file before a lawyer contacts the insurer, then the auto liability insurer will open such a file immediately upon contact by the plaintiff's lawyer.³⁵⁴

All but one of the answers filed in the sample shows evidence of the involvement of an insurance company. There are only four pro se defendants in the sample.³⁵⁵

Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Id.; see also COLO. R. CIV. P. 11.

³⁴⁹ See Engstrom, *When Cars Crash*, *supra* note 47, at 295 (quoting scholars who have observed that automobile claims are the paradigm for individualized dispute resolution in the tort system).

³⁵⁰ *Estimated Percentage of Uninsured Motorists by State - 2015*, INS. INFO. INST., <https://www.iii.org/table-archive/20641> [<https://perma.cc/UVQ8-AFKJ>].

³⁵¹ COLO. REV. STAT. § 10-3-1104(h)(III) (2020) defines “[f]ailing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies” as among an array of “[u]nfair claim settlement practices.” *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325, 328–29 (Colo. App. 1992).

³⁵² ROSS, *supra* note 41, at 87–96; Michael E. Brown & Jeffery A. Doty, *Strategies for Counsel for the Insurer—Investigation of the Automobile Loss*, 4 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 51:8 (June 2020) (stating that typically, the company file will contain a recorded statement of the policyholder and/or the claimant as well as witnesses). For first-party property claims, the Colorado Division of Insurance has promulgated a rule concerning “Reasonable Investigation” that includes a list of sources that insurers may consult along with a list of what records the insurers must keep in claim files. 3 COLO. CODE REGS. § 702-5-5-1-14(4)(B) (2020).

³⁵³ See, e.g., KEN BROWNLEE & PAT MAGARICK, CASUALTY, FIRE AND MARINE INVESTIGATION CHECKLISTS § 9:1 (10th ed. 2019).

³⁵⁴ 4 LAW & PRACTICE OF INSURANCE COVERAGE LITIGATION § 51:8, Westlaw (database updated June 2020).

³⁵⁵ Answer to Complaint at 1, *Mulholland v. Fernandez*, No. 2015-CV30021 (Colo. Dist. Ct. Feb. 25, 2015) (Adams Cnty.); Complaint at 1, *Jones v. Flores*, No. 2015CV31497 (Colo. Dist. Ct. Apr. 28, 2015) (Denver Cnty.); Answer Under Simplified Civil Procedure at 2, *Walker v.*

Situations in which there existed no insurance claim files at the time of the filing of the lawsuit are, therefore, exceedingly rare. There is no authoritative data—no data at all, really—for how many filed car-crash lawsuits are the first news that a defendant’s insurance company has of a crash. For the filing of the lawsuit to be the first notice to the insurer, no one could have called the insurance company after the crash—not its insured, the injured person or persons, nor the police—and not the plaintiff’s lawyer once he or she undertook the representation.

In the sampled lawsuits, plenty of time elapsed between the crashes and the filing of the lawsuits. The median number of days between the crash and the filing of the complaint was 727 days or just over twenty-three months. The mean time to file the complaint was 741 days, or just over two years.³⁵⁶ The shortest number of days from crash to complaint was twenty-one days, but only four of the 298 complaints were filed thirty days or fewer from the crash date. Plaintiffs’ attorneys do not rush to the courthouse to file car crash cases.

Plaintiffs’ attorneys filed forty-four of the cases within one week of the three-year statute of limitations, whether through their own procrastination, because the injured persons waited a long time to find lawyers, or some other reason. Plaintiffs’ lawyers filed another fifteen cases beyond the expiration of the three-year statute of limitations for car crashes in Colorado, with the longest filed 2,393 days or 6.5 years after the crash. Some of the late filed car crash complaints were uninsured motorist or underinsured motorist (UM/UIM) cases in which the injured persons sued their own insurance companies for benefits because the tortfeasor’s insurance was either nonexistent or insufficient. Some late filed complaints may have been subject to tolling agreements in which the parties agreed to delay the filing of the case, and with some suits, perhaps the minority of the plaintiffs³⁵⁷—or another factor—tolled the running of the statute of limitations.

Even the passage of many, many months from the crash to the filing of the complaint did not lead to the insurance defense mill attorney admitting to knowing facts that a reasonable investigation would have uncovered. For example, Sukey Austin filed suit against his insurer, USAA, on June 12, 2015, for a crash that had happened on August 1, 2009.³⁵⁸ His claim against USAA was for underinsured

Cook, No. 2015CV30021 (Colo. Dist. Ct. May 11, 2015) (La Plata Cnty.); Answer Under Simplified Civil Procedure at 1, Richards v. Shuler, No. 2015CV30540 (Colo. Dist. Ct. Jan. 21, 2016) (Denver Cnty.).

³⁵⁶ Because the crashes that led to litigation happened two years before the filing of the litigation and because the state collects most data on an annual basis, the above analysis of traffic volume and number of crashes looked at the 12-month period starting in July 2012 through June 2013.

³⁵⁷ Colorado law defines a “minor under eighteen years of age” as a “person under disability” unless the minor has a “legal guardian.” COLO. REV. STAT. § 13-81-101(3) (2020). An injured minor has three years or until his or her twentieth birthday, whichever is later, to file a car crash complaint, COLO. REV. STAT. § 13-81-103(1)(c) (2020), except that there is no tolling of the statute if an injured minor at the time of the crash “is represented by a legal representative” such as a guardian. COLO. REV. STAT. § 13-81-103(1)(a) (2020).

³⁵⁸ Complaint and Jury Demand at 2, para. 7, Austin v. USAA Cas. Ins., No. 2015CV30489 (Colo. Dist. Ct. June 12, 2015) (Larimer Cnty.) [hereinafter *Austin* Complaint].

motorist benefits because the tortfeasor's Farmers Insurance policy limits of \$100,000 were inadequate given his substantial injuries.³⁵⁹ Notwithstanding the passage of nearly six years from the crash to when Timms Fowler, Esq., filed suit on behalf of Mr. Austin; notwithstanding Mr. Fowler's attachment of the traffic accident report as an exhibit to the complaint; and notwithstanding that Mr. Fowler likely sent demand letters and records to USAA attempting to settle the underinsured motorist claim; USAA's lawyer Deana Dagner, Esq., of Dagner, Schluter, Mitzner & Werber LLC, claimed to be without sufficient information to answer thirty of the complaint's forty-three allegations.³⁶⁰ Ms. Dagner claimed not to be able to answer whether Mr. Austin lived "at all relevant times" in Larimer County nor that he now lived in El Paso County.³⁶¹ About the accident, Ms. Dagner claimed insufficient information to be able to admit the date, time, or location of the accident; the name of the tortfeasor; the make or year of her car; her license plate number; the direction she was driving; or where she was headed.³⁶² Ms. Dagner claimed not to be able to admit the color, year, and make of the vehicle that the plaintiff drove notwithstanding the fact that USAA was his insurer.³⁶³ The insurance defense mill lawyer also claimed insufficient information to admit Mr. Fowler's allegation that the other driver got a ticket, the number of the ticket, and what part of the code she had allegedly violated.³⁶⁴ Ms. Dagner refused to admit that the other driver failed to yield the right of way to Mr. Austin.³⁶⁵ Ms. Dagner refused to admit that Mr. Austin was wearing his seat belt, a fact contained within the Traffic Accident Report.³⁶⁶ Ms. Dagner refused to admit that the vehicle of USAA's insured was damaged or the dollar amount of the damage.³⁶⁷ USAA did admit that the plaintiff's attorney, Mr. Fowler, gave notice to USAA of the possible UM/UIM claim and received permission from USAA to settle the claim for the \$100,000 limit of the tortfeasor's policy with Farmers Insurance.³⁶⁸ Notwithstanding these admissions,

³⁵⁹ *Id.* at 5, para. 39.

³⁶⁰ *Austin Answer*, *supra* note 341, at 1–4; *Austin Complaint*, *supra* note 358, at 2, para. 7.

³⁶¹ *Austin Answer*, *supra* note 341, at 2, para. 4 (Ms. Dagner refers to para. 5 but means para. 4); *Austin Complaint*, *supra* note 358, at 2, para. 4.

³⁶² *Austin Answer*, *supra* note 341, at 2, paras. 7–8; *Austin Complaint*, *supra* note 358, at 1–2.

³⁶³ *Austin Answer*, *supra* note 341, at 2, para. 9; *Austin Complaint* *supra* note 358, at 2, para. 7.

³⁶⁴ *Austin Answer*, *supra* note 341, at 2, para. 10; *Austin Complaint* *supra* note 358, at 2, para. 10.

³⁶⁵ *Austin Answer*, *supra* note 341, at 2, para. 11; *Austin Complaint* *supra* note 358, at 2, para. 11.

³⁶⁶ *Austin Answer*, *supra* note 341, at 2, para. 14; *Austin Complaint*, *supra* note 358, at 3, para. 14.

³⁶⁷ *Austin Answer*, *supra* note 341, at 3, para. 19; *Austin Complaint*, *supra* note 358, at 2, para. 10.

³⁶⁸ *Austin Answer*, *supra* note 341, at 4–5, paras. 35–36; *Austin Complaint*, *supra* note 358, at 5, paras. 35–36.

USAA's lawyer denied knowing that the tortfeasor had settled with Mr. Austin, denied knowing the date on the check and the date of its receipt, and denied knowing that Mr. Austin "executed a General Release releasing [the driver] on July 19, 2013."³⁶⁹

Facts that USAA's attorney Ms. Dagner claimed not to know were within USAA's knowledge. In settling the claim with the underlying tortfeasor, the UM/UIM provisions of the USAA insurance policy obliged the plaintiff's attorney, Mr. Fowler, to keep USAA apprised of the steps in his negotiation and settlement with Farmers Insurance.³⁷⁰ If USAA's attorney, Ms. Dagner, disputed any of Mr. Fowler's allegations on behalf of his client Mr. Austin, then she should have denied them. But, years after the crash and with a claim investigation file that had to be expansive, Ms. Dagner's claims not to have sufficient information simply cannot be true unless USAA failed to provide her with its claim file due to USAA's own bureaucratic incompetence. Bureaucratic dysfunction is one possible reason explaining the inability of defense lawyers to admit the most basic information that an insurer is obliged to collect as part of a reasonable investigation. However, were the file missing or incomplete, Ms. Dagner had plenty of time to collect that information herself after Mr. Fowler filed his June 12, 2015, complaint. She did not answer until November 16, 2015, more than five months after Mr. Fowler filed the complaint. During that time, USAA's lawyer might have conducted a reasonable investigation that was consistent with the insurance policy, Colorado law concerning unfair practices, and Rule 11. Her research would have yielded not only the color, make, and year of Mr. Austin's car but would have resolved a slew of other facts Mr. Fowler alleged. For good measure, Ms. Dagner also refused to answer four allegations that called, she said, for a conclusion of law and, as noted above, she claimed that the USAA policy spoke for itself.³⁷¹ Ms. Dagner concluded her answer with a prayer for relief asking that USAA, "having fully [sic] answered plaintiff's Complaint and Jury Demand," receive a judgment on its behalf.³⁷²

Insurance defense mill attorneys have adequate time to answer complaints. Under Colorado's Rules, the defendant has twenty-one days to answer a complaint.³⁷³ However, plaintiffs' lawyers routinely agree to allow additional time when a defense attorney asks. And, if a plaintiff's lawyer refuses to allow additional time to answer, a judge could routinely grant additional time—and the uncooperative plaintiff's lawyer could expect some harsh words from the court.³⁷⁴

³⁶⁹ *Austin Answer*, *supra* note 341, at 4, paras. 30–31; *Austin Complaint*, *supra* note 358, at 4, paras. 30–31.

³⁷⁰ *Austin Complaint*, *supra* note 358, at 4–5, paras. 29–39.

³⁷¹ *Austin Answer*, *supra* note 341, at 1, 4, paras. 1–3, 33.

³⁷² *Austin Answer*, *supra* note 341, at 5–6.

³⁷³ COLO. R. CIV. P. 12(a)(1) ("A defendant shall file his answer or other response within 21 days after the service of the summons and complaint."); *accord* FED. R. CIV. P. 12(a)(1)(A)(i) ("A defendant must serve an answer within 21 days after being served with the summons and complaint . . .").

³⁷⁴ COLO. R. CIV. P. 12(a)(1)(B).

Defense attorneys answered just 10.7% or thirty-eight of the suits within twenty-one days or fewer with eleven answers coming on day twenty-one. That is, only one out of ten attorneys answered within the twenty-one day deadline of Rule 12. One eager lawyer, Gregory Falls, Esq., answered on behalf of GEICO in an UM/UIM claim on the very day that the plaintiff's attorney, Meloney Perry, Esq., filed the lawsuit.³⁷⁵ Likely, Ms. Perry had shared a draft complaint with the defense attorney before filing, as Mr. Falls was able to admit several facts including, for example, details regarding the crash.³⁷⁶

Defense lawyers took longer than Rule 12's twenty-one days to answer 89.3% of the complaints. By four weeks after the filing of the complaint, defense lawyers had answered another 14.6% of the complaints, bringing the total number answered to just over one quarter of all complaints. During week five, they answered another 10.4% and another 10.1% the week after. By the end of seven weeks, there were answers in just over half of the lawsuits (53.5%). Overall, defendants' lawyers filed their answers an average of seventy-nine days after the filing of the complaint, although the amendment and sometimes re-amendment of complaints and answers makes this number a bit squishy. The median number of days to answer—also a squishy number—is shorter, at forty-seven days, which is more than twice the number of days the rule specifies.³⁷⁷ The longest time from the filing of the complaint to answering is 411 days, with this delay a function of actions of the attorneys for both the plaintiff and defendant. Overall, having to answer within twenty-one days of the filing was not a significant constraint.

In car crash cases, a claim file nearly always exists. Plaintiffs' lawyers are unlikely to file suit if there is no insurance. Lawyers know, long before filing, whether the potential defendant has insurance. For starters, the Traffic Accident Report "speaks" of the presence (or absence) of insurance. After signing a client, the plaintiff's lawyer will contact the tortfeasor's insurance carrier and generally send a letter of representation. If there is no coverage, then the plaintiff's lawyer will usually explain to the client that there is no point in proceeding.

On the other side, there is no excuse for the defense lawyer not reading the claim file before answering in order to answer based upon the facts therein. The insurance company need only share a digital copy of the file with the defense lawyer. The insurance defense mill attorney should also speak with the insured, who is also known as the client. The defense lawyer has contact information for the defendant—mobile phone numbers, email addresses, and physical address—and the insured defendant has

³⁷⁵ Defendant GEICO Casualty Company's Answer to Plaintiff's Complaint at 1, *Gribble v. GEICO Cas. Co.*, No. 2015CV30535 (Colo. Dist. Ct. Apr. 2, 2015) (Adams Cnty.), Filing ID No. 7F8F7514D98F.

³⁷⁶ *Id.*

³⁷⁷ COLO. R. CIV. P. 12(a)(1).

a duty under the policy to cooperate in his or her own defense.³⁷⁸ Ethically, the insurance defense mill lawyer is obliged to investigate before answering.³⁷⁹

Given the existence of insurance claim files and the routineness of car crash claims, the twenty-one days that Rule 12 provides should be sufficient to answer. Indeed, if Rule 12's provision of three weeks to answer is unrealistic, then the Colorado Supreme Court should revise the rule. When a defense attorney needs additional time, plaintiffs will generally agree, knowing that judges freely grant motions to enlarge time to answer.³⁸⁰

Even in the unimaginably rare situation in which no claim file existed at the time of the filing of the lawsuit, the insurance companies would still have weeks during which they could investigate the crash, injuries, and claim before the insurance defense attorney would have to answer the complaint. Plaintiffs lawyers and, even more so, judges would freely grant a defense lawyer's motion to enlarge time in order to investigate the claim before answering.³⁸¹

Insurance defense attorneys can speak with the client and read the claim file without ever leaving their desks. Personally, I also believe that they should leave their desks and visit the crash site, as nothing substitutes for in-person viewing.

Why, then, is there so much evidence in the answers that the defense mill attorneys have not read the claim file, have not spoken to the defendants, and have never visited the scenes of the accidents? As with refusals to answer allegations that ask for a legal conclusion, concern a codefendant, or refer to a document, insurance defense mill lawyers' practice is to delay by refusing to answer even when they could.

IV. FRIVOLOUS AFFIRMATIVE DEFENSES

This Article has not yet cataloged the truly frivolous aspects of insurance defense mill attorneys' answers to complaints in car crash cases. Thus far, this Article has looked at insurance defense mill attorneys' responses to the allegations within plaintiffs' complaints. Defense attorneys ignore the clear pathway of Rule 8 and avoid

³⁷⁸ Some defendants, of course, do not assist with their own defense nor live up to their obligations under the policy. *See, e.g.*, *Soicer v. State Farm Mut. Auto. Ins. Co.*, 351 P.3d 559, 565 (Colo. App. 2015) ("Colorado law recognizes that the right to recover under an insurance policy may be forfeited when, in violation of a policy provision, the insured fails to cooperate with the insurer in some material and substantial respect and the failure to cooperate causes material and substantial disadvantage to the insurer.").

³⁷⁹ COLO. R. PRO. CONDUCT 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); COLO. R. PRO. CONDUCT 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); COLO. R. PRO. CONDUCT 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

³⁸⁰ COLO. R. CIV. P. 12.

³⁸¹ COLO. R. CIV. P. 6(b) ("When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed . . .").

answering by claiming they need not respond to an allegation that calls for—or includes—a legal conclusion; that they can ignore allegations directed at another defendant; and that various documents—statutes, traffic accident reports, tickets, and insurance policies—speak for themselves. Notwithstanding the existence of claims-investigation files, the passage of considerable time from the crash to the filing of the complaint, and generally, ample time to answer, defense attorneys also often claim insufficient information to answer and do not reveal that they know much of anything about their clients nor the crash. The defense attorneys’ responses depart from the Colorado Rules of Civil Procedure, which a judge once said to me are not the Colorado Suggestions for Civil Procedure.³⁸²

The second part of the answer that defense attorneys file includes affirmative defenses. An affirmative defense takes the form of “If so, so what?”³⁸³ This means that the defense attorney claims that even if the defendant did what the plaintiff alleges, an affirmative defense shields the defendant from liability.³⁸⁴ The statute of limitations offers a simple example. A defense attorney could include an affirmative defense that says, even if the defendant caused the car crash and injuries as the plaintiff alleges, the crash was fifteen years ago, so the statute of limitations has run. If so, so what?³⁸⁵

Colorado’s Rule 8(c) authorizes the inclusion of affirmative defenses and anticipates, at least implicitly, their inclusion after the defendant has answered the complaint’s allegations.³⁸⁶ Section (c) of Rule 8 is titled “Affirmative Defenses and Mitigating Circumstances.”³⁸⁷ Rule 8(c), like the federal rule,³⁸⁸ includes a nonexhaustive list of affirmative defenses, which the rule notes, “a party shall set forth affirmatively” when “pleading to a preceding pleading.”³⁸⁹ The affirmative defenses relevant to torts include assumption of risk, contributory negligence, injury by fellow servant, release, *res judicata*, statute of limitations, and a catchall for “any other matter constituting an avoidance or affirmative defense.”³⁹⁰ Of relevance when the insurance defense mill lawyer wants to claim, for example, that that plaintiff did not receive

³⁸² COLO. SUG. CIV. PRO.

³⁸³ I credit Dean Beto Juárez for this formulation. “Yes, but” is another version.

³⁸⁴ See *Salinas v. State Farm Fire & Cas. Co.*, No. B-10-194, 2011 WL 13254062, at *2–4 (S.D. Tex. Dec. 27, 2011) (finding that some of a party’s “affirmative defenses” were not true affirmative defenses).

³⁸⁵ Russell, *supra* note 141, at Sections VI.D., VIII.D., IX.C.

³⁸⁶ COLO. R. CIV. P. 8(c).

³⁸⁷ *Id.*

³⁸⁸ FED. R. CIV. P. 8(c)(1).

³⁸⁹ COLO. R. CIV. P. 8(c).

³⁹⁰ *Id.*

enough or any medical treatment, Rule 8(c) specifies that “[a]ny mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded.”³⁹¹

Of the 356 answers in the sample, 350 included a separate list of defenses. Some defense lawyers labeled their separate list as “affirmative defenses” and others simply as “defenses.” Technically speaking, many of the listed items were not true affirmative defenses in the “if so, so what?” form. The highest number of separate defenses was twenty-eight. Including the six answers with no separate defenses, both the median and average number of defenses for the car crash answers was nine. The standard deviation was 4.6.

The list of nine “affirmative defenses” that Robert Jones, Esq., included in his answer on behalf of Rhonda Mills is typical of the work of insurance defense mill lawyers. On behalf of Nancy Severns, Amanda Francis, Esq., alleged that on January 11, 2012, Ms. Severns was a passenger in a car that Ms. Mills hit after running a stop sign.³⁹² After “answering” the complaint that Ms. Francis filed, Mr. Jones appended the following list:

AFFIRMATIVE DEFENSES

1. That Plaintiff’s claims for damages against the Defendant are barred, reduced or governed by the contributory negligence or comparative fault of the driver of the automobile the Plaintiff was a passenger in in accordance with the provisions set forth in C.R.S. §13-21- 111, 111.5 and C.R.S. §13-50.5-101. et. seq.
2. The alleged injuries and damages, if any, were proximately caused by unforeseeable intervening acts of third parties over whom the Defendant had neither control nor right of control.
3. Defendant, without fault, faced a sudden emergency and acted reasonably under the circumstances.
4. Plaintiff’s failure to take such reasonable steps as would have mitigated or minimized the alleged injuries and damages, which includes but is not limited to failure of the Plaintiff, Nancy Severns to utilize a safety belt system, precludes recovery on those injuries and damages pursuant to C.R.S. § 42-4-237(7) 7 [sic].
5. The Plaintiff’s damages, if any, are barred or limited by the provisions of C.R.S. § 13-21- 102.5 (limitations on damages for non-economic loss or injury).
6. Plaintiff’s claims for damages are barred or reduced as such damages were proximately caused by unrelated prior and/or subsequent events for which the Defendant is not responsible.

³⁹¹ *Id.* The rule also notes that “[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.” *Id.*

³⁹² Civil Complaint at 2, paras. 8, 10, *Severns v. Mills*, No. 2015CV30033 (Colo. Dist. Ct. Jan. 9, 2015) (Douglas Cnty.).

7. The Plaintiff named herein may not be the real party in interest to prosecute all or a portion of the claim in question.
8. The Plaintiff's recovery is barred or reduced by payment from a collateral source pursuant to the provisions of C.R.S. §13-21-111.6.
9. The Defendants respectfully reserves [sic] the right to amend this Answer in the future to include additional affirmative defenses as discovery reveals are appropriate. To the extent the law and/or facts in this matter currently support any affirmative defense listed in C.R.C.P. 8(c) not heretofore stated, and/or to the extent any facts or law later discovered or enacted support any such defenses, such defenses are hereby affirmatively plead.³⁹³

Mr. Jones's list of "affirmative defenses" is what plaintiffs' lawyers face after filing complaints. The first item in the list is not an affirmative defense at all. The first item simply refers to Colorado's law on comparative fault,³⁹⁴ pro-rata liability of defendants according to fault,³⁹⁵ and then refers to Colorado's enactment of the Uniform Contribution Among Tortfeasors Act.³⁹⁶ Mr. Jones includes no facts whatsoever with this "affirmative defense." He does not, for example, include any factual allegation that Ms. Severns was herself negligent. Therefore, this allegation does not in any way put Ms. Severns or her attorney on notice that Mr. Jones will be trying to prove comparative fault. The effect of the "affirmative defense" is nothing more than to say that Colorado law regarding comparative fault and pro-rata apportionment apply, but the law would apply regardless of whether he cites the statutes. As for the reference to the Uniform Act—a particularly gnarly statute in my view as a torts professor—the statute applies without Mr. Jones's saying so but has no application given there is but one defendant and therefore no need for contribution among tortfeasors. In all, the first "affirmative defense" is at best a waste of words that says that the law applies, though at worst, the "affirmative defense" might establish—depending on the judge—that Mr. Jones has successfully put the plaintiff's lawyer on notice of a comparative fault defense without alleging any factual basis.

Other of the nine "affirmative defenses" in Mr. Jones's list also do nothing more than pointlessly refer to applicable law. For example, the fifth item in the list states that "[t]he Plaintiff's damages, if any, are barred or limited by the provisions of C.R.S. § 13-21-102.5 (limitations on damages for non-economic loss or injury)."³⁹⁷ With this provision of the state's statutes, the Colorado General Assembly capped damages for noneconomic loss.³⁹⁸ In 2015, the cap for non-economic loss—pain and suffering or

³⁹³ Defendant Rhonda M. Mills' Answer to Complaint and Jury Demand at 2–3, *Severns*, No. 2015CV30033 [hereinafter *Severns* Answer].

³⁹⁴ COLO. REV. STAT. § 13-21-111 (2020).

³⁹⁵ COLO. REV. STAT. § 13-21-111.5 (2020).

³⁹⁶ COLO. REV. STAT. § 13-50.5-101 (2020).

³⁹⁷ *Severns* Answer, *supra* note 393, at 3, para. 5.

³⁹⁸ COLO. REV. STAT. § 13-21-102.5(1) (2020).

general damages—was \$366,250, which could double with clear and convincing evidence.³⁹⁹ Inclusion of the citation of the damages cap is not an affirmative defense, and citation of the cap is neither necessary for the cap to be in effect nor useful in any way.

Mr. Jones's eighth item in his list of affirmative defenses is also pointless.⁴⁰⁰ Mr. Jones cites Colorado's amendment of the collateral source rule.⁴⁰¹ Mr. Jones includes no facts. Without the citation of the statute, the law would still apply. The first, fifth, and eight "affirmative defenses" do nothing other than state that Colorado law applies.

With his second "affirmative defense," Mr. Jones claims that "[t]he alleged injuries and damages, if any, were proximately caused by unforeseeable intervening acts of third parties over whom the Defendant had neither control nor right of control."⁴⁰² This, too, is not an affirmative defense but rather a suggestion of an attack on the plaintiff's case-in-chief. That is, Mr. Jones suggests with this "affirmative defense" that someone else caused the harm, but he does not suggest who that might be. If, indeed, his client Ms. Mills was not driving the car and did not run a stop sign and crash into Ms. Severns, then the plaintiff (and the court) might reasonably expect to hear that claim in the answer, which Mr. Jones filed more than six months after the filing of the complaint and more than three and a half years after the crash. Indeed, if any truth lay behind this allegation, then the plaintiff's attorney would likely have dumped the case long before filing. But, of course, no facts lay behind the boilerplate language of this or other of Mr. Jones's "affirmative defenses."

Mr. Jones's fourth "affirmative defense" misstates the law and also is fact-free. Mr. Jones states that "Defendant, without fault, faced a sudden emergency and acted reasonably under the circumstances."⁴⁰³ Mr. Jones attempts to state what torts students know as the sudden emergency doctrine. A sudden emergency is, however, not a defense; a sudden emergency is a circumstance relevant to whether the defendant exercised reasonable care under the circumstances.⁴⁰⁴ Moreover, the Colorado Supreme Court had, in 2013, eliminated sudden emergency from the state's pattern jury instructions and abolished the doctrine.⁴⁰⁵ For the court, then-Justice and later Chief Justice Nancy Rice wrote: "[w]e hold that Colorado negligence law no longer requires the sudden emergency instruction and that the instruction's potential to

³⁹⁹ COLO. REV. STAT. § 13-21-102.5 (2015), *amended by* COLO. REV. STAT. § 13-21-102.5(3)(c)(III) (2019) (increasing the limitations on general damages to \$468,010, which may be raised to a maximum of \$936,030 on clear and convincing evidence); *see* COLO. SEC'Y OF STATE, ADJUSTED LIMITATIONS FOR DAMAGES PURSUANT TO C.R.S. 13-21-102.5(3)(c)(III) (2020), https://www.sos.state.co.us/pubs/info_center/files/damages_new.pdf [<https://perma.cc/8GPL-CXC9>] (order of the Secretary of State increasing limitations on general damages).

⁴⁰⁰ *Severns* Answer, *supra* note 393, at 3, para. 5.

⁴⁰¹ COLO. REV. STAT. § 13-21-111.6 (2020).

⁴⁰² *Severns* Answer, *supra* note 393, at 2, para. 2.

⁴⁰³ *Id.* at 2, para. 3.

⁴⁰⁴ *DIAMOND ET AL.*, *supra* note 190, at 50–52.

⁴⁰⁵ *Bedor v. Johnson*, 292 P.3d 924, 925 (Colo. 2013) (en banc).

mislead the jury outweighs its minimal utility.”⁴⁰⁶ More than two years before Mr. Jones filed his list of affirmative defenses, she had written: “[w]e therefore abolish the sudden emergency doctrine.”⁴⁰⁷

Mr. Jones’s fourth “affirmative defense” is one of the two items in the list that comes closest to being a true affirmative defense, and with this item, he swerves closest to including a fact. The first part of the fourth defense is that “Plaintiff’s failure to take such reasonable steps as would have mitigated or minimized the alleged injuries and damages . . . precludes recovery on those injuries and damages pursuant to C.R.S. § 42-4-237(7) 7 [sic].”⁴⁰⁸ Mr. Jones tucks the second part of the defense, commonly known as the seat belt defense, into the middle of the item as a nonrestrictive clause set off by commas—“which includes but is not limited to failure of the Plaintiff, Nancy Severns[,] to utilize a safety belt system”—and then returns to cite only that part of Colorado’s title 42 that refers to seat belt nonuse.⁴⁰⁹ This affirmative defense may have two parts, with the first being a general failure to mitigate damages and the second a failure to avoid consequences by wearing a seatbelt.⁴¹⁰ To the extent that Mr. Jones intends to plead a failure to mitigate other than with regard to seatbelt use, he has run afoul of Rule 8(c)’s specific requirement that “[a]ny mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded.”⁴¹¹ His fact-free claim includes no circumstances. Regarding seat belts, for the moment I will assume that he is alleging as fact that Ms. Severns failed to wear her seatbelt while a passenger on the day of the crash, a datum to which the Traffic Accident Report would *speak*. If Mr. Jones were to prove that Ms. Severns was not wearing her seatbelt as the Motor Vehicle Code required, then the statutory section that he cited provides that the evidence “shall be admissible to mitigate damages with respect to any person who was involved in a motor vehicle accident and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident.”⁴¹² Nonuse of a seatbelt can reduce recovery for pain and suffering but not economic loss including damages for medical costs.⁴¹³

Mr. Jones’s sixth “affirmative defense,” like his second, is not an affirmative defense but instead is a vague attack on the plaintiff’s case-in-chief. The listed item is that “Plaintiff’s claims for damages are barred or reduced as such damages were proximately caused by unrelated prior and/or subsequent events for which the

⁴⁰⁶ *Id.* at 927.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Severns* Answer, *supra* note 393, at 3, para. 4 (the second numerical 7 after citation to the statute is a typographical error); COLO. REV. STAT. § 42-4-237(7) (2020).

⁴⁰⁹ *Severns* Answer, *supra* note 393, at 3, para. 4.

⁴¹⁰ ROBERTSON ET AL., *supra* note 48, at 418. My former colleagues at The University of Texas School of Law helpfully distinguish these concepts.

⁴¹¹ COLO. R. CIV. P. 8(c).

⁴¹² COLO. REV. STAT. § 42-4-237(7) (2020).

⁴¹³ *Id.*

Defendant is not responsible.”⁴¹⁴ Again, this fact-free language puts the plaintiff and court on notice of nothing at all. If the matter were to go to trial, and Ms. Severns’ lawyer failed to prove that Ms. Mills caused her harm, then Mr. Jones could move at the trial’s midpoint for a directed verdict. He could make that motion without having included the sixth “affirmative defense” in his answer. His claim about unrelated events is not an affirmative defense at all, plus he alleges no facts whatsoever to support the claim. He does not, for example, allege that Ms. Severns was injured in a prior car crash nor that after the car crash, she injured herself while snowboarding or walking her dog.

The seventh item is also almost a bona fide affirmative defense albeit one that Mr. Jones has pleaded without any factual support. The seventh item in the list is that “[t]he Plaintiff named herein may not be the real party in interest to prosecute all or a portion of the claim in question.”⁴¹⁵ Like the federal rule, Colorado’s Rule 17 specifies that “[e]very action shall be prosecuted in the name of the real party in interest.”⁴¹⁶ The person injured when another driver runs a stop sign is the real party in interest, even if there are various insurers who paid crash-related property or medical costs and may themselves hold subrogation claims. Exactly how a defense attorney should raise the claim that the plaintiff is not the real party in interest is unclear. The leading commenter, Stephen A. Hess, notes:

Colorado rules do not explicitly designate the procedure for raising an objection that the plaintiff is not the real party in interest. However, the cases indicate, and the federal authorities confirm, that the challenge may be raised either as an affirmative defense under Rule 8(c) or in a pretrial motion under Rule 12(b).⁴¹⁷

Mr. Jones pleaded this claim without factual support, but this groundlessness is not what makes this item only “almost” an affirmative defense. Mr. Jones uses the “may” rather than “is.” This is perhaps an acknowledgment that no factual support can exist for the claim.

Finally, Mr. Jones’s ninth claim (the eighth I addressed above as a mere statement of existing Colorado law) is a weird catchall in three separate parts.⁴¹⁸ The first sentence is “The Defendant respectfully reserves the right to amend this Answer in the future to include additional affirmative defenses as discovery reveals are appropriate.”⁴¹⁹ With this sentence, the insurance defense mill lawyer tries to expand the Colorado Rules of Civil Procedure’s already liberal rules for amendment of pleadings. Like its federal counterpart, Colorado Rule 15(a) allows for a party to

⁴¹⁴ *Severns* Answer, *supra* note 393, at 3, para. 6.

⁴¹⁵ *Id.* at 3, para. 7.

⁴¹⁶ COLO. R. CIV. P. 17(a); *see also* FED. R. CIV. P. 17(a).

⁴¹⁷ STEPHEN A. HESS, HANDBOOK ON CIVIL LITIGATION § 4:2 (2020), Westlaw (database updated Oct. 2020).

⁴¹⁸ *Severns* Answer, *supra* note 393, at 3, para. 9.

⁴¹⁹ *Id.* Reserving the right to add affirmative defenses has no legal effect. *See* Russell, *supra* note 141, at 146.

“amend his pleading once as a matter of course at any time before a responsive pleading is filed.”⁴²⁰ More important, the defendant may amend with permission of the plaintiff or the court, with the rule specifying that “leave shall be freely given when justice so requires.”⁴²¹ Plaintiffs’ lawyers faced with requests for amendment should ask the court to consider whether the claims-investigation file that existed at the time the insurance defense mill attorney answered included facts that the defense attorney might have included when making a list of affirmative defenses. If so, then justice might not require that the judge permit amendment. Enforcing the provision for amendment as written might encourage defense lawyers to incorporate facts into their affirmative defenses. In any event, nothing about the Rules of Civil Procedure allows the party to expand the scope of Rule 15 by simply saying so at the end of a list of affirmative defenses.

The second sentence of Mr. Jones’s final “affirmative defense” is a bit of magical realism that incorporates time travel. Mr. Jones writes that “[t]o the extent the law and/or facts in this matter currently support any affirmative defense listed in C.R.C.P. 8(c) not heretofore stated, and/or to the extent any facts or law later discovered or enacted support any such defenses, such defenses are hereby affirmatively plead.”⁴²² The first long clause remarkably claims that Mr. Jones pleads as an affirmative defense any of the defenses that Rule 8(c) lists if at the time he answers, there exist facts or law in support of such defense. If effective, this would be an awesome way for the defense attorney to avoid doing any investigation, research, or reading of the investigation file. She or he could simply say that I have already pleaded all defenses that existing facts or law support, even though I have no idea what those facts or law are and, therefore, the plaintiff’s attorney and plaintiff cannot possibly have any idea whatsoever, either. Carrying this magic into the future, Mr. Jones adds that when he later discovers facts (perhaps by actually reading the claim-investigation file?) or uncovers law or the legislature passes new law, then those facts and law will coalesce into new affirmative defenses that he has already pleaded and that may, perhaps, magically appear in his pleadings without having to resort to Rule 15 amendment.

I understand the second part of the last item in Mr. Jones’s list of “affirmative defenses” in several ways. Most importantly, my opinion is that an insurance defense mill attorney who uses this type of language is implicitly admitting to having failed to read the claim-investigation file, investigate the claim himself or herself, research the law, and speak with the client. Knowing of these professional and ethical failures, the attorney nonetheless wishes to establish the affirmative defenses his or her client would be entitled to make had the attorney acted ethically and professionally. Second, I see these claims roughly like middle school children reserving cafeteria tables with their backpacks on the way into the lunchroom or like Bostonians claiming a property

⁴²⁰ COLO. R. CIV. P. 15(a); *see also* FED. R. CIV. P. 15(a).

⁴²¹ COLO. R. CIV. P. 15(a). *Compare id.*, with FED. R. CIV. P. 15(a) (allowing, under subsection (1) amendment as a matter of course within 21 days and in other circumstances, while subsection (2) notes that “[i]n all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”).

⁴²² *Severns Answer*, *supra* note 393, at 3, para. 9.

right by placing chairs in parking spaces they have shoveled.⁴²³ Neither the middle schoolers nor the Bostonians are making actual legal claims, although they do generally get what they want.

No one should be surprised that lawyers reuse parts of pleadings and motions. For the sake of efficiency and also for the sake of making some money, lawyers adapt previous work-product to new clients. From the biggest Wall Street firms to solo practitioners in small towns, all lawyers do this. Oddly, Professor Engstrom seems offended when lawyers operate efficiently.⁴²⁴

There is, however, a difference between adapting the work done for a previous client and simply cutting and pasting. Like other insurance defense mill lawyers, Mr. Jones simply cut and pasted his list of affirmative defenses—including a typographical error. Likely, a legal assistant or paralegal did the actual cutting and pasting. The list of “affirmative defenses” that Mr. Jones included in his answer to the lawsuit against State Farm insured Ms. Mills was, character-for-character identical to the one that he had included in defending T. Jay Alvarado and his employer Service Master of Colorado Springs.⁴²⁵ Every jot and tittle of the nine defenses listed above had appeared in the answer that Jones had filed a few months earlier including the typographical error in referring to “C.R.S. § 42-4-237(7) 7.” The final 7 in this string is a typo, as subsection (7) has no subparts and, if it did, they would be lettered not numbered.⁴²⁶

The only difference between Mr. Jones’s two lists is with the fourth “affirmative defense” regarding seat belts. In the April answer, this item refers to “the Plaintiffs, Bobbie Jackson and Adam Jackson.”⁴²⁷ The June answer substitutes Nancy Severns and remembers to make Plaintiffs singular.⁴²⁸ Again, whether Mr. Jones or nonlawyer State Farm staff made these changes is presently unknown.

Cutting and pasting would be acceptable if insurance defense mills adapted each affirmative defense to the facts of each complaint after reading the claim-investigation file and interviewing the client. Rather than cutting and pasting, the defense attorneys and their staffs might use templates. A template might say, for example, “the plaintiff was comparatively at fault because [he or she] [insert facts concerning the Plaintiff’s negligence].” Perhaps the plaintiff was talking on the phone, not driving in her lane, failed to use his signal, or any other thing. A template that includes a list of affirmative

⁴²³ See PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998). This book’s cover features a chair holding a shoveler’s property interest in a Boston parking spot.

⁴²⁴ See Engstrom, *Run-of-the-Mill Justice*, *supra* note 14, at 1493 (“At settlement mills, it is assumed that claims will be straightforward. Standardized and routinized procedures are then designed and employed in keeping with that assumption. Efficiency trumps process and quality.”).

⁴²⁵ Defendants T. Jay Alvarado and Egeler Enterprises, Inc. DBA Service Master of Colorado Springs’ Answer to Complaint and Jury Demand at 3–4, *Jackson v. Alvarado*, No. 2015CV30810 (Colo. Dist. Ct. Apr. 27, 2015) (El Paso Cnty.), Filing ID No. 5A4FAF62A38B5 [hereinafter *Jackson Answer*].

⁴²⁶ COLO. REV. STAT. § 42-4-237(1)(a) (2020).

⁴²⁷ *Jackson Answer*, *supra* note 425, at 1.

⁴²⁸ *Severns Answer*, *supra* note 393, at 3.

defenses and that prompts the insurance defense mill attorney to add facts would satisfy the factual commands of Rules 11 and 8. Cutting and pasting without facts does not.

Going through every insurance defense mill attorney's list of defenses would be tedious for this Article's dear readers; imagine how infuriating the lists are for the plaintiffs' attorneys! Simply describing and analyzing one list takes pages. A motion to strike or to flesh them out takes even more time and text.

Insurance defense mill attorneys working for GEICO employed an approach very similar to that of Mr. Jones on behalf of the State Farm insureds. With an asterisk, attorneys in the office of Elizabeth A. Kleger & Associates identify themselves as "Employees of Government Employees Insurance Company."⁴²⁹ Answers by firm attorneys make clear that they share their laundry lists of affirmative defenses within the firm even though each attorney may tailor the list somewhat. Thus, in an answer that Kianna Jackson, Esq., filed on August 7, 2015, in response to an amended complaint concerning a crash on January 25, 2015, Ms. Jackson included the following list:

AFFIRMATIVE DEFENSES

1. The failure to take such reasonable steps as would have mitigated or minimized the alleged injuries and damages precludes recovery on these injuries and damages.
2. The alleged injuries and damages, if any, may have existed before the occurrence complained of and recovery therefore may be precluded or diminished as required by law.
3. The alleged injuries and damages, if any, may have resulted from injuries incurred after the occurrence complained of and recovery therefore may be precluded or diminished as required by law.
4. The alleged injuries and damages, if any, may have been proximately caused by unforeseeable intervening acts of third parties over whom the Defendant had no control nor right of control.
5. The Plaintiff named herein may not be the real party in interest to prosecute all or a portion of the claim in question.
6. The Defendant's liability, if any, is limited to that amount represented by Defendant's pro rata share of negligence for fault, if any, producing the claimed injury or loss.
7. The Plaintiff's claims may be barred or limited by the collateral source rule of C.R.S. §13-21-111.6.
8. Per C.R.S. § 13-21-111.5(3)(b), Defendant designates the driver of Plaintiffs' vehicle, Mr. Louis Daniel, as a negligent non-party.

⁴²⁹ Answer to Complaint and Jury Demand at 1, *Salazar v. MacNaughton*, No. 2015CV31851 (Colo. Dist. Ct. June 22, 2015) (Denver Cnty.) [hereinafter *Salazar* Answer]; Answer to Complaint and Jury Demand at 1, *Crayton v. Zachary*, No. 2105CV32342 (Colo. Dist. Ct. Aug. 7, 2015) (Denver Cnty.) [hereinafter *Crayton* Answer].

9. The Defendant respectfully requests the right to amend this Answer in the future to include additional affirmative defenses as discovery reveals are apparent.⁴³⁰

As with Mr. Jones's list, there are no facts to support these "affirmative defenses" and, in my opinion, no indication, apart perhaps from the attempt to designate a nonparty, that Ms. Jackson had read the claim file nor interviewed her client before answering. Like Mr. Jones's list, few of the items are true affirmative defenses, several suggest possible attacks on the plaintiff's case-in-chief, and others pointlessly refer to existing Colorado law. Like Mr. Jones, Ms. Jackson uses the final item in the list to "respectfully request the right to amend" the answer, although, as noted above, Rule 15 liberally allows amendment and sets out a procedure.⁴³¹ With the eighth item, Ms. Jackson tried to designate the driver of the plaintiff's car as a nonparty, which is neither an affirmative defense nor quite the right way to designate a nonparty.⁴³²

Skye McCulloch, Esq., a colleague of Ms. Jackson's at Elizabeth A. Kleger & Associates, cut and pasted from the same source as Ms. Jackson. Ms. McCulloch filed an answer on June 22, 2015, for a crash that happened on August 8, 2013.⁴³³ Ms. McCulloch's first item in her list of "affirmative defenses" was, character-for-character identical to the first item in the list that Ms. Jackson would file in her August answer.⁴³⁴ Five other of Ms. McCulloch's items differed from Ms. Jackson's items by just a single word. Three of Ms. McCulloch's were distinct but still pointless—one purported to raise the seatbelt defense, another stated the cap on non-economic loss, and a third stated, of course without facts, that the defendant might be entitled to set-off.⁴³⁵ Again, there is nothing wrong with cutting and pasting for the sake of efficiency within a firm, but, in my opinion, there is everything wrong professionally and ethically with listing items as affirmative defenses that have no factual predicate and that suggest or reveal that the attorney has failed to investigate.

The single word that distinguished the Ms. Jackson and Ms. McCulloch's answers on behalf of GEICO and its insured was "may." As with the Jones list, Ms. Jackson included the word "may" in five of the nine items on her list—the plaintiff's injuries "may have existed before"; the damages "may have resulted from injuries incurred after"; the injuries "may have been proximately caused by" unrelated third parties; and the plaintiff "may not be the real party in interest."⁴³⁶ As noted above, the use of "may," even if the attorneys included facts, turns these items into garbage. The

⁴³⁰ Crayton Answer, *supra* note 429, at 2–3.

⁴³¹ *Id.* at 3, para. 9.

⁴³² See COLO. REV. STAT. § 13-21-111.5 (2020) ("The notice shall be given by filing a pleading in the action designating such nonparty and setting forth such nonparty's name and last-known address, or the best identification of such nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault.").

⁴³³ Salazar Answer, *supra* note 429, at 1.

⁴³⁴ *Id.* at 3; Crayton Answer, *supra* note 429, at 2.

⁴³⁵ Salazar Answer, *supra* note 429, at 3.

⁴³⁶ Crayton Answer, *supra* note 429, at 2.

standard of proof in civil claims is a preponderance of evidence; “may” is always less than a preponderance.

For GEICO, Ms. McCulloch, who used the word “may” only once, instead hedged her list with a 148-word introduction. Nothing in the Rules of Civil Procedure authorizes or creates a need for such an introduction. “The Rules of Civil Procedure require every Defendant to plead potential Affirmative Defenses at the time the Answer is filed,” Ms. McCulloch correctly wrote, “or risk a determination,” she continued, that “the potential Affirmative Defenses are waived, even though no disclosures have been exchanged, and no right of discovery exists, at the time the Answer is filed.”⁴³⁷ As noted above, Rule 8(c) offers a nonexclusive list of affirmative defenses, many of which apply specifically to personal injury cases, and states that “[i]n pleading to a preceding pleading, a party shall set forth . . . any other matter constituting an avoidance or affirmative defense.”⁴³⁸ However, Ms. McCulloch’s claim about waiver of affirmative defenses is a bit dramatic because of the leniency, already described, of Rule 15 and also because, as Mr. Hess comments, Colorado “courts have been reluctant to allow forfeiture of affirmative defenses where the defendant tries to raise the defense through some other means and there is no prejudice to the plaintiff. Consequently,” Mr. Hess continues, “several cases have allowed a defendant to raise an affirmative defense in briefs on a motion for summary judgment.”⁴³⁹ Furthermore, Ms. McCulloch’s complaint that she had to assert defenses when answering rather than after conducting discovery rings hollow. She took twenty-seven days to answer the complaint, and GEICO had 656 days from the date of the crash to the filing of the complaint to investigate.⁴⁴⁰ The claim-investigation file surely would have allowed her to plead at least a single fact in her list of affirmative defenses. Instead, Ms. McCulloch moaned in the second sentence of her introduction, “the following Affirmative Defenses are necessarily pled based only upon information and belief.”⁴⁴¹

Like other insurance defense mill attorneys, Ms. McCulloch attempted to enlarge the Rules of Civil Procedure to her own benefit: “Defendant reserves the right,” she proclaimed in the third sentence, “to seek leave to add, withdraw, and/or modify Affirmative Defenses once disclosures are exchanged, discovery is received, or other information is obtained.”⁴⁴² Strangely, she also noted that, “[i]n identifying the following as ‘Affirmative Defenses,’ Defendant does not imply the burden of proof or of going forward with evidence has shifted, as that is a matter for Court

⁴³⁷ Salazar Answer, *supra* note 429, at 2–3.

⁴³⁸ COLO. R. CIV. P. 8(c).

⁴³⁹ HESS, *supra* note 417, § 3:4 (citing *Bebo Const. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999)); *see, e.g.*, *Cox v. Pearl Inv. Co.*, 450 P.2d 60, 61–62 (Colo. 1969); *Drake v. Tyner*, 914 P.2d 519, 521–22 (Colo. App. 1996); *Alien, Inc. v. Futterman*, 924 P.2d 1063, 1068 (Colo. App. 1995).

⁴⁴⁰ Salazar Answer, *supra* note 429, at 1.

⁴⁴¹ *Id.* at 3.

⁴⁴² *Id.*

determination.”⁴⁴³ As defendant’s counsel, she would have the burden of proving affirmative defenses that she asserted; that’s the idea!

With the final sentence of her introduction to her list of “affirmative defenses,” Ms. McCulloch implicitly revealed, as other insurance defense mill lawyers also have, that she understood she was violating the Rules of Civil Procedure. “Pursuant to Rule 11,” she promised, “any defense that is not supported by the evidence, upon completion of discovery, will be withdrawn prior to the start of trial.”⁴⁴⁴ As I discuss below, Rule 11 requires both an investigation and a factual basis for any defenses *before* an insurance defense mill lawyer pleads those defenses.⁴⁴⁵ I understand Ms. McCulloch’s promise to withdraw frivolous or groundless defenses “prior to the start of trial” to be an admission that she violated Rule 11 with her answer. Ms. McCulloch inserted the same introduction to affirmative defense in all but one of eleven of her answers that are in the sample.⁴⁴⁶ In one answer, though, she or her paralegal inserted the introduction, but neglected to cut and paste the list of affirmative defenses into the answer.⁴⁴⁷

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ COLO. R. CIV. P. 11(a).

⁴⁴⁶ Ms. McCulloch filed 11 of the answers in the sample. On average, she answered 57 days after the filing of the complaint. *See, e.g.*, Salazar Answer, *supra* note 429, at 2–3; Answer to Complaint and Jury Demand at 3, Norwood v. Oetken, No. 2015CV32323M (Colo. Dist. Ct. Sept. 11, 2015) (Denver Cnty.); Answer to Complaint and Jury Demand at 2, McKenna v. Rackliff, No. 2015CV30776 (Colo. Dist. Ct. Aug. 31, 2015) (Jefferson Cnty.) [hereinafter *McKenna* Answer]; Answer to Complaint and Jury Demand at 3, Mays v. Hague, No. 2015CV30021E (Colo. Dist. Ct. May 15, 2015) (Jefferson Cnty.); Answer to Complaint and Jury Demand at 2, Benavidez v. Meyers, No. 2015CV31427 (Colo. Dist. Ct. May 11, 2015) (Denver Cnty.); Defendant French’s Answer to Complaint and Jury Demand at 5, Carter v. Marshall, No. 2015CV30517 (Colo. Dist. Ct. Apr. 30, 2015) (Arapahoe Cnty.); Answer to Complaint and Jury Demand at 3, Lucero v. Barry, No. 2015CV30245 (Colo. Dist. Ct. Apr. 14, 2015) (Denver Cnty.); Defendant Caitlin Butler’s Answer to Complaint and Jury Demand at 4, Britain v. Butler, No. 2015CV30712 (Colo. Dist. Ct. Apr. 10, 2015) (Denver Cnty.); Answer to Complaint and Jury Demand at 2, Turner v. Settle, No. 2015CV30670 (Colo. Dist. Ct. Apr. 2, 2015) (El Paso Cnty.); Answer to Complaint and Jury Demand at 4, Norris v. Ross, No. 2015CV30336 (Colo. Dist. Ct. Feb. 23, 2015) (Denver Cnty.); Answer to Complaint and Jury Demand at 3, Cook-Heisser v. Winters, No. 2015CV30094 (Colo. Dist. Ct. Feb. 9, 2015) (Jefferson Cnty.).

⁴⁴⁷ *McKenna* Answer, *supra* note 446, at 2. Two other insurance defense mills, Senter, Goldfarb & Rice, LLC, and Overturf McGath & Hull, P.C., used the identical introduction to their own lists of affirmative defenses. *See* Answer and Jury Demand at 2, Sefcovic v. Riggan, No. 2015CV30303 (Colo. Dist. Ct. May 4, 2015) (Douglas Cnty.); Defendant Robert Graham’s Answer & Jury Demand to Plaintiff’s Complaint at 6, Yankey v. Graham, No. 2015CV30013 (Colo. Dist. Ct. Mar. 19, 2015) (Arapahoe Cnty.). The exact mechanism by which this text diffused among the insurance defense mills is unknown. Deana Dagner used a similar introduction to her list of fact-free affirmative defenses. *See* Defendant Polunci’s Answer to Plaintiffs’ Complaint for Damages and Demand for Jury Trial at 4, Magill v. Ford Motor Co., No. 2015CV32019 (Colo. Dist. Ct. Nov. 23, 2015) (Denver Cnty.).

As noted, defense lawyers asserted an average of nine different defenses in their lists of “affirmative defenses.” Few were true affirmative defenses. In support of these affirmative defenses, the attorneys pleaded almost no facts. The median number of facts that attorneys pleaded in support of their entire list of affirmative defenses was zero. Indeed, 196 of the 356 answers included no facts in their assertion of affirmative defenses. That is, more than half the answers contained no facts whatsoever in support of any of the items in the list of defenses. The greatest number of facts in any answer was four; the mean was one half. Again, that is an average of one-half of a fact pleaded in support of the entire list of affirmative defenses, not one-half of a fact for each defense.

However, even the figure of one-half fact per list of defenses is misleadingly high. When coding the answers, I counted the assertion of the seat belt defense as a fact. As my subthesis is that defense attorneys do not plead facts, I interpreted the assertion of the seat belt defense conservatively against my thesis. So, I counted as a fact the claim that the plaintiff may not have been wearing a seat belt, whereas I did not count as a fact the bald claim that the plaintiff was also—or may have been—at fault for no specified reason. Of the 160 answers that included from one to four facts, 130 of those asserted that the plaintiff was not wearing a seat belt. As in other states, compliance with the law that requires seat belts is quite high in Colorado with 80.7% of drivers wearing their seat belts in 2012 and 82.1% in 2013.⁴⁴⁸ Without success, I attempted to collect a subsample of Traffic Accident Reports for a number of the crashes in order to see what the reports said about whether the plaintiff had been wearing a seat belt and to determine whether crashes included an unrepresentative sample of seat belt nonwearers. My conclusion is that the assertion of the seat belt defense is not truly the assertion of a fact, rather, the defense attorney is simply taking a shot in the dark.

Excluding the assertion of the seat belt defense as a fact reduced the number of answers that asserted any facts at all to thirty-five. That is, only in 9.8% of the answers did the insurance defense mill attorneys marshal any fact at all in support of the entire list of affirmative defenses they asserted. Scandalous! Thus reduced, the average number of facts that defense attorneys pleaded in support of each list of affirmative defenses was 0.14. Again, this is not 0.14 facts per affirmative defense; this is 0.14 facts per list of affirmative defenses. Shameful!

Colorado’s statutes provide for attorney fees “against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification.”⁴⁴⁹ In 1977, the General Assembly claimed to “recognize[] that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice.”⁴⁵⁰ The legislators responded “to this problem” with “provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or

⁴⁴⁸ COLO. DEP’T OF TRANSP. & COLO. STATE UNIV. INST. OF TRANSP. MGMT., 2013 STATE OF COLORADO STATEWIDE SEATBELT SURVEY (2013), <https://www.codot.gov/library/surveys/2013cdotstatewide.pdf> [<https://perma.cc/534C-4T2T>].

⁴⁴⁹ COLO. REV. STAT. § 13-17-102(2) (2021).

⁴⁵⁰ COLO. REV. STAT. § 13-17-101 (2016).

substantially vexatious.”⁴⁵¹ The terms of the statutory provisions apply equally to plaintiffs and defendants.⁴⁵² Even so, during the forty-three years since the General Assembly took action against frivolous claims, one hears of “frivolous lawsuits” but not of “frivolous defenses.”

The legislature directs that “[t]he court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification.”⁴⁵³ The statute further specified that “‘lacked substantial justification’ means substantially frivolous, substantially groundless, or substantially vexatious.”⁴⁵⁴ Subsequent litigation has allowed Colorado courts to further refine the definitions of groundless and frivolous. For example, a division of the Colorado Court of Appeals held that “[a] claim is frivolous if the proponent can present no rational argument based on the evidence or law in support of the claim. A claim is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence.”⁴⁵⁵ Groundlessness and frivolousness overlap while differing slightly in some way that is unimportant to my argument.

Rule 11 bolsters the threat of an award of attorney fees. Colorado’s Rule 11 provides that, “[t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact.”⁴⁵⁶ In addition, the attorney, by signing, certifies that the pleading is “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”⁴⁵⁷ Of course, a complaint and an answer are pleadings.⁴⁵⁸

Rule 11 requires that attorneys conduct “reasonable inquiry” and file only pleadings that are “grounded in fact.” The rule provides for sanctions against those

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ COLO. REV. STAT. § 13-17-102(4) (2021).

⁴⁵⁴ *Id.*

⁴⁵⁵ *Remote Switch Sys., Inc. v. Delangis*, 126 P.3d 269, 275 (Colo. App. 2005).

⁴⁵⁶ COLO. R. CIV. P. 11(a).

⁴⁵⁷ *Id.*

⁴⁵⁸ COLO. R. CIV. P. 7 specifies the following pleadings: complaint, answer, a reply to a counterclaim, answer to a cross-claim, third-party complaint, third-party answer, “and there may be a reply to an affirmative defense.” Of course, only a complaint and answer will exist in all cases. The defendant pleading affirmative defenses allows the plaintiff to reply to those affirmative defenses, which pushes back the at-issue date. *See* COLO. R. CIV. P. 16(b)(1) (“A case shall be deemed at issue when all parties have been served and all pleadings permitted by [COLO. R. CIV. P.] 7.”). Lawyers often mistakenly refer to motions, responses, and other documents outside Rule 7 as pleadings as if “pleading” were a generic term for any document a lawyer files with the court.

who violate the rule. Linked, the Colorado statute allows attorney fees against parties who present substantially frivolous or substantially groundless defenses or claims.⁴⁵⁹ Any defense that lacks any factual support is groundless and frivolous.

V. CONCLUSION

This Article is about civil procedure, torts, insurance, litigation, and professional ethics. This empirical study draws data from trial courts using car crash lawsuits filed in the first six months of 2015. Plaintiffs' lawyers filed a total of 1,538 such suits during this period, and I collected and analyzed 298 complaints and 356 answers. On average, these crashes took place about two years before filing, during which time drivers in Colorado drove 46,868 million VMT per year.⁴⁶⁰ This driving led to 103,687 crashes of which about one quarter, or 25,760, resulted in injury.⁴⁶¹ Not quite one in nine injury crashes (11.5%) led to the filing of a lawsuit.⁴⁶² Altogether, personal injury litigation amounts to just under five percent of all civil litigation in Colorado, with car crash lawsuits comprising 60.2% of all personal injury lawsuits.⁴⁶³ Understanding torts and personal injury litigation means investigating car crashes, which is not a sexy topic.

Stanford Law School's Professor Nora Freeman Engstrom has looked at the claimant's side of personal injury claiming in a series of terrific articles. This work has looked instead at the defense and specifically at what I call—adapting Professor Engstrom's terminology—insurance defense mill lawyers. These are the lawyers right at the heart of personal injury litigation who represent car crash defendants, who work for or are paid for by insurance companies, and who file answers to the complaints of personal injury lawyers—many of whom advertise on billboards or TV. Less noticed, perhaps, is that the insurance companies also advertise everywhere.

This Article shows that the insurance defense mill lawyers engage in practices that ought to surprise—shock, really—anyone who believes that lawyers ought to follow the law. I show that when answering a complaint, insurance defense mill lawyers habitually ignore the Colorado Rules of Civil Procedure. Despite clear guidance from Rule 8, insurance defense mill lawyers answer evasively by using specious claims that the Rules do not support. They typically refuse to answer when they believe the complaint asks about a legal conclusion. They do not answer allegations that concern a codefendant or another person. Instead of answering allegations that concern statutes, Traffic Accident Reports, insurance policies, or other documents, the insurance defense mill lawyers claim that the documents speak for themselves. But they don't.

⁴⁵⁹ SHEILA K. HYATT & STEPHEN A. HESS, WEST'S COLORADO PRACTICE SERIES, CIVIL RULES ANNOTATED R. 8 (5th ed. 2020) (“Litigants should familiarize themselves with both Rule 11 and with the Colorado legislation that governs the attorney's responsibility for insuring that the litigation process is not abused.”).

⁴⁶⁰ See sources cited *supra* note 92.

⁴⁶¹ See *supra* notes 102103 and accompanying text.

⁴⁶² See *supra* text accompanying notes 126128.

⁴⁶³ See *supra* Table 1 and note 129.

Insurance defense mill lawyers in my opinion often do not investigate before answering, which violates both Rule 11 and the Rules of Professional Conduct. After crashes, insurance companies investigate. Indeed, the insurers are obliged to do so. On average, plaintiffs' lawyers filed complaints two years after the crash. The Rules allow defense attorneys twenty-one days to answer, but defense lawyers file only about one in ten answers that quickly. Instead, the median number of weeks from the filing of the complaint to the filing of an answer seems to be about seven, which, even in the absence of a claim file, is plenty of time to investigate at least the basic facts of a car crash.

The affirmative defenses that insurance defense mill lawyers file with their answers are lists of groundless, frivolous defenses that lawyers or their paralegals cut and paste into the answers. These lists of defenses violate the Rules of Civil Procedure, Colorado statutes, and, in my opinion as a law professor and member of the bar, the ethical requirements of the legal profession. I do not believe that we should dignify systematic departures from the Rules of Civil Procedure with the term "professional," nor do I think that signing pleadings into which paralegals have cut and pasted laundry lists of affirmative defenses is appropriate professional behavior. Practicing law in this way fails to meet any conception of professionalism with which I am familiar.

Why do insurance defense lawyers practice law like this? I plan to explore this issue in more detail after interviewing defense lawyers, their paralegals, and others in much the same way that Professor Engstrom interviewed personal injury lawyers. There are many explanations for the departure of defense lawyers from the rules of pleading. One explanation about which I mostly have third-hand knowledge is that insurance companies have increasingly put the squeeze on insurance defense firms by reducing the amount they will pay to the lawyers who defend their insureds. Competition for the business that auto insurance companies provide to defense firms—especially to defense mills that, obviously, are not in-house—leads defense lawyers to do less and less when answering. The Rules of Professional Conduct for lawyers require that we stand up to clients whose demands push us to behave below professional norms. At some point, when the client refuses to pay for what needs to be done, lawyers with ethical standards have to turn down the work.

The simplest answer, though, for why insurance defense mill lawyers practice law in this way is because they can get away with ignoring the rules and not investigating before they answer. They are, of course, willing participants in the practices that I have described in this Article. Defense lawyers ignore the Rules of Civil Procedure because the plaintiffs' bar allows them to do so. Although the legal profession relies on norms of self-policing, litigation's essence is adversarial. Plaintiffs' lawyers rarely file motions asking defense lawyers to provide better answers. In part, they do not file motions challenging the normal practices of evasion and non-investigation because those motions take an enormous amount of time. Simply describing a list of nine affirmative defenses took many pages in this Article; more pages are necessary to add the citations and to convince a judge to order the defense attorney to amend the answer.

A more important explanation for how insurance defense mill attorneys get away with evading the law and the norms of the profession is that the plaintiffs' bar's acquiescence regarding frivolous defenses is a kind of compromise that expresses the symbiosis between the insurance industry and the plaintiffs' bar. Professor Engstrom has shown how plaintiff-side settlement mills work in tandem with insurance firms and churn out small settlements of small cases in an efficient manner that may not make all law professors greatly proud of the profession. The same kind of implicit agreement not to be disruptive seems to support frivolous defenses.

Of course, judges also condone departures from the rules. A rare few judges—only Judge Shadur, really, and he has died—review answers *sua sponte* and force defense lawyers to file answers that comport with the Rules of Civil Procedure.⁴⁶⁴ My experience is that when asked by plaintiffs' lawyers via motions to strike or motions for more definite statements, few judges grant motions striking fact-free lists of affirmative defenses and answers that evade by ignoring the rules. Why do judges do this? Perhaps because the bad pleading is part of the culture, and judges tend not to want to rock the boat. Other explanations for such judicial behavior include that the judges are subject to bureaucratic pressure that causes them to believe—wrongly, I think—that pre-trial motions that force the defense to present facts and confine their responses within the rules will tend to prolong litigation. I think the opposite is true. Another explanation is that judges' unwillingness to force insurance defense lawyers to plead within the rules may also reflect the judges' own bias against personal injury plaintiffs.

For car crash cases, which dominate personal injury litigation, the attorneys answering complaints have plenty of time and resources that they should use to comply with the Rules of Civil Procedure and the Rules of Professional Conduct. The defense lawyers, their counterparts in the plaintiffs' bar, judges, injured people, and all the insureds should expect and receive no less.

⁴⁶⁴ See Russell, *supra* note 141.