Combating the Reptile Theory

Miscellaneous Reading

Reptile Theory: What Is It and How It Is Used

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In the case of *Williams v. Tennessee River Pulp & Paper Co.*, 442 So.2d 20 (Ala. 1983), Justice Jones, dissenting from the majority, noted:

> We need not take a public poll to know that the most feared of all vehicles on the highways of this State, and for good reason, is not the truck hauling explosives, or toxic chemicals, or even atomic waste, but the old, overloaded, no-brakes, slick-tired, one headlight, no-tail lights, uninsured log truck. This is not intended as a reflection on those hard working timber cutters who eek out a bare existence under these so-called independent contractor arrangements, where they barely earn a minimum wage, but the vehicles which they operate on the public highways are moving accidents, looking for a place to happen. 442 So.2d at 24-25.

Fear is a great motivator. As emphasized in the quote by Justice Jones, no public poll is needed to know the public fears reckless commercial activity. In awarding large verdicts, jurors are more often motivated by fear or anger than by sympathy for an injured plaintiff. This reality became publicized to the plaintiff's bar with the publication of *Reptile: The 2009 Manual of the Plaintiff's Revolution.* In this publication, David Ball and Don Keenan provided plaintiff's counsel with a technique and strategic outline for building themes around fear and anger. This strategy begins with the initial complaint, and follows through with carefully scripted deposition questions, voir dire examination of prospective jurors, and examination at trial. We will explore the origin of the Reptile Theory, whether it truly represents a new strategy for the plaintiff's bar, and the defendant's best response to negate it.

Origin of the Reptile Theory

The Reptile Theory originates from the work of the American physician and nuero-physiologist Paul D. MacLean. In the 1950s, Dr. MacLean introduced the term "limbic system" in a paper describing the inter-connected brain structures which included the septum, amygdalae, hypothalamus, and hippocampal complex and cingulate cortex. Dr. MacLean's description of the limbic system as a major system in the brain was not widely accepted by neuro-scientists, but this has been regarded as Dr. MacLean's most important contribution to neuro-science. Dr. MacLean formulated his model for the triune brain in the 1960s and published a book entitled, *The Triune Brain in Evolution* in 1990. Dr. MacLean described the brain as consisting of three major divisions: the reptilian complex, the paleomammalian complex and the neomammalian complex. Dr. MacLean described each of these divisions as developing as a separate and more advanced stage of evolution of the brain. The triune brain hypothesis became popular through Carl Sagan's Pulitzer Prize winning 1977 book *The Dragons of Eden*. However, the theory has been rejected by many modern neuro-scientists.

Reptilian Complex

The Reptilian Complex, also known as the R-Complex and the "reptilian brain," consists of the basal ganglia, which Dr. MacLean proposed was derived from the floor of the forebrain during development. The name was derived from a view of comparative neuro-anatomists who proposed

that the forebrains of reptiles and birds were dominated by these structures. Dr. MacLean proposed that the Reptilian Complex controlled instinctive behaviors involved in aggression, dominance, territoriality, and ritual behavior.

Paleomammalian Complex
The Paleomammalian brain consists of those structures Dr. MacLean described as "the limbic system." Dr. MacLean proposed that the structures of the limbic system arose early in mammalian evolution and were responsible for the motivation and emotion involved in feeding, reproductive behavior, and parental behavior.

Neomammalian Complex
The Neomammlian Complex consists of the cerebral neocortex structure found uniquely in higher mammals. Dr. MacLean regarded the development of the cerebral neocortex as the most recent step in the evolution of the mammalian brain. The cerebral cortex controls the ability for language, abstract thought, planning, and perception.

The Reptile Theory in Litigation
The idea behind the Reptile Theory in litigation is to pursue a strategy that will ultimately lead to engaging the jurors on a more fundamental level than an appeal to rational thought. Ball and Keenan proposed tactics that would place the members of the jury into "survival mode." Under this theory, survival mode supplants logic, producing a verdict motivated by fear or anger. In order to accomplish this, the jury must be convinced of the existence of a real and present threat of harm, so that the jurors are motivated to respond positively to the plaintiff's counsel request for a large monetary award as a means of protecting the community at large. The jury must be convinced that a defense verdict will promote reckless behavior and further endanger each juror and the community at large.

Reptilian Trial Strategies
Advocates of the Reptile Theory propose developing themes centered around safety issues through the early phases of discovery, the voir dire examination of prospective jurors, and the themes developed during the trial. In the book *Reptile: The 2009 Manual of the Plaintiffs Revolution*, Ball and Keenan propose lines of questions in depositions that will equate a legal duty to a safety standard. For instance, under the Reptile Theory, the regulations of the Federal Motor Carrier Safety Administration become standards for safe conduct. The plaintiff's counsel may ask, "Is a trucking company obligated to follow the federal regulations?" This question is then quickly followed by the following: "Do you agree that the federal regulations are imposed for the safety of the public?" Or in a professional liability case, the plaintiff's counsel may ask, "Are you obligated to follow the standard of care? Do you agree that the standard of care is important because it protects the safety of the individual? Did you follow patient safety rules?" By asking such questions, the focus is shifted from the facts of the individual case to a broader concern for safety of the general public.

Does the Reptile Theory Work?
Skilled plaintiff's counsel have learned that jurors are motivated more by anger or fear than by sympathy. If the plaintiff's counsel focuses on the injuries or situation of his own client, it places the focus on the individual plaintiff. This may also lead to jurors questioning whether the plaintiff did everything the plaintiff should have done to avoid injury or whether the plaintiff had mitigated his injury. However, if the focus can become a more general sense of public safety, then the focus is on

the behavior of the defendant, and the jury can be motivated to return a large verdict to alter behavior which the jury perceives as a threat to the jurors individually or to the public at large.

Flaws in the Neuro-Science

While the Reptile Theory is a clever term which intrigues, the tactics are not new and do not depend on an appeal to the "Reptilian Brain." The emotions that produce fear and anger are part of higher thinking. Reptiles do not respond in fear or in anger; rather, the basic survival instinct of a bird or reptile responds to a perceived danger. This is not at all an emotional response. Thus, while the Reptile Theory may not truly fit an appeal to the Reptile Brain as identified by Dr. MacLean, the tactics are valid for motivating large verdicts, and defense counsel should be prepared to deal with such tactics. Jurors have always responded positively to theories of liability that reveal public dangers. For example, exploding gas tanks, failing air bags, and seat belt failures provide good examples of the types of cases that jurors have responded with large monetary awards because of a perceived threat of harm to the public at large.

Countering Reptile Theories

Defense counsel should be prepared for the themes that will focus on public safety issues. With the publicity given to these theories by Ball and Keenan, the defense witness should be prepared for questions that will attempt to make a breach of legal duty synonymous with a breach of a safety standard. Thus, the witness should be prepared to recognize such questions and be prepared to deal with them. Defense counsel should also be prepared to present pretrial motions to prevent Reptile tactics before they occur. A motion in limine can be effective in convincing the court of the inadmissibility of such tactics. An example of a motion in limine directed to the Reptile Theory can be found at the end of this paper. A motion in limine can be effective in preventing the plaintiff from making improper comments that would suggest Reptile tactics to the jury in voir dire examination of prospective jurors, opening statements, or in questions presented to witnesses.

In countering the Reptile tactics, it is important to remember that such tactics are not actually appeals to the "Reptile Complex". Rather, such tactics may be improper appeals to the passion of jurors or improperly asking the jurors to place themselves in the position of the plaintiff, rendering such tactics inadmissible at trial.

Conclusion

It is important to recognize that the Reptile tactics are nothing more than the age-old tactic of appealing to the passion and prejudice of jurors. In countering these theories, it is important to remember that jurors are not reptiles. The brain consists of more than the instinctive response to perceived danger. Rather, the human brain is a complex organ which permits a juror to view the evidence in an objective, thoughtful, and intelligent manner. Jurors are not reptiles, and they should not be treated as such. Reptile tactics, and Reptile lawyers, are best defeated by rational appeals to human intelligence.

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IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

RICHARD SURLES and ROQUEL SURLES,	*	
Plaintiffs,	*	
v.	*	**Civil Action No.: CV-12-900568**
ERIC MURRAY, M.D., et al.	*	
Defendants.	*	

MOTION IN LIMINE

COME NOW the defendants, Eric Murray, M.D. and Huntsville Cardiac Anesthesia, and move in limine for this Court to issue an order prohibiting the parties, their attorneys, as well as all witnesses during the trial of this matter from making any reference before the jury in any form whatsoever to the following subjects, whether references are made in arguments to the jury, voir dire, witness examination, offers of evidence, objections to evidence, or otherwise:

1. That the plaintiff refrain from questioning Dr. Murray concerning "patient safety rules" or alleged violation of "patient safety rules." Dr. Murray was repeatedly asked concerning "patient safety rules" beginning at p. 86 of Dr. Murray's deposition. Despite Dr. Murray advising that he had never heard of patient safety rules and did not know a definition of patient safety rules, plaintiff's counsel continued to question him concerning "patient safety rules" as if that was synonymous with the standard of care. The jury instructions in this case will define the standard of care, and "patient safety rule" appears nowhere in the Alabama Medical Liability Act or the Alabama Pattern Jury Instructions that are based on the Alabama Medical Liability Act. The use of the term "patient safety rules" in lieu of "standard of care" is a blatant effort to introduce manipulative and fear-based tactics that originate from the publication *REPTILE: The 2009 Manual of the Plaintiff's Revolution*.

The premise of the "Reptile" theory is for the Plaintiffs to establish a broad, over-generalized "umbrella rule" or "safety rule" they will allege was violated by the Defendant. The *Reptile* authors argue that the valid measure of damages for a Reptile plaintiff is not the amount of harm actually caused in a case, but instead the maximum harm that a defendant's alleged *could have* caused. The intent of this strategy is to prime the jury to return a verdict for the plaintiff out of fear of safety for themselves and their community.

While traditional trial strategies appeal to jurors through reasoning and the evidence, *Reptile* encourages the spreading of "tentacles of danger" to intimidate the jury into deciding the case based upon manufactured fear for their own safety and that of others. The basis of the *Reptile* tactics is that each juror has an inner "reptile" that can be awakened by sensing danger, real or imagined. The theory is that if a jury begins to fear for his or her own safety, or the safety of others, emotions override reason and the juror will make decisions out of self-preservation rather than based on the evidence.

The *Reptile* teaches, therefore, that "in trial, your goal is to get the juror's brain out of fritter mode and into survival mode. You do this by framing the case in terms of Reptilian survival." *Id.* At 18 (emphasis added). Shockingly, the *Reptile* defines "brain fritter," as "free to do whatever it wants." *Id.* The Plaintiffs are counting on inciting in jurors sufficient fear for personal and community safety that they no longer objectively weigh the evidence or follow the Court's instructions as required by Alabama Law. The *Reptile* teaches that fear wins over facts. The *Reptile* strategy encourages plaintiff attorneys to "spread the tentacles of danger" beginning in *voir dire*, opening statement and throughout the trial as a means to manipulate the jurors into a favorable verdict. *Id.* At 354; 58; 138. The Reptile is promoted as a means of *exacting revenge for tort reform*. *See id. at Chapter 3* The Toxicology of Tort- "Reform"; Chapter 4 (*Antidote for Tort – "Reform" Poison*) (emphasis added). The strategy violates the golden rule on the most fundamental level and has no

place in Alabama courtrooms. Further, it runs afoul of Alabama Rules of Evidence 401 and 403. Finally, it deprives defendant of his constitutional right to a fair and impartial trial.

Such tactics to intentionally inject "terror and anxiety" into the courtroom should not be allowed in this case, and the Defendant respectfully requests that the Court prohibit the Plaintiffs from the use of Reptile tactics, including in *voir dire*, as they violate Alabama law.

Based upon Plaintiff's deposition examination of Defendant Dr. Eric Murray, Defendant anticipates that the Plaintiffs intend to utilize Reptile tactics at trial. The Reptile strategy calls for the Plaintiff to establish certain "rules" at trial because "errors and mistakes don't motivate verdicts (especially med mal verdicts); patient safety-rule violations do." *Reptile*, p. 243 (emphasis added). In questioning Dr. Murray, plaintiff's counsel repeatedly used the phrase "patient safety rules" as if that term is synonymous with standard of care.

The *Reptile* lines of questioning do not seek to address the standard of care for a physician similarly-situated to Dr. Murray, but instead seek to establish generalized public safety speculation with the intent to mislead the jury. This emphasis on "safety rules" and their alleged violations move the focus of the jury beyond the realm of the Plaintiffs' burden in a medical malpractice case to prove by expert testimony an alleged breach in the standard of care and that the alleged breach probably caused the injury and death. This speculation as to public safety dangers, which seek to trigger an irrational response in a jury separate and apart from the facts and evidence presented at trial, have no place under Alabama law.

The *Reptile* strategy is nothing more than a backdoor attempt to make golden rule arguments that are improper as a matter of law. In Alabama, the golden rule disallows any argument asking jurors to put themselves in the shoes of a party or which arouses their passion or prejudice. For these reasons, plaintiffs should refrain from making reference to "patient safety rules" or pursuing other "Reptile" tactics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court using the Alafile system and that I have served a copy of the foregoing electronically or by placing a copy of same in the U.S. Mail postage prepaid and properly addressed on this the 29th day of January, 2016, to the following:

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OF COUNSEL

Reptile Theory: Bad Science, Good Results

Deborah Johnson, MC
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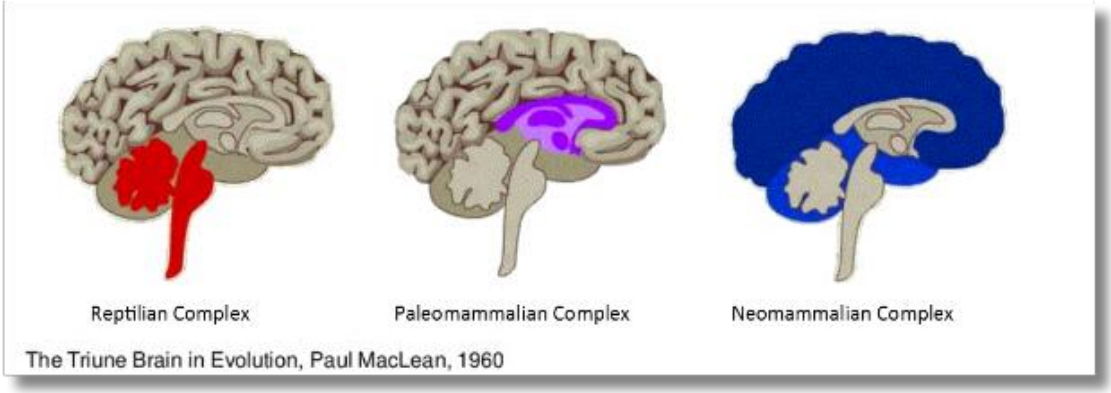
There are more than six billion reasons to take a close look at what's happening with Reptile Theory in the courtroom right now. Because that's how many dollars have been awarded in verdicts and settlements, according to David Ball and Don Keenan's boast back in 2015.

Like it. Hate it. Believe in it. Don't believe in it. What you think doesn't matter. Because something powerful is happening. Plaintiffs are hammering defendants in the courtroom. They're eviscerating witnesses in deposition and the case is effectively over before it barely begins. This article will peel back the curtain of this plaintiff's theory and show you the key elements to enable you to turn the tables. There are basically four elements to look at: 1) the science Reptile Theory is based on, 2) how it's alleged to work, 3) why it doesn't work *that* way, and the final and most important part, 4) the actual psychology and neurophysiology that does work.

The Science Behind Reptile Theory

In the 1960s Paul MacLean, physician and neuroscientist, theorized that our brain had three separate "complexes" or parts. He called it the Triune Brain. These three complexes are a result of evolution from simple to complex, each with distinct capabilities and capacities. This view of our brain is the foundation of the Reptile Theory.



The most primitive part of our brain is called the reptilian complex. It rests at the base of the skull and is the lowest level of brain functioning. This is the instinctual and survival part of your brain, running on autopilot.

The next level of evolution is our paleomammalian complex, also referred to as the limbic system. This is the emotional center of our brain. It supports a variety of functions including behavior, motivation, and long-term memory. Part of it is responsible for learning and decision-making.

The third, and by far the largest and most evolved part of our brain, is the neomammalian complex. This is our grey matter where higher-order brain functions like sensory perception, cognition, spatial reasoning, and language occur.

How the Reptile Theory Allegedly Works: "Danger, Will Robinson!"

The organizing principle is simple: tap into the deepest or most primitive part of the brain where instinct and our need to survive resides. Since this part of the brain is automatically scanning for danger, the plaintiff attorney only has to evoke danger to activate it. Then, according to the theory, when the jury senses this danger they will unconsciously drop into survival mode, letting their reptilian instincts take over.

The Reptilian attorney develops his or her case to trigger these primordial, autopilot reactions: the truck driver didn't follow the safety rules and then smashed into the plaintiff, the doctor was negligent in not running more tests, the train engineer should have done everything he could to protect the car full of first graders at the railroad crossing, etc.

The insidious extension of this is to take that initial reaction to danger and s-t-r-e-t-c-h it, not just to encompass the plaintiff, but to include everyone on the jury and *their* family and *their* entire community, thus, stimulating the jurors' other primitive instinct to protect their own.

Why it Doesn't Really Work that Way

When the Reptile Theory first appeared on the plaintiff landscape in 2009, experts were quick to debunk it; shredding the science behind the theory.

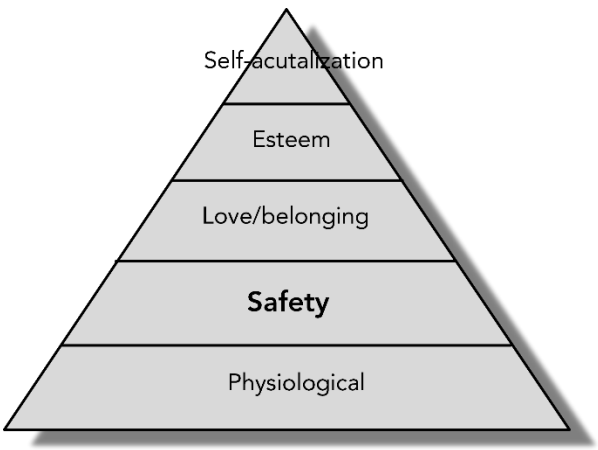
Here's a quick summary of why:

- First, we're not reptiles; we did evolve.
- Second, humans operate beyond their brainstem. A reaction to danger is not a stand-alone. We don't linger in that primordial part of our brain for long. When our brain engages the higher levels of operations in the limbic system (the paleomammalian complex), emotion is far more influential in how we react to danger than just the initial reptilian response.
- Third, simply *talking* about a danger may not always activate the survival instinct, because the danger is not imminent in the courtroom. But, even if jurors are triggered by some sense of danger, they don't stay in that state. When our brain is faced with threats or danger or fear, it immediately starts seeking a way to calm the fear. It is internally scanning for relief; it wants a solution that will relieve the fear-induced brain activity.

What <u>is</u> Working: The Real Psychology and Neurophysiology

If Ball and Keenan's theory doesn't hold up under scientific scrutiny, what *is* working? From my perspective, it's actually a little of this and a little of that, whipped together into a brilliantly developed blueprint to leverage human behavior to favor the plaintiff. Below are six principles of psychology, neuroscience, and subliminal messaging that plaintiff attorneys have seized on to work for them.

<u>#1 Jurors' brains are Velcro for negative thoughts.</u> The human brain evolved to focus on threats because our ancestors needed to avoid threats to survive. We are genetically wired for negativity; our brain is built more for negative thoughts than for positive. Our mind acutely focuses on the bad and can actually discard the good. According to neuropsychologist Rick D. Hanson, PhD, our brain is like "Velcro for negative experiences and Teflon for positive ones." The Reptile attorney amplifies this by calling up negative characterizations of <u>your</u> client.



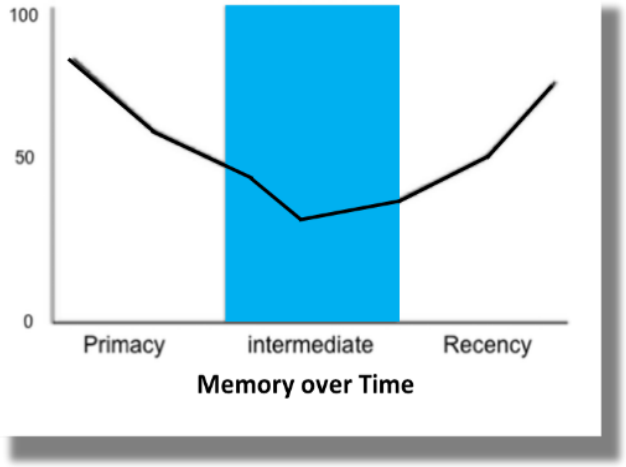
<u>#2. The jurors are not reptiles.</u> In 1943, Abraham Maslow developed a widely-accepted theory referred to as Maslow's Hierarchy of needs; what motivates humans from the most basic to the most evolved. As it relates to Reptile Theory, this addresses our need to feel safe. But this is *not* reptile nature – it's human nature.

Basically, Maslow proposed that motivation is the result of a person's attempt at fulfilling five basic needs: physiological, safety, social, esteem and self-actualization. We start at the bottom and

work up as each level is satisfied. For example, if you need food or water you are not thinking about fulfilling your self-esteem needs. Apply Maslow's Hierarchy in the courtroom and if the jury is manipulated into focusing on danger or safety, they may not move into the higher levels. But satisfying that need for safety allows the jury to move to a higher level of thinking/processing.

#3 Make the jury think about bananas. There's a psychological concept known as priming. Research shows that exposure to one stimulus influences our response to another. It's basically selective attention. For example, if you are asked to think about the color yellow and then asked to name a fruit, you are more likely to say banana than to say strawberry.

In the courtroom, Reptile plaintiff attorneys are tutored to expose jurors to concepts like danger, safety, and risk beginning in voir dire and carrying throughout the trial. For example, asking potential jurors if they feel that a truck driver should always put safety first? With that simple question, the jury will see plaintiff and defense testimony through the lens of "putting safety first."



#4 Give the jury dessert first. Part and parcel of the brain's need for efficiency is a concept known as the primacy/recency theory of memory. The first things you tell the jury have the highest recall. The last things you say are next. And everything in the middle, frankly, becomes a muddle.

Knowing this to be true, Reptile attorneys shoot out of the gate with their key themes. They don't waste time with nonessentials that the jury neither cares about nor will remember.

#5 Make it simple, stupid. Ball and Keenan describe their relentless laser focus in litigation as "elegant simplicity." This is the linchpin of the psychological concepts that empower Reptile litigation. Our brain is built for efficiency so it is constantly packing, sorting, and condensing. It seeks ways to simplify what needs to be stored in memory. The more efficient the case and the narrower the focus, the easier it is for the jury to absorb. The simpler the path to a conclusion, the easier it is to get the jury on your side. In the manual, they are adamant about the role of focus in prevailing.

The maestros of Reptile Theory teach how to keep the jury laser-focused on one thing: safety rules. Your client's own safety rules! They say they awaken the reptile brain by showing the jury the danger of breaking those safety rules. Maybe it does and maybe it doesn't. Nevertheless, this relentless focus is working.

In their book, they focus on words like prudent, negligent, needless, and danger. They appear again and again and again. They don't stray. Right from the get-go they are implanting key concepts, in layman's language, focused on what they want the juror parroting back during deliberations.

The result of this unwavering focus is that jurors can articulate the entire case in a single sentence in deliberations: the defendant broke their own safety rules and endangered all of us.

#6. Forget about what you want the jurors to *know.* A substantial part of Reptile is not about what jurors know. It's about how they feel. Why? Because far more of our brain is dedicated to emotion than to logical/rational processes. The limbic system (paleomammalian) can hijack rational thought from the higher brain functions as well as override innate brain stem responses in the reptile brain.

Reptile Theory leverages this to the hilt. Reptile lawyers know that emotions are an integral part of attention, learning, and memory. Burgeoning brain research indicates that *no* learning occurs without emotion. You can have an emotion with no learning attached, but there is no learning that occurs without emotion.

The same is true for memory. Do you want the jury to remember the salient points of your case? Dry data, without an emotional component, will never get it done. Have you heard the old saw that the best story wins? Nope. It's the best story imbued with emotion that wins.

Emotions are also an essential part of decision-making. Reptile followers utilize what all marketing experts know; people buy with emotion and justify with facts. Jurors want to know what to care about – not what data to memorize. They want to make decisions that make them feel good, e.g., protecting their family and the community. When the plaintiff's attorney evokes emotion, it can eclipse those pesky facts the defense may want to present.

Conclusion

Forget about reptiles in the courtroom. Ball and Keenan have masterfully leveraged psychological and neurophysiological concepts into a nearly bulletproof roadmap for plaintiffs:

- Jurors are wired to focus on threats
- It's in our human nature to drop out of higher-order thinking when there is a threat
- Priming the jury gives them a lens through which to interpret the whole trial
- Forget linear – go with the most important information first and last
- Laser focus keeps the jury on track, easily
- It's all about how the jury feels… not what they know

While Reptile Theory may not do exactly what Ball and Keenan posit, it does work. Fortunately, none of the principles are secret; they are well-known. It's just a matter of unwinding them to understand how they affect human beings. Additionally, they are not the sole purview of plaintiff's attorneys. They can be used by the defense as powerful offensive measures against the Reptile attorney – from discovery to deposition to trial.

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Defending Against The Reptile Theory:
Combating the Reptile Theory in Written Discovery

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Written discovery, a formal process which allows a defendant 60 days to contemplate an answer is not as effective as other discovery tools in carrying out the reptile theory strategy. Written discovery alerts the well-prepared defendant to what is coming. However, certain questions and requests tee up that strategy well for deposition testimony and for trial and the ill-prepared defendant is at risk if he or she doesn't recognize this.

Keep in mind that the reptile theory is designed to encourage a jury to decide a lawsuit in favor of the plaintiff based on a fear that a defendant's verdict will harm the safety of the community. So, the easy way to spot discovery questions that may be part of a "reptile theory" tactic is to look for the word "safety."

1. Interrogatories and Requests for Production
    a. Discovery seeking a description and production of "policies and procedures designed to protect . . ." or "policies and procedures for safety.

    b. "Any and all documents provided to the employees and/or agents of Defendant regarding identifying real or perceived threats or suspicious events related to patient safety".

    c. "Any and all security audits that Defendant performed and/or was subject to. . ."

    d. "Safety plans"

    e. "All policies and procedures addressing safety."

    f. "Risk management guidelines."
        i. The primary goal in requesting this data is to either establish there *are* no "safety plans" or "safety audits" (a home run for a plaintiff even if there's no industry standard that such "plans" or "audits" be performed) or --
        ii. to eliminate a defendant's argument that they couldn't have foreseen the occurrence or that they didn't cause it. Example – a fitness facility has procedures for calling 911 or rendering first aid and a plaintiff's lawyer used those procedures to suggest that a client's stroke while working out was foreseeable *and* caused by the fitness trainer's negligence in making the client work out hard.

    g. Please identify the name, business address, home address, employer and telephone number of each and every person, consultant, adviser or company that conducted a safety assessment and/or inquiry of [individual employee] for one (1) year prior to the accident, the day of the accident, and after the accident.

i. "safety assessment" has a technical meeting under certain regulatory schemes that make it an industry term for some cases, e.g. trucking, but verbiage like this is used even when, in a particular industry, there isn't something called "safety assessments."
    1. The WRONG answer, if that's the case is, "We don't do safety assessments."
    2. Best course of action is to just answer with whatever it is you do, "annual review," "performance evaluation done on [employee]."

h. Safety training including:
    i. Any and all sign-in sheets from any and all safety and/or driving seminars and meetings conducted for defendant's employees and/or sponsored by defendant XYZ Company in the 24 months preceding the date of this accident for the benefit of its employees, whether or not such seminars or meetings were conducted on defendant XYZ Company's premises
    ii. All documents concerning any efforts undertaken by XYZ Company to determine the appropriate warnings, safety devices and signs to be placed at the accident location, in the ten (10) years before the subject incident/accident
    iii. Copy of the Defendants' System Safety Plan for XYZ Company which was created or used during the previous ten (10) years.

i. They will seek to take documents reflecting efforts to prevent accidents and make that into the standard of care against which the defendant will be measured. It plays right into the strategy that everyone is vulnerable to talk incessantly at trial about the policies and procedures a company has to address risk.

j. Incident reports, post incident investigations – not unusual requests and not immediately referable to a "reptile theory" tactic, but the purpose for which they use can further that tactic. The lawyer argues, "they didn't even care enough to do an investigation." This is clearly objectionable argument, and the defense lawyer should recognize the discovery request as an attempt to facilitate an improper argument and file a motion in limine to prevent it from being made during trial.

k. Interrogatories relating to the discipline or subsequent work status of the employee alleged to have been negligence.
    i. Please indicate any changes in Employee A's job title and description since the date identified response to Interrogatory ** by stating when said change occurred and his new job title and job description.
    ii. There is no causal relationship between how or if the employee was disciplined and the incident that allegedly harmed the plaintiff, but the responses to these questions may incite a reptilian response. If employee is no longer there, the insidious suggestion is that the employer thought he was negligent, so he was terminated. If he is still employed, the company gets portrayed as not caring about safety.

l. Interrogatories addressing subsequent changes to policies or practices.

i. Theoretically inadmissible pursuant to FRE 407 (subsequent remedial measures).
ii. But subsequent conduct insidiously utilized to portray either that the company recognized it was deficient or that it was insensitive.
iii. Very hard to object to subsequent remedial measure discovery since there are exceptions to the admissibility of such measures, e.g. to rebut a claim that any other way of doing things was impracticable.
iv. In general, the way to answer these discovery requests is to provide information and/or produce documents using a very broad definition of "safety."
    1. Medical malpractice context – best practices documents
    2. Trucking company – compliance with Federal Motor Carrier Safety Act
    3. Schools – mandatory reporter policies, Title IX policies, bullying policies
    4. Allow your interpretation as to what promotes safety to provide the guideline as to what to produce.

2. Requests for Admission
    a. XYZ Company failed to have sufficient safety rules in place to reasonably ensure the safe operation of their vehicles on highways.

    b. XYZ Company failed to conduct an internal safety assessment as to the causes of the subject accident.

    c. XYZ Company failed to have policies and procedures in place to investigate the causes of accidents.

    d. XYZ Company had no budget for safety in its operation budget.

    e. It is the policy of XYZ Company to discharge any employee at any time if we feel that an employee has demonstrated that he is no longer capable of [doing his job] in a safe manner. Followed by a Request to admit that "Employee A is still an employee of XYZ Company."

    f. XYZ Company failed to have sufficient safety rules in place to reasonably ensure the safe operation of its business.

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Pre-Trial Motions Against The Reptile Strategy

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The jury's role is to decide, based on the evidence presented, what is the truth in regards to the facts of the case. The jury is then to apply those facts to the relevant law or statute, as instructed by the judge, in order to reach its verdict. When effectively used, the Reptile Strategy shifts the jury's role by asking the juror to decide whether the juror, and the entire community, would be safer if damages were awarded against the defendant's conduct, instead of asking whether and how plaintiff was damaged. The Reptile Strategy attempts to improperly employ the Golden Rule Argument by asking a juror to place himself or herself in plaintiff's shoes in order to determine if he or she would feel safe in the plaintiff's situation. The strategy can result in damages being punitively awarded against the defendant's conduct, even when punitive damages are not an issue in the case, for the potential or hypothetical harm to a non-party (i.e. the community).

The best defense to the Reptile Strategy is simple; see it coming before it sneaks up on you. Because the Reptile Strategy focuses on conduct of the defendant, rather than on the damages to the plaintiff, it is important to seek before trial to limit any pleading or evidence that attempts to advance an improper standard of care. The two primary pre-trial motions are motions to dismiss or strike and motions in limine. Motions for a protective order may also be considered in order to try to restrict plaintiff's counsel on anticipated Reptile deposition questions. All of your pre-trial motions will educate the judge on the Reptile in preparation its possible use at trial.

I. MOTIONS TO DISMISS OR STRIKE

A plaintiff intending to employ the Reptile will often use the complaint as a *de facto* first discovery request because, in most jurisdictions, the scope of disclosures and discovery requests are governed by the claims and defenses of the parties. Thus, if you see pleadings referencing "violations of safety rules" or "unnecessarily endangering the public or community," you should anticipate the Reptile and generally respond with denials. Be aware of buzz words and phrases such as:

1. *safety*
2. *needlessly endanger*
3. *safety rules*
4. *danger*
5. *unnecessary risk*
6. *safest available choice*
7. *responsibility*
8. *required*

Because the Reptile relies on broad umbrella rules, i.e. a truck driver/health care provider/scuba instructor should never needlessly endanger the public, the allegations in the complaint may be broader than required to set forth the elements of plaintiff's claim. The goal of the defense in defeating the Reptile should be to limit the pleadings, and later the evidence, to only the accident or incident at issue. Be sure the plaintiff's complaint complies with the law of your jurisdiction and be prepared to file motions to dismiss and motions to strike in order to clearly frame the issues in the case based on the relevant law.

A. Motion to Strike Fed. R. Civ. P. 12(f)

Under Fed. R. Civ. P. 12(f), the court may strike from a pleading "redundant, ***immaterial, impertinent***, or scandalous matter." "[I]mmaterial matter is that which has no essential or important relationship to the plaintiff's underlying claim for relief." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 at 782 (1990). "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* Motions to strike Reptile pleadings may be successful if broad allegations regarding negligence, duties, and standards care, as well as punitive damages, lack factual support and simply recast boilerplate elements and legal conclusions.

You may achieve the same results with a motion to dismiss as a motion to strike, and oftentimes the two motions are filed simultaneously. Motions to strike, however, are not a favored motion and whether to grant them is in the discretion of court. *Rees v. PNC Bank, N.A.*, 308 FRD 266 (N.D. Cal 2015) "Motions to strike are often considered time wasters, and should be denied unless the challenged allegations have no possible relationship or logical connection to the subject matter of the controversy." *Whitten v. City of Omaha*, _____ F3d ___ (D. Neb. 2016) (2016 WL 4196945 at *7); *Cobell v. Norton*, 2003 WL 721477 (D. D.C. 2003). Moreover, Rule 12(f) motions are reviewed for "abuse of discretion," whereas Rule 12(b)(6) motions are reviewed *de novo. San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir.1998).

B. Motion To Dismiss Fed. R. Civ. P. 12(B)(6)

> "**Fed. R. Civ. P. 12(b)(6)** How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (6) failure to state a claim upon which relief can be granted."

Motions under Fed. R. Civ. P. 12(b)(6) usually incorporate Fed. R. Civ. P. 8(a)(2), which requires a complaint to state a "short and plain statement of the claim showing that the pleader is entitled to relief." Vague or general allegations do not satisfy Fed. R. Civ. P. 8(a)(2), and are thus subject to dismissal under Fed. R. Civ. P. 12(b)(6) because they lack sufficient factual allegations to state a claim for relief. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the U.S. Supreme Court held that a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (Quoting *Bell Atlantic Corp v. Twombley*, 550 U.S. 544, 570 (2007)). Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on judicial experience and common sense." *Ashcraft*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief. *Id.* The Supreme Court in *Ashcroft* utilized a two-part analysis to determine whether a complaint satisfies FRCP 8(a)(2). First, the Court identifies and disregards legal conclusions because they are no more than conclusions, not entitled to assumption of truth. Overbroad Reptile-style pleadings fail this first step. (The second step is whether the well-pleaded facts give rise to an entitlement to relief, which is usually not an issue with Reptile pleadings. See, *Hall v. Wittman*, 584 F.3d 859, 863 (10th Cir. 2009) (quoting *Ashcraft*, 556 U.S. at 681)).

Because the Reptile teaches that a juror's sense of fear and threat is not evoked by a random or single occurrence or accident, but rather by the systematic violation of a safety rule that compels a juror to act, plaintiffs utilizing the Reptile will often plead broad allegations in order to encompass

prior incidents or accidents. Evidence of prior incidents or accidents are discoverable and sometimes admissible based upon knowledge or absence of mistake. See Fed. R. Evid. 404(b). Broad allegations for claims such as negligent hiring, training, supervision, oversight, or retention are often supported by such evidence. David Ball & Don Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution 53–54 (2009). The plaintiff's burden, however, at the pleading stage in defending a motion to dismiss is to establish that the complaint contains sufficient facts "to state a claim to relief that is plausible on its face." *See, Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Ashcroft* at 556 U.S. 662, 678 (2009)). Assuming your jurisdiction follows this pleading standard, motions to dismiss punitive damages and direct corporate negligence claims should be filed against every complaint that lacks adequate factual allegations. If you are successful in having these claims dismissed, other incidents and accidents become less likely to be relevant to the claims at issue, and, therefore, less likely to be admitted as evidence. The narrower the scope of the pleadings, the easier it will be to defend against the Reptile.

II. MOTIONS IN LIMINE

Once you are beginning the early stages of trial preparation, it is essential to consider potential motions in limine in order to eliminate, or minimize, the use of the Reptile at trial. Motions in limine are the most widely used and most effective pre-trial motion against the Reptile. If successful, they will assist in keeping out irrelevant and inflammatory evidence. They will also inform or educate the judge that the Reptile Strategy misstates the legal standard at issue because it improperly seeks to compel opinions from lay witnesses and encourages jurors to ignore the judge's jury instructions.

Motions in limine should explain to the judge what the Reptile is and cite controlling case law to support the Reptile exclusion. Although many judges are by now familiar with the Reptile, it is important to make sure the judge in your trial understands the theory behind it and how plaintiff's counsel may seek to use it at trial. Inform the judge of the psychology behind the theory and the routine creation of safety rules through the use of hypothetical questions. Support these points with plaintiff's discovery requests and deposition questions. Make sure that the judge properly understands how the theory is used. You may consider referring the judge to the Reptile's book and website in order to consider such quotes as:

- "This gives us our primary goal in trial: To show the immediate danger of the kind of thing the defendant did – and how fair compensation can diminish that danger within the community." Reptile, p. 30.

- "Show the Reptile [juror] that a good verdict for [plaintiff] facilitates [the juror's] survival." [Jurors just need to perceive] "a danger to themselves that a fair verdict can diminish." Reptile, pp. 45 and 48.

- "Once [jurors] know the answers and understand the public menace . . . and that a proper verdict can diminish the menace, the Reptile is in your employ." Reptile, p. 38.

Motions in limine arguments should be supported with evidence of plaintiff's use of Reptile Strategy taken from the written discovery requests and deposition questions. It is important to timely obtain deposition transcripts to include with your motions. Your motions should state with specificity the

anticipated questions or testimony that should not be allowed at trial. *See, e.g., Hensley v. Methodist Healthcare Hospitals*, No. 13–2436–STA–CGC (2014 WL 1154890 at *4–5 (W.D. Tenn. 2015).

When the judge understands the theory and its use, explain to the judge that the use is impermissible because it violates the "Golden Rule" argument. The Golden Rule argument suggests or encourages the jury to place itself in a party's position in order to make its decision as to how liability or damages should be determined. *Lovett v. Union Pacific, 201 F.3d 1074* (8th Cir. 2000). Some courts have defined the Golden Rule argument as an argument that asks a jury not "to decide according to the evidence, [but] according to how its members might wish to be treated," *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 585 S.E.2d 557, 565 (Va. 2003) (quoting *Seymour v. Richardson*, 75 S.E.2d 77, 81 (Va. 1953)). A simple example is that a plaintiff's counsel cannot ask the jury how much the loss of their legs would mean to them – the permissible question is what is the value of the loss of the plaintiff's legs to the plaintiff. The jury should also determine what a reasonable person in the defendant's position would do, not what the juror would do.

Your motions in limine should explain that the Golden Rule argument is widely condemned because it encourages the jury to depart from the fundamental principle of neutrality and to decide the case on personal interests and bias rather than on the evidence. The Reptile attempts to circumvent the Golden Rule argument by requesting that the jury act as the conscience of the community, which is generally prohibited. *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984); *Haberstroh v. State*, 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989). "Our condemnation of a community conscience argument is not limited to the use of those specific words. It extends to all impassioned pleas intended to evoke a sense of community loyalty, duty and expectation. Such appeals serve no proper purpose . . ." *Westbrook v. Gen. Tire*, 754 F. 2d 1233 (5thCir. 1986). Thus, any argument that suggests or insinuates that a juror place themselves in the place of the plaintiff is improper. Plaintiff's counsel usually try to appeal to the "conscience of the community" during *voir dire*, witness testimony, and at closing arguments. See, e.g., *Sechrest v. Baker*, 816 F. Supp. 2d 1017, 1054 (D. Nev. 2011) (prosecutor stated during closing argument "[I]n this one instance in your lifetime, you are the conscience of the community. It is you and only you who will set the standard in this community for this type of act.")

Allowing plaintiff's counsel to utilize the Golden Rule argument, and its accompanying appeal to sympathies rather than the admitted evidence, over your motions in limine and objections is a basis for reversal on appeal. In *Caudle v. District of Columbia*, plaintiff's counsel's use of Golden Rule arguments at closing resulted in the reversal of a three-week trial verdict. The court in *Caudle* stated:

> At least four circuits have found such a golden rule argument permissible. *See, e.g. McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1071 n.3 (11th Cir. 1996); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir. 1990); *Shultz v. Rice*, 809 F.2d 643, 651-52 (10th Cir. 1986); *Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir. 1976). On the other hand, the Third Circuit has rejected the liability-damages distinction. *Edwards v. City of Phila.*, 860 F.2d 568, 574 n.6 (3d Cir. 1988) ("We see no rational basis for a rule that proscribes the 'Golden Rule' argument when a plaintiff argues damages, but permits it when the defendant argues liability. . . [because the] same concerns are present in both situations — the creation of undue sympathy and emotion" (quotation marks and brackets omitted)); *see also Ins. Co. of N. Am., Inc.,* 870 F.2d at 154 (suggesting but not holding that defense counsel's opening statement—"asking the jurors to consider whether any of them would like to be accused of fraud based upon the

> evidence which they were about to hear"—was improper); *Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir. 1985) ("[The Plaintiff] urges that the Golden Rule argument is not objectionable when it refers only to the assessment of credibility. There is no reason for such a distinction because the jury's departure from its neutral role is equally inappropriate regardless of the issue at stake."). We join our sister circuits and hold that a golden rule argument is improper and may thus serve as the basis for a new trial.

Your motions in limine should also argue that evidence and arguments used to inflame a jury are generally prohibited. Attempts to use the Reptile through inflammatory remarks are nothing more than a character attack on the defendant. *See, e.g., Las Palmas Assoc. v. Las Palmas Ctr. Assoc.*, 1 Cal. Rptr. 2d 301, 315 (Cal. Ct. App. 1991) (explaining that "[p]ersonal attacks on opposing parties . . . whether outright or by insinuation, constitute misconduct" and that such "behavior only serves to inflame the passion and prejudice of the jury, distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial"). The Reptile's underlying "umbrella" safety questions are irrelevant to whether the defendant complied with the applicable legal standard of care, and plaintiffs should not be allowed to engage in character attacks on the defendant by presenting and arguing non-applicable duties and standards.

Do not limit yourself in the arguments you raise within your motions in limine. Be creative in trying to actively limit your opponent's ability to include Reptile-related information. The goal is to try to obtain rulings that opposing counsel may not argue:

1. That plaintiff and the jury are part of the same community that was endangered by the defendant's conduct;

2. That the defendant violated any "safety rules" (which would confuse and mislead the jury);

3. The Golden Rule argument as to any liability or award of damages; and

4. That the jury can protect the community by awarding damages to punish the defendant.

The success of your motions in limine should not be based on whether they are granted or denied. Even if your motions are denied, they will educate your judge on the potential use of the Reptile at trial and the court will hopefully be more receptive to your trial objections at the time the Reptile arguments and evidence are presented. If you have supported your arguments by identifying specific anticipated *voir dire* questions and closing argument statements, you have placed the judge in a better position to be aware of such questions and arguments at trial.

III. RECENT COURT RULINGS ON PRE-TRIAL MOTIONS AGAINST THE REPTILE:

- The Court denied a motion to exclude Reptile tactics where the defendants "have again not identified the specific evidence that is sought to be excluded"; however, the Court noted that "any attempt by either party to appeal to the prejudice or sympathy of the jury will not be condoned." *Hensley v. Methodist Healthcare Hosps.*, No. 13-2436-STA-CGC, 2015 WL 5076982, at *5 (W.D. Tenn. 2015).

- Granting motion to "[p]reclude any attempt by plaintiff's counsel to utilize the Reptile Strategy." *Glover v. State*, No. 10-2-35124-8, 2015 WL 7355966 (Wash. Super. Ct. 2015).

- Granting "[m]otion *in limine* regarding use of Reptile Theory Tactics, Golden Rule references, or other 'safety rules'." *Palmer v. Virginia Orthopaedic, P.C.*, No. CL14000665-00, 2015 WL 5311575 (Va. Cir. Ct. June 19, 2015).

- Motion to exclude Reptile Tactics denied, but "parties may not violate the 'golden rule'." *Berryhill v. Daly, MD*, No. STCV1102180SA, 2015 WL 5167586 (Ga. State Ct. May 8, 2015).

- Motion to exclude Reptile denied after finding that "[a] general rule prohibiting Plaintiff from referring to rules or standards is not workable in that it could preclude Plaintiff from arguing at all about the standard of care and is denied. As stated above, the Court will, however, prohibit direct appeals that violate the Golden Rule." *Scheirman v. Picerno*, No. 2012CV2561, 2015 WL 4993845 (Colo. Dist. Ct. April 16, 2015).

- Denying "[m]otion to exclude use of 'reptile strategy' which includes evidence and argument by Plaintiffs referring to general physician 'safety rules', arguments asking jurors to place themselves in Plaintiffs' position, or arguments that a jury should 'send a message' or otherwise punish Defendant," but stating that "the Court assumes all of plaintiff's arguments will comply with the Court Rules, the Rules of Evidence, and the medical malpractice statute. . . The court will consider any legal objection made at trial." *Hutson v. Rooney, MD*, No. 142045603, 2015 WL 3455867 (Wash. Super. Ct. 2015).

- Trial court was admittedly "handicapped because of its unfamiliarity with the *Reptile Strategy"* and denied a motion to exclude Reptile tactics. *Pressey v. Children's Hosp. Colorado*, No. 2013CV72, 2015 WL 1583852 (Colo. Dist. Ct. 2015) ($17.8 million jury award against Children's Hospital).

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"Well, of *course* I did it in cold blood,
you idiot! ... I'm a reptile!"

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Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

_

Plaintiff,

v.

,

Defendants.

CASE NO.

DEFENDANT MOTION IN LIMINE #15 TO PRECLUDE "REPTILE THEORY" ARGUMENT

Judge:
Date: TBD
Time: TBD
Dept.: 36

Assigned to

Action Filed:
Trial Date:

I. Introduction

In this case, Plaintiff's post assault examination revealed no physical trauma and a completely normal medical examination with no trace of male DNA present. According to Plaintiff's mother the alleged assault occurred when Plaintiff was alone on the bus with Defendant _____, a period of approximately five minutes during which _____. When asked how he intended to deal with the absence of any physical or temporal corroboration for the claims in this case, Plaintiff's counsel replied that he has a "trump card", namely a 3 and one-half year old girl "victim." From discussions with counsel it is apparent that Plaintiff's counsel intends to present a

case to the jury based on an appeal to the jury's sympathy regardless of the facts or the evidence.

Such an approach will attempt to present "Reptile Theory" evidence or argument at trial based on the popular 2009 manual created for plaintiffs' attorneys across the nation. The "Reptile Theory" is an impermissible "Golden Rule" argument because it attempts to appeal to jurors' concerns about their own safety and the safety of the community, rather than the evidence regarding plaintiffs. The theory purports to require that employers must make the "safest possible choice" in all circumstances regardless of any actual standard of care. Because the "reptile Theory" and the Golden Rule" arguments are improper, this Court should prohibit plaintiffs from presenting any such irrelevant and prejudicial evidence or argument. Defendant makes this motion pursuant to Evidence Code sections 350, 352 and 402 and the Court's inherent power to exclude irrelevant evidence.

II. THIS COURT SHOULD PROHIBIT PLAINTIFF FROM PRESENTING ANY EVIDENCE OR ARGUMENT BASED ON THE IRRELEVANT AND PREJUDICIAL "REPTILE THEORY."

A. Introduction to the "Reptile Theory."

In 2009, David Ball and Don C. Keenan co-authored *Reptile*: *The 2009 Manual of the Plaintiff's Revolution*. *Reptile* is based on a concept by neuroscientist Paul MacLean that people are driven by the "triune" or "reptilian" portion of their brains. (*Reptile*, p. 13, excerpts attached as Exhibit A.) This portion of the brain is referred to as "reptilian" because its function is identical to the brain of reptiles, in that it houses basic life functions, such as breathing, balance, hunger, and the fundamental life force: survival. (*Id.* at pp. 13, 17.) The survival instinct extends beyond an individual's survival and has the larger purpose of allowing for the survival of the human species. (*Id.* at p. 17.)

The authors of the Reptile manual explain that the trial goal of a plaintiff s attorney should be to get a juror's brain into "reptilian" survival mode. (*Reptile, supra*, at p. 18.) The major axiom of Reptile is that "when the Reptile [(shorthand for the reptilian portion of the brain)] sees a survival danger, she protects her genes by impelling the juror to protect himself and the community." (*Id.* at p. 19.)

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In the chapter entitled Safety Rules and the Reptile, the authors explain that every case needs an "umbrella rule" to trigger everyone's reptilian survival instincts. (*Reptile, supra*, at p. 55.) The authors define the umbrella rule for almost every case as follows:

> A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients]. (*Id.* at p. 55.) In a subsection of the chapter entitled *The Reptile and the Standard of Care*, the authors explain how to use the above "umbrella rule" as a starting point for avoiding expert testimony regarding the actual standard of care, as follows:
>
> The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows - demands! - only one level of care: the safest. And the Reptile is legally right. The second-safest available choice, *no matter how many "experts" say it's okay, always violates the legal standard of care.* Here's how:
>
> 1. A doctor [or whatever] is never allowed to needlessly endanger a patient [or whoever]. In other words, a "prudent" [*or careful, depending on the instruction*] doctor does not needlessly endanger a patient.
>
> 2. When there's more than one available way to achieve exactly the same level of benefit, the doctor is not allowed to select a way that carries more danger than the other. That would allow unnecessary danger, which doctors are not allowed to do.
>
> 3. So a "*prudent*" doctor must select the safest way. If she selects the second-safest, she's not prudent because she's allowing unnecessary danger. * * *
>
> The standard of care is not what other doctors do. It is -- exclusively -- what prudent doctors do. It makes no difference if the defendant met *other* standards of care. In medicine, *every* choice must meet the risk/benefit requirement: "No unnecessary risk," meaning "safest available choice."

(*Id.* at pp. 62-63, underlining added.)

Here, plaintiffs' counsel has, throughout the deposition process, presented witnesses with questions focused on protecting the "community" rather than merely eliciting facts. Asking such questions as "[you investigate _____]...to make sure they don't harm the

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kids" (_____Deposition, p. 41, lines 2-8), or "If you find out a_____has beaten up 20 kids, that guy shouldn't be [working with kids] right?" (Deposition of _____, p. 71, lines 12-13) or "Is that information you would have wanted to know to protect the students at your school?" (Deposition of _____, p. 28, lines 4-5) are asked not to determine facts relating to Plaintiff or this case, but are designed to raise questions of community protection far beyond the scope of this litigation. This case is about whether an assault, which no one witnessed and for which neither physical nor temporal corroborating evidence exists, occurred on October 12, 2010. It is not an indictment of the_____ or of _____ or their role in society. Plaintiff's counsel, lacking specific proof in this specific case, tries to spread the aroma of fear in the community through such questioning. It is improper and irrelevant and intended only to set up the jury as protector of the community, a role they do not have in this case. Their role is to protect the rights of _____ and the Plaintiff.

Based upon such irrelevant questioning, it appears that plaintiff will attempt to present evidence or argument at trial based on the "Reptile Theory" by misdirecting the jury's attention away from what the facts and evidence are in this case and to focus the jury instead on what plaintiffs' counsel will contend (with the benefit of 20:20 hindsight) would have been the safest possible action.

B. The "Reptile Theory" is an impermissible "Golden Rule" argument.

So-called "golden rule" arguments are those that have the effect of asking the jurors how they would feel if placed in the plaintiff's position, and inviting the jurors to find liability and award damages based on subjective feelings about personal or community safety. In *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764-765, the Court of Appeal condemned such arguments as improper:

> The only person whose pain and suffering is relevant in calculating a general damage award is the plaintiff. How others would feel if placed in the plaintiff's position is irrelevant. It is improper, for example, for an attorney to ask jurors how much "they would 'charge' to undergo equivalent pain and suffering. (Citation.) This so-called 'golden rule' argument . . . . is impermissible. (Citations)."

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> "*The appeal to a juror to exercise his subjective judgment rather than an impartial judgment predicated on the evidence cannot be condoned.* It tends to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence. (Citation.) Moreover, it in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence. Finally, it may tend to induce each juror to consider a higher figure than he otherwise might to avoid being considered self-abasing."

(*Id.* at 764-765, footnotes omitted, emphasis added; accord *Beagle v. Vasold* (1966) 65 Cal.2d 166, 172, fn. 11; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 797-798; *Neumann v. Bishop* (l 976) 59 Cal.App.3d 451, 484-485.)

Thus, it is improper for plaintiff's counsel to suggest that a jury is obligated to "send a message" with its verdict or that the defendant must not "risk harm to . . . citizens." (*Collins v. Union Pacific R. Co.* (2012) 207 Cal.App.4th 867, 883; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 305.) Such arguments tend to "deflect the jury from their task, which [is] to render a verdict based solely on the evidence admitted at trial." (*Nishihama*, at p. 305.)

The "Reptile Theory" seeks to appeal to the jurors' subjective judgments about the best interests of the community rather than their impartial judgments predicated on the evidence. Thus, the "Reptile Theory" demands "the safest available choice." (*Reptile, supra*, at p. 63.) As the Reptile explains: "That's all the Reptile demands from anyone. And she really demands it, once you show her that the violation can hurt her . . . ." (*Id.* at p. 63.) Plaintiffs' counsel's statements during discovery about the concerns of the "community" thus appear to be the beginning of a "Reptile" trial strategy, based not on the evidence concerning plaintiffs, but on the jurors' concerns about their own safety and the safety of the community. This Court should nip this improper tactic in the bud by at the outset of trial any efforts by plaintiffs to use the "Reptile Theory" to present such impermissible "Golden Rule" arguments.

C. The "Reptile Theory" impermissibly departs from the focus on evidence.

The "Reptile Theory" is not relevant to the issues in this matter. In this matter, the jury must first determine whether the evidence shows that more likely than not _____sexually assaulted and slapped _____. This determination must be made based on the evidence

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adduced in the case relative to whether an assault occurred (physical evidence), whether those reporting the alleged incident are credible or not, and whether there was sufficient time or motivation for the assault to have occurred. _____ vehemently denies the allegations. The question of whether the assault actually occurred is not corroborated by any independent evidence. He was never charged or prosecuted for these allegations. In every reported case where the employer is sued for negligent retention or hiring, the employee was either criminally convicted or admitted to the alleged assault before a case could be brought against the employer. Therefore it is crucial in this case that the determination of whether the assault occurred be made deliberately, based on evidence, and not based on some amorphous "Golden Rule" or "Reptilian" theory.

Only after a determination of the predicate act having occurred is made, and only *if* a jury finds _____assaulted the plaintiff, will the jury then have to determine whether his employer knew or should have known he would have committed the specific type of act alleged. "**Negligence liability will be imposed on an employer if it "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes**. *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, at 1139-1140. It is not enough to show that _____ is not a perfect employee, or even that he is unsavory. The proof against the employer, which must be based on the evidence, must show that_____ knew he created a particular risk of sexually assaulting an infant, and despite such knowledge retained him as an employee. Innuendo, "community protection" and similar themes are not relevant to a determination of any issue in the case.

The "Reptile Theory" is designed to redefine and heighten the standard of conduct and the level of proof in this action by effectively turning such a claim into one akin to strict liability. Under the "Reptile Theory," the only standard raised is the "safest possible choice." (*Reptile, supra*, at p. 63.) There is no variance allowed for the different settings, coinciding events, or other factors which would apply under similar circumstances as required by the standard of care. Instead, the "Reptile Theory" is designed to create strict liability whenever a defendant does not make what plaintiff contends, with the benefit of hindsight, would have

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been the "safest possible choice," without regard for other acceptable choices. (*Reptile, supra*, at p. 63.)

Rather than holding the plaintiff to the burden of proof required by California law, the "Reptile Theory" is plaintiffs' attempt to lessen plaintiffs' burden to that of proving merely that the defendant did not act in a manner which hindsight reveals may have been the "safest" way possible. This manipulation of the standard of care to create strict liability against defendants is contrary to California law.

Plaintiffs' counsel's statements during discovery regarding the concerns of the "community" appear to be a starting point for an argument at trial based on the "Reptile Theory" that the standard of care requires defendants to make the "safest possible choice." Such evidence and argument is not relevant to the only issues in this case: whether a breach of the standard of care by defendants caused damage to plaintiffs. (See Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) Further, such evidence and argument should be excluded under Evidence Code section 352 on the grounds it is designed to influence the jury to ignore the standard of care and is thus far more prejudicial than probative.

III. CONCLUSION

For the foregoing reasons, this Court should preclude plaintiffs from presenting evidence or argument at trial based on the "Reptile Theory," such as questions concerning the safest possible action or community safety.

DATED: _____, 2015

SCHAFFER, LAX, McNAUGHTON & CHEN
A Professional Corporation

By: _____
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[redacted]

Attorneys for Defendant [redacted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF [redacted]

[redacted]

Plaintiffs,

vs.

[redacted]

Defendants.

Case No. [redacted]

MOTION TO PRECLUDE PLAINTIFFS' USE OF IRRELEVANT AND PREJUDICIAL EVIDENCE OR ARGUMENT AT TRIAL REGARDING THE "REPTILE THEORY"

Dept : [redacted]

I. INTRODUCTION

Based on statements plaintiffs' counsel made during jury voir dire, it appears that plaintiffs will attempt to present "Reptile Theory" evidence or argument at trial based on the popular 2009 manual created for plaintiffs' attorneys across the nation. The "Reptile Theory" is an impermissible "Golden Rule" argument because it attempts to appeal to jurors' concerns about their own safety and the safety of the community, rather than the evidence regarding plaintiffs. The theory purports to require that healthcare providers make the "safest possible choice" in all circumstances regardless what the actual standard of care requires. For both reasons, this Court should prohibit plaintiffs from presenting any such irrelevant and prejudicial evidence or argument. Defendant makes this motion pursuant to Evidence Code sections 350, 352 and 402 and the Court's inherent power to exclude irrelevant evidence.

II. THIS COURT SHOULD PROHIBIT PLAINTIFFS FROM PRESENTING ANY EVIDENCE OR ARGUMENT BASED ON THE IRRELEVANT AND PREJUDICIAL "REPTILE THEORY."

A. Introduction to the "Reptile Theory."

In 2009, David Ball and Don C. Keenan co-authored *Reptile: The 2009 Manual of the Plaintiff's Revolution. Reptile* is based on a concept by neuroscientist Paul MacLean that people are driven by the "triune" or "reptilian" portion of their brains. (*Reptile*, p. 13, excerpts attached as Exhibit A.) This portion of the brain is referred to as "reptilian" because its function is identical to the brain of reptiles, in that it houses basic life functions, such as breathing, balance, hunger, and the fundamental life force: survival. (*Id.* at pp. 13, 17.) The survival instinct extends beyond an individual's survival and has the larger purpose of allowing for the survival of the human species. (*Id.* at p. 17.)

The authors of the *Reptile* manual explain that the trial goal of a plaintiff's attorney should be to get a juror's brain into "reptilian" survival mode. (*Reptile, supra*, at p. 18.) The major axiom of *Reptile* is that "when the Reptile [(shorthand for the reptilian portion of the brain)] sees a survival danger, she protects her genes by impelling the juror to protect himself and the community." (*Id.* at p. 19.)

In the chapter entitled *Safety Rules and the Reptile*, the authors explain that every case needs an "umbrella rule" to trigger everyone's reptilian survival instincts. (*Reptile, supra,* at p. 55.) The authors define the umbrella rule for almost every case as follows:

> A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients].

(*Id.* at p. 55.) In a subsection of the chapter entitled *The Reptile and the Standard of Care*, the authors explain how to use the above "umbrella rule" as a starting point for avoiding expert testimony regarding the actual standard of care, as follows:

> The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows – demands! – only one level of care: the safest. And the Reptile is legally right. The second-safest available choice, *no matter how many "experts" say it's okay, always violates the legal standard of care.* Here's how:
>
> 1. A doctor [*or whatever*] is never allowed to needlessly endanger a patient [*or whoever*]. In other words, a "prudent" [*or careful, depending on the instruction*] doctor does not needlessly endanger a patient.
>
> 2. When there's more than one available way to achieve exactly the same level of benefit, the doctor is not allowed to select a way that carries more danger than the other. That would allow unnecessary danger, which doctors are not allowed to do.
>
> 3. So a "*prudent*" doctor must select the safest way. If she selects the second-safest, she's not prudent because she's allowing unnecessary danger. * * *
>
> The standard of care is not what other doctors do. It is – exclusively – what *prudent* doctors do. It makes no difference if the defendant met *other* standards of care. In medicine, *every* choice must meet the risk/benefit requirement: "No unnecessary risk," meaning "safest available choice."

(*Id.* at pp. 62-63, underlining added.)

Here, plaintiffs' counsel during jury voir dire repeatedly raised the concerns of the "community." Based upon such irrelevant statements, it appears that plaintiffs will attempt to present evidence or argument at trial based on the "Reptile Theory" by misdirecting the jury's attention away from what the actual standard of care required and to focus the jury instead on what plaintiffs' counsel will contend (with the benefit of 20:20 hindsight) would have been the safest possible action.

B. The "Reptile Theory" is an impermissible "Golden Rule" argument.

So-called "golden rule" arguments are those that have the effect of asking the jurors how they would feel if placed in the plaintiff's position, and inviting the jurors to find liability and award

damages based on subjective feelings about personal or community safety. In *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764-765, the Court of Appeal condemned such arguments as improper:

> The only person whose pain and suffering is relevant in calculating a general damage award is the plaintiff. How others would feel if placed in the plaintiff's position is irrelevant. It is improper, for example, for an attorney to ask jurors how much "they would 'charge' to undergo equivalent pain and suffering. (Citation.) This so-called 'golden rule' argument . . . . is impermissible. (Citations)."
>
> "*The appeal to a juror to exercise his subjective judgment rather than an impartial judgment predicated on the evidence cannot be condoned.* It tends to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence. (Citation.) Moreover, it in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence. Finally, it may tend to induce each juror to consider a higher figure than he otherwise might to avoid being considered self-abasing."

(*Id.* at 764-765, footnotes omitted, emphasis added; accord *Beagle v. Vasold* (1966) 65 Cal.2d 166, 172, fn. 11; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 797-798; *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484-485.)

Thus, it is improper for plaintiff's counsel to suggest that a jury is obligated to "send a message" with its verdict or that the defendant must not "risk harm to . . . citizens." (*Collins v. Union Pacific R. Co.* (2012) 207 Cal.App.4th 867, 883; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 305.) Such arguments tend to "deflect the jury from their task, which [is] to render a verdict based solely on the evidence admitted at trial." (*Nishihama*, at p. 305.)

The "Reptile Theory" seeks to appeal to the jurors' subjective judgments about the best interests of the community rather than their impartial judgments predicated on the evidence. Thus, the "Reptile Theory" demands "the safest available choice." (*Reptile*, *supra*, at p. 63.) As the *Reptile* explains: "That's all the Reptile demands from anyone. And she really demands it, once you show her that the violation can hurt her . . . ." (*Id.* at p. 63.) Plaintiffs' counsel's statements during jury voir dire about the concerns of the "community" thus appear to be the beginning of a "Reptile" trial strategy, based not on the evidence concerning plaintiffs, but on the jurors' concerns about their own safety and the safety of the community. This Court should nip this improper tactic in the bud by prohibiting at the outset of trial any efforts by plaintiffs to use the "Reptile Theory" to present such impermissible "Golden Rule" arguments.

C. The "Reptile Theory" impermissibly departs from the standard of care.

The "Reptile Theory" is not relevant to the standard of care issue in this matter.

In a medical malpractice action, the plaintiff must establish through expert testimony (1) the applicable standard of care; (2) a breach of that standard; (3) causation; and (4) damages. (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542 ["As a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligence by the defendant caused the plaintiff's damages"]; see *Landeros v. Flood* (1976) 17 Cal.3d 399, 410 ["The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman"].)

The standard of care requires "only that physicians and surgeons exercise in diagnosis and treatment that *reasonable degree* of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 (*Mann*), emphasis added; see *Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [the Supreme Court has consistently recognized this standard]; see also CACI No. 501.)

The "Reptile Theory" is designed to redefine and heighten the standard of care in a medical malpractice action by effectively turning such a claim into one akin to strict liability. Under the "Reptile Theory," the *only* standard raised is the "safest possible choice." (*Reptile*, *supra*, at p. 63.) There is no variance allowed for the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful practitioners would apply under similar circumstances as required by the standard of care. (See, e.g., *Mann*, *supra*, 38 Cal.3d at p. 36; CACI No. 501.) Instead, the "Reptile Theory" is designed to create strict liability whenever a defendant does not make what plaintiffs contend, with the benefit of hindsight, would have been the "safest possible choice," without regard for other acceptable choices. (*Reptile*, *supra*, at p. 63.)

Medical negligence actions, however, are not based on strict liability and must not be converted into strict liability actions. (See *Valentine v. Baxter Healthcare Corp.* (1999) 68

Cal.App.4th 1467, 1484 ["Strict liability is not concerned with the standard of due care or the reasonableness of a [defendant's] conduct"].) Questions such as whether a medical practitioner "needlessly endangered a patient," while seemingly innocuous, are actually designed as the first step in improperly transforming a medical malpractice claim into one akin to strict liability. Rather than holding the plaintiff to the burden of proof required by California law, the "Reptile Theory" is plaintiffs' attempt to lessen plaintiffs' burden to that of proving merely that the defendant did not act in a manner which hindsight reveals may have been the "safest" way possible. This manipulation of the standard of care to create strict liability for medical malpractice defendants is contrary to California law.

Plaintiffs' counsel's statements during jury voir dire regarding the concerns of the "community" appear to be a starting point for an argument at trial based on the "Reptile Theory" that the standard of care requires healthcare providers to make the "safest possible choice." Such evidence and argument is not relevant to the only issues in this medical malpractice case: whether a breach of the standard of care by defendants caused damage to plaintiffs. (See Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) Further, such evidence and argument should be excluded under Evidence Code section 352 on the grounds it is designed to influence the jury to ignore the standard of care and is thus far more prejudicial than probative.

III. CONCLUSION

For the foregoing reasons, this Court should preclude plaintiffs from presenting evidence or argument at trial based on the "Reptile Theory," such as questions concerning the safest possible action or community safety.

DATED: August ___, 2014

[redacted]

By: _____
[redacted]

Attorney for Defendant
[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

[redacted]

Plaintiff,

and

[redacted]

Intervenor Plaintiffs,

v.

[redacted]

Defendants.

DEFENDANTS' OMNIBUS MOTION IN LIMINE

[redacted]

COMES NOW the Defendants, [redacted] hereby move this Court, *in limine*, and submits their argument with supporting argument and authorities as follows:

1. **The Court should not allow testimony from witnesses not previously identified as witnesses by Plaintiffs in their answers to interrogatories.**

For the first time in this case in Plaintiffs' trial witness list, Plaintiffs have listed a number of new witnesses. Discovery in the case ended April 24, 2015 and Plaintiffs previously opposed an extension of that deadline. For the first time, Plaintiffs in their

by Rules 401 (relevance), 403 (no probative value, unfair prejudice, confusion of the issues and misleading), Rule 602 (need for personal knowledge), and Rules 701 and 702 (calls for speculative opinion testimony) of the Federal Rules of Evidence.

3. The Court should not allow any Golden Rule argument and/or Reptile Theory questions and argument as such are misleading, improper, vague and confusing.

Plaintiff in this case has questioned witnesses in a manner that will imply that the jury should place themselves in the position of Plaintiff and that Defendants are a danger to the public. For example, Defendants' expert was questioned by Plaintiffs as follows:

> Q. Knowingly driving in a fatigued condition -- strike that.
>
> Driving down the highway when you know you are fatigued and have not received proper rest needlessly endangers the lives of other people, doesn't it?
>
> [redacted] Object to the form.
>
> [redacted]Object to the form.
>
> THE WITNESS: If you are, in fact, fatigued you are -- you can create hazards to others, yes.
>
> • • •
>
> Q. Based on all of your experience, familiarity with trucks and truck accidents, do you believe that a driver who knowingly violates the hours of service regulations is needlessly endangering other people on the highway?
>
> [redacted] Object to the form.
>
> [redacted]: Object to the form.
>
> THE WITNESS: They could be. That possibility certainly is there.

(Deposition of [redacted] at pp. 71:20-72:4; 76:2-10; 149:24-150:11). This type of general or non-specific questioning and argument related to "needlessly endangering other people" and "hazards" to the general public has no relation to the facts of this case. Any questioning or argument that implies the Defendants are a threat to the community goes beyond liability to Plaintiffs based on the facts of this case and implies or expressly requests the jury to put themselves in the position of Plaintiff, or implies that the jury's

role is to protect the public from Defendants, and is barred by North Carolina law. *See Fox-Kirk v. Hannon*, 142 N.C. App. 267, 279, 542 S.E.2d 346, 355 (2001)(holding that in personal injury cases, as in criminal cases, argument in which the jury is asked to put itself in the position of the injured party is improper); *See also*, Rule 401 and 403 of the Federal Rules of Evidence.

This line of questioning also implies the jury should be awarding speculative damages for harm that might have occurred to the community and/or to award damages on potential harm rather than actual harm based on the facts. *See Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 577-578; 715 S. Ct. 428, 430 (1951) (speculative proof of negligence and damages is not proper); Fed. R. Civ. Pro. Rules 401 and 403.

This type of questioning and argument is also requesting that the jury decide the case on the basis of emotion and prejudice, an improper basis, and not a rational view of the facts of the case. *See Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968) and *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966)(holding a verdict should be supported by a rational view of the evidence and cannot be based upon speculation, passion, caprice, prejudice, or other consideration not founded on the evidence); *See also, Burgess v. Vestal*, 99 N.C. App. 545, 546, 393 S.E.2d 324, 325 (1990)(upholding trial court's setting aside of verdict because the amount was excessive and appeared to have been awarded under influence of passion or prejudice); Fed. R. Civ. Pro., Rules 401and 403.

4. The Court should prohibit any post-accident decedent photos.

It is undisputed that the decedent in this case died due to an explosion of his gas

Genesis Health Venture, Inc., 151 N.C. App. 139, 152, 565 S.E.2d 254, 262-63 (2002)(Estate must submit evidence that allows for the jury to reasonably infer from the testimony that there was conscious pain and suffering).

Any such evidence would be prohibited pursuant to Rules 401 (relevance), and 403 (unduly prejudicial and no probative value, waste of time and confusion), Rule 602 (need for personal knowledge) and Rules 701 and 702 (speculative opinion) of the Federal Rules of Evidence and applicable case law.

19. The Court should not allow any evidence or testimony concerning liability insurance for [redacted] or [redacted].

Rule 411 of the Federal Rules of Evidence provides that "[e]vidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." Fed. Rule Evid. Rule 411. Absent indication that the existence of insurance is necessary to prove bias or prejudice or agency, ownership or control, the existence of insurance is inadmissible. *Id.* Defendants request an instruction to all parties that the existence of insurance is not to be mentioned at trial.

Respectfully Submitted,

[redacted]

Attorney for Defendant

[redacted]

Respectfully Submitted,

[redacted]

Attorney for Defendant

[redacted]

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

_____ and _____,	*	
Plaintiffs,	*	
v.	*	**Civil Action No.: CV-_____**
_____., et al.	*	
Defendants.	*	

MOTION IN LIMINE

COME NOW the defendants, _____, and move in limine for this Court to issue an order prohibiting the parties, their attorneys, as well as all witnesses during the trial of this matter from making any reference before the jury in any form whatsoever to the following subjects, whether references are made in arguments to the jury, voir dire, witness examination, offers of evidence, objections to evidence, or otherwise:

1. That the plaintiff refrain from questioning Dr. ____ concerning "patient safety rules" or alleged violation of "patient safety rules." Dr. ____ was repeatedly asked concerning "patient safety rules" beginning at p. 86 of Dr. ____'s deposition. Despite Dr. ____ advising that he had never heard of patient safety rules and did not know a definition of patient safety rules, plaintiff's counsel continued to question him concerning "patient safety rules" as if that was synonymous with the standard of care. The jury instructions in this case will define the standard of care, and "patient safety rule" appears nowhere in the Alabama Medical Liability Act or the Alabama Pattern Jury Instructions that are based on the Alabama Medical Liability Act. The use of the term "patient safety rules" in lieu of "standard of care" is a blatant effort to introduce

manipulative and fear-based tactics that originate from the publication *REPTILE: The 2009 Manual of the Plaintiff's Revolution.*

The premise of the "Reptile" theory is for the Plaintiffs to establish a broad, over-generalized "umbrella rule" or "safety rule" they will allege was violated by the Defendant. The *Reptile* authors argue that the valid measure of damages for a Reptile plaintiff is not the amount of harm actually caused in a case, but instead the maximum harm that a defendant's alleged *could have* caused. The intent of this strategy is to prime the jury to return a verdict for the plaintiff out of fear of safety for themselves and their community.

While traditional trial strategies appeal to jurors through reasoning and the evidence, *Reptile* encourages the spreading of "tentacles of danger" to intimidate the jury into deciding the case based upon manufactured fear for their own safety and that of others. The basis of the *Reptile* tactics is that each juror has an inner "reptile" that can be awakened by sensing danger, real or imagined. The theory is that if a jury begins to fear for his or her own safety, or the safety of others, emotions override reason and the juror will make decisions out of self-preservation rather than based on the evidence.

The *Reptile* teaches, therefore, that "in trial, your goal is to get the juror's brain out of fritter mode and into survival mode. You do this by framing the case in terms of Reptilian survival." *Id.* At 18 (emphasis added). Shockingly, the *Reptile* defines "brain fritter," as "free to do whatever it wants." *Id.* The Plaintiffs are counting on inciting in jurors sufficient fear for personal and community safety that they no longer objectively weigh the evidence or follow the Court's instructions as required by Alabama Law. The *Reptile* teaches that fear wins over facts.

The *Reptile* strategy encourages plaintiff attorneys to "spread the tentacles of danger" beginning in *voir dire*, opening statement and throughout the trial as a means to manipulate the

jurors into a favorable verdict. *Id.* At 354; 58; 138. The Reptile is promoted as a means of *exacting revenge for tort reform. See id. at Chapter 3* The Toxicology of Tort- "Reform"; Chapter 4 (*Antidote for Tort – "Reform" Poison*) (emphasis added). The strategy violates the golden rule on the most fundamental level and has no place in Alabama courtrooms. Further, it runs afoul of Alabama Rules of Evidence 401 and 403. Finally, it deprives defendant of his constitutional right to a fair and impartial trial.

Such tactics to intentionally inject "terror and anxiety" into the courtroom should not be allowed in this case, and the Defendant respectfully requests that the Court prohibit the Plaintiffs from the use of Reptile tactics, including in *voir dire*, as they violate Alabama law.

Based upon Plaintiff's deposition examination of Defendant Dr. ____, Defendant anticipates that the Plaintiffs intend to utilize Reptile tactics at trial. The Reptile strategy calls for the Plaintiff to establish certain "rules" at trial because "errors and mistakes don't motivate verdicts (especially med mal verdicts); patient safety-rule violations do." *Reptile*, p. 243 (emphasis added). In questioning Dr. ____, plaintiff's counsel repeatedly used the phrase "patient safety rules" as if that term is synonymous with standard of care.

The *Reptile* lines of questioning do not seek to address the standard of care for a physician similarly-situated to Dr. ____, but instead seek to establish generalized public safety speculation with the intent to mislead the jury. This emphasis on "safety rules" and their alleged violations move the focus of the jury beyond the realm of the Plaintiffs' burden in a medical malpractice case to prove by expert testimony an alleged breach in the standard of care and that the alleged breach probably caused the injury and death. This speculation as to public safety dangers, which seek to trigger an irrational response in a jury separate and apart from the facts and evidence presented at trial, have no place under Alabama law.

The *Reptile* strategy is nothing more than a backdoor attempt to make golden rule arguments that are improper as a matter of law. In Alabama, the golden rule disallows any argument asking jurors to put themselves in the shoes of a party or which arouses their passion or prejudice. For these reasons, plaintiffs should refrain from making reference to "patient safety rules" or pursuing other "Reptile" tactics.

[redacted]

CERTIFICATE OF SERVICE

[redacted]

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF

Plaintiff, v. Defendants.	Case No. MOTIONS IN LIMINE AND PROPOSED CURATIVE INSTRUCTION

Defendant _____ moves this Court *in limine* to exclude a number of subjects and evidence which _____ anticipates plaintiff will attempt to introduce at trial. Defendant moves that such testimony and evidence be limited as follows.

STANDARD FOR MOTION IN LIMINE

A motion *in limine* is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 US 38, 40 (1984). The court has inherent authority to decide such motions in order to manage the course of trials. *Id.* at 41. A motion *in limine:*

> provides a legal procedure to flush out problems to be encountered during the trial, before a jury is contaminated with the evidence. An objection to evidence, with a motion to tell the jury to disregard it, is a poor alternative. The old cliché, 'you can't unring a bell,' still applies.

State v. Foster, 296 Or 174, 182, 674 P2d 587 (1983); OEC 103. In addition to evidentiary rulings, the Court may also determine the propriety of jury argument and *voir dire* questioning of jurors.

State v. Foster, supra at 183; OEC 103, 104. The court also has broad authority to decide preliminary questions concerning the admissibility of evidence. OEC 104.

MOTIONS IN LIMINE

MOTION NO. 1: No "Reptile Theory" arguments.

Defendant moves the Court for an order prohibiting plaintiff's counsel from making any arguments based on the 2009 manual authored by David Ball, a jury consultant, and Don Keenan, a plaintiff's attorney, entitled *Reptile: The 2009 Manual of the Plaintiff's Revolution.* The "Reptile Theory" promoted in this manual is designed to appeal to the "reptilian" portion of juror's brains which governs the survival instinct. The manual instructs plaintiff's attorneys to create a "safety rule" and argue that defendant's failure to follow that safety rule endangered the community at large. This "safety rule" approach is simply a crafty pretext for manipulating jurors' emotions, playing to their fears rather than the facts of the case and the applicable law. It is an attempt to redefine the law with a vague, overbroad notion of what is safe and what is dangerous, rather than the standard of care at issue.

Based on questions plaintiff's counsel asked defendant at her deposition, it appears plaintiff's counsel will attempt to present "Reptile Theory" evidence or argument at trial. Plaintiff's counsel asked defendant at her deposition: "Would you agree that the traffic laws and safety rules on the roadway are created for the safety of everyone in the community, including my client?" (Ex. 1 - _____ Depo. p. 49, ll. 16-19). He also asked "Would you agree that a violation of those safety rules or the laws of the road needlessly endangers the community and individuals such as my client?" (Ex. 1 - _____ Depo. p. 49, ll. 21-24). He asked other questions along the same lines reading from the Reptile script, including "Would you agree that such needless danger and violation of those rules would be below the standard of care set for the community?" (Ex. 1 - _____ Depo. p. 50, ll. 6-8).

The "Reptile Theory" improperly seeks to appeal to jurors' subjective concerns about their own safety and the safety of the community at large rather than their impartial judgments based on the evidence presented. This is a cleverly disguised attempt to introduce impermissible "Golden Rule" arguments. *Hovis v. City of Burns*, 243 Or 608, 613, 415 P2d 29 (1966). By asking jurors to find liability and award damages based on their feelings about personal or community safety, plaintiff's counsel is in essence telling jurors to put themselves in plaintiff's position. This improper tactic should be prohibited at the outset of trial.

The "Reptile Theory" impermissibly departs from the applicable standard of care in this case. Any "reptilian" evidence or argument is improperly designed to appeal to jurors' emotions. It is further designed to influence the jury to ignore the standard of care and apply a broad, vague notion of what is "safe for the community" and what constitutes "needless danger" to the public. Plaintiff's counsel should be prohibited from introducing any such irrelevant evidence or making any such improper argument. OEC 401, 402, 403.

Proposed Curative Instruction for Violations of Any Orders on these Motions *in Limine*

Without waiving any rights to move for a mistrial for any violation of any order on these motions in limine, or any other warranted reasons, Defendant proposes language in substantially the following form in the event of such violations:

> Ladies and Gentlemen, I need to give you an additional instruction. Plaintiff's counsel has made statements or suggestion that you consider the safety of the community or your own personal safety in making your decision as to whether the Defendant's conduct met the applicable legal standard of care that I have given you. Those arguments are incorrect and I have ordered them stricken. You must totally disregard such statements or suggestions.
>
> Your job is not to consider whether Defendant's conduct could hypothetically be of any harm to a community as a whole, or to you individually, but rather to determine, with

respect to the damages alleged to have been suffered by the plaintiff, whether Defendant acted as a reasonably prudent person would have acted under the facts admitted into evidence in this case alone.

DATED:

By:_____

[redacted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

[redacted]

Plaintiffs,

v.

[redacted]

Defendant.

Case No. [redacted]

[Complaint Filed: February 14, 2011
[Assigned to Dept. 6 – Judge David Flinn]

DEFENDANT'S MOTION IN LIMINE TO PRECLUDE "GOLDEN RULE ARGUMENT"; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF [redacted] AND [PROPOSED] ORDER

[DEFENDANTS' MOTON IN LIMINE # 1]

Discovery Cut-Off:
Motion Cut-Off:
Trial Date:

TO THE COURT AND TO ALL OTHER PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

Defendants hereby move this Court for an order restricting plaintiff's counsel, plaintiff, and any witnesses called upon by plaintiff's counsel from making any inquiry, comment or argument and excluding any and all evidence, references to evidence, testimony or argument relating, referring or mentioning that jurors should base their verdict on damages in an amount that the jurors' would charge to endure similar injuries or that verdict for the plaintiff will make

the community safer because it will prevent the defendant or others similarly situated from harming the juror, the juror's family, or someone close to the juror.

The motion is based upon the belief that plaintiff's counsel will attempt to inquire, comment, suggest and argue that the jurors put themselves in the place of the plaintiff in this action and make a judgment based on that virtual reality. However, any such attempt is prohibited by law, is irrelevant to the issues in this case and will create a substantial danger of undue prejudice to Defendants and will also result in confusion or misleading of the jury.

Dated: September _____, 2012

[redacted]

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

This case arises from a three-vehicle accident that occurred on April 21, 2009 at approximately 9:15 a.m. This accident occurred on westbound State Route 4 approximately 500 feet east of Hillcrest in Contra Costa County, California. [redacted] employee at the time, [redacted] was driving a 2006 Ford Explorer. [redacted] vehicle rear-ended a 2000 Toyota 4 Runner driven by [redacted], which was stopped, and the impact caused [redacted] vehicle to rear-end the 2006 Honda Odyssey driven by Plaintiff [redacted], which was also stopped.

Defendants bring this motion in advance of jury selection to prevent unfair prejudice to the defendants in this personal injury action. Defendants expect Plaintiff's counsel will attempt to any inquire, comment or argue to the jury during voir dire, opening statement, examination of witnesses and at closing argument that the that jurors should find for the plaintiff because to do so will make the community safer because it will prevent the defendant and/or other similarly situated as the defendant from harming the juror, the juror's family or someone close to the juror. It is also expected that Plaintiff's counsel will attempt to inquire, comment or argue to the jury that if they find for the plaintiff they should then base their verdict on damages in an amount that the jurors' would charge to endure similar injuries or that the amount of damages will, of itself, work to make the community safer because it will prevent the defendant or others similarly situated from harming the juror, his family, or someone close to the juror. This practice, known as the "golden rule argument" is specifically precluded, as a matter of law as set forth in CACI 100 which provides in pertinent part as follows:

> "You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict."

The above instruction is also repeated at the conclusion of trial as set forth in CACI 5000

which states in pertinent part:

"You must not let bias, sympathy, prejudice, or public opinion influence your decision."

Further, the "golden rule argument" has been rejected by California courts and is clearly prejudicial under an Evidence Code section 352 balancing. (See *Brokopp v. Ford Motor Co.* (1977) 71 Cal. App.3d 841, 860.)

To allow such comments, evidence or argument would only result in an undue consumption of this Court's time, on matters which are prohibited by law, are irrelevant to the issues in this case and would be highly improper and prejudicial to Defendants, even if this Court were to sustain an objection thereto and properly instruct the jury not to consider such facts.

Based on the foregoing analysis, this Court should order that plaintiff, plaintiff's counsel, and all witnesses, refrain from any reference, comment, or evidence, either by way of documents or testimony, as to the substance of the matters referenced hereinabove, and further request said matters not be admitted into evidence.

II.

THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE IN ADVANCE OF TRIAL BY WAY OF AN IN LIMINE MOTION

The Court has inherent power to grant a motion in limine to exclude "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." [*Clemens v. American Warranty Corp.* (1987) 193 Cal. App.3d 444, 451; *Peat, Marwick, Mitchell & Co. v. Sup. Ct.* (1988) 200 Cal. App.3d 272, 288.]

Evidence Code section 352 allows the court to exclude evidence where there is a substantial danger that the probative value will be outweighed by the danger of undue prejudice. [See *People v. Cardenas* (1982) 31 Cal.3d 897, 904.]

Evidence Code section 402 allows the court to hear and determine the question of admissibility of evidence outside the presence or hearing of the jury. [See *Mize v. Atchinson, Topeka & Santa Fe Ry. Co.* (1975) 46 Cal. App.3d 448.]

In this case, the probative value of making a "golden rule argument" to the jurors is easily outweighed by the danger of the undue prejudice to Defendants.

III.

REJECTION OF "GOLDEN RULE ARGUMENT"

There is a long line of California cases prohibiting the "golden rule argument." In *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860, the Court found it improper to ask jury to award the amount they would "charge" to undergo equivalent disability, pain and suffering; also known as "golden rule argument." Similarly, in *Newmann v. Bishop* 91976) 59 Cal.App.3d 541, 548, the Court found that arguments that suggest jurors step into the shoes of the plaintiff are improper as they may induce jurors to assess higher damage amounts than they would otherwise assess in objectively looking at the facts and circumstances of the particular case. Furthermore, in *Zibbell v. Southern Pacific Co.* (1911) 160 Cal. 237, 235, the Court stated, "It is, of course, improper for the jury to attempt to measure the damage occasioned by the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what plaintiff has endured, and must endure."

There is a relatively recent trend among the plaintiff's bar suggesting that plaintiff's lawyers must appeal to the jurors' own sense of self-protection in order to persuade and prevail at trial. This tactic is based upon the notion that appealing to a juror's self-protective instincts will reverberate and convince better than any other argument because the most powerful thinking occurs when one is protecting one's life. Thus, a trial lawyer can communicate most effectively by converting every issue into one of self protection (or its cousin, community safety.) By linking every argument in some way to a juror's sense of personal or community safety, the plaintiff's lawyer increases his chance of prevailing. Plaintiff's lawyers are told to "use the powerful Reptilian imperative" to use devastating events as a springboard from which to create safety. They are further told to express to the jury that every injury presents a hope for a safer future and to position the jurors as the cultivators of that hope.

At the end of the day, the goal is for the plaintiff's lawyer to convince the jury that a verdict for the plaintiff will make the community safer because it will prevent the defendant or others similarly situated from harming the juror, his family, or someone close to him.

The Court needs to recognize the above for what it truly is, i.e., an attempt to resurrect "Golden Rule arguments," which are impermissible in California and most other jurisdictions in the United States and have been for a very long time. The bottom line is that jurors are not to be asked to put themselves in the place of a party and make a judgment based on that virtual reality.

Defendant's in this case believe that plaintiff's counsel will make every attempt during voir dire, examination of witnesses and during closing argument to circumvent this evidentiary rule by asking the jurors to put themselves in the same position as the plaintiff - a position of jeopardy that calls upon survival instincts.

IV.

THE COURT SHOULD EXCLUDE INTENDED TO INFLAME JURORS' EMOTIONS

Even if the Court were to somehow determine that suggesting the jury place themselves "in plaintiff's place" or "in plaintiff's shoes" or referring to plaintiff as "victim," or other words to that effect, at any time during trial was relevant or probative to issues in this case, which the [redacted]Defendants contend they are not, such evidence should be excluded under California Evidence Code section 352. See, e.g., *Hrnjak v. Graymar, Inc.* (1971) 4 Cal. 3d 725, 732 (trial court must carefully weigh the relevancy and probative value of the proffered evidence against the prejudicial impact such evidence is likely to have on the jury's deliberations).

Here, not only is it inappropriate to ask the impartial trier of fact to assume plaintiff's place, there is no doubt that any suggestion that the jury put themselves in plaintiff's position or to issue a verdict to promote safety in the community would serve no purpose other than to inflame the jury and appeal to prejudice. In the same manner, referring to the plaintiff as "victim" or words to that effect will also have no purpose but to inflame the jury and prejudice the Defendants' position. Such trial tactics are inappropriate, create undue and permanent prejudice, and should be prohibited.

Furthermore, Evidence Code section 350 states that "(n)o evidence is admissible except relevant evidence." Relevant evidence is defined by Evidence Code section 210 as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." [See *People v. Kelly* 91992) 1 Cal.4th 495, 523 (only relevant evidence is admissible).

Evidence may be properly excluded where not relevant to matters at issue. [See *Castaline v. City of Los Angeles* (1975) 47 Cal. App.3d 580, 592; see also *People v. Coleman* (1979) 89 Cal. App.3d 312, 321.]

The suggestions, evidence or argument that are the subject of this motion in limine are not relevant to the determination of liability and therefore, should be excluded on that basis as well.

V.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court issue an Order precluding Plaintiff, their counsel and all witnesses from making any reference to, or presenting evidence, testimony, or argument referring to Plaintiff's as "victim" or suggesting that jurors put themselves "in plaintiff's place or "in plaintiff's shoes" or to find for the plaintiff because to do so will make the community safer because it will prevent the defendant and/or other similarly situated as the defendant from harming the juror, the juror's family or someone close to the juror.

Dated: September _____, 2012

[redacted]

[redacted]

Attorneys for Defendants,

[redacted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

[redacted]

Plaintiffs,

v.

[redacted]

Defendants.

CASE NO. [redacted]

[Complaint filed September 18, 2012]

MOTION IN LIMINE OF [redacted] TO PRECLUDE PLAINTIFFS' COUNSEL FROM QUESTIONING, INQUIRING AND/OR EXAMINING WITNESSES OR ARGUING ALLEGATIONS OF LIABILITY IN TERMS OF "SAFETY" AND OTHER REPTILIAN THEORIES.

(DEF'S MIL #8 of 10)

([PROPOSED] ORDER filed concurrently)

Time: 8:30 a.m.
Dept: [redacted]

Trial Date: SEPTEMBER 19, 2014

TO THE PARTIES AND TO THEIR ATTORNEYS OF RECORD:

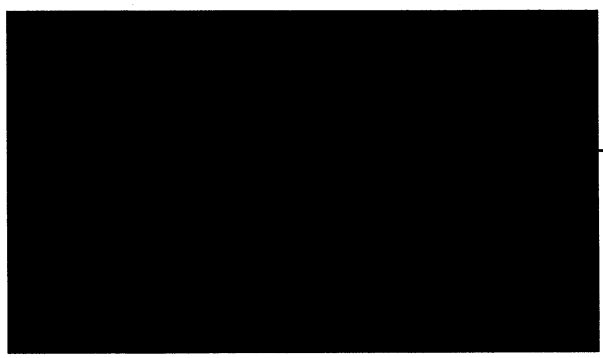
Defendants [redacted] move this court *in limine*

for an order precluding plaintiffs' counsel from questioning, inquiring and/or examining defendants and medical experts on the golden rule, as to what is "safe" or "safest" or what is a "better" approach, on the ground that such questions are irrelevant and inadmissible under Evidence Code §350 as to whether any defendant conformed with the applicable professional standard of care, whether they provided informed consent, or caused any damage. Such questions or argument are also more prejudicial than probative and inadmissible under Evidence Code §352.

Defendants will further move for an *in limine* order directing plaintiffs' counsel to instruct plaintiffs, plaintiffs' witnesses and other persons under their control, that no mention or display be made in the presence of jurors or prospective jurors of the matter that is the subject of this motion.

This motion is based on this Notice, the attached Memorandum of Points and Authorities, on all pleadings on file, and upon such further oral and/or documentary evidence as may be properly considered by the court.

DATED: October ___, 2014



MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs' counsel may attempt to question, inquire and/or examine defendants and medical experts on what is "safe" for the patient, or ask "isn't it true that a nurse or doctor is never allowed to needlessly endanger a patient?" or ask the jury to place themselves in plaintiff's shoes. All such questions and argument are irrelevant and establish a clear attempt by plaintiffs' counsel to mislead the jury. [These questions and argument were set forth in a book entitled *REPTILE; The 2009 Manual to Plaintiff's Revolution.]*

1. PLAINTIFFS ARE ATTEMPTING TO REDEFINE THE STANDARD OF CARE OR INFORMED CONSENT BY ARGUING LIABILITY IN TERMS OF SAFETY.

The first question in determining any defendant's liability for professional malpractice is whether or not that defendant's treatment complied with the applicable standard of care. The standard of care requires that physicians exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and used by members of the medical profession under similar circumstances. (*Landeros v Flood* (1976) 17 Cal.3d 399, 410; *Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977; *Williamson v. Prida* (1999) 75 Cal.App.4th 1417; CACI No. 501.)

The "standard of care" requires that the defendant provide the minimum level of acceptable level of care, no more and no less. Conceptually, the standard of care is a continuum – it requires that the physician receive the minimum passing grade, not an A+. Certain professionals may practice at an A+ level, but

that standard is not relevant because it is not the standard to be imposed on the defendants. To the contrary, the "standard of care" is a fluid concept, embracing different treatment methods by different physicians, even if ultimately wrong, unsuccessful, or chosen by a numerical minority of reputable practitioners:

> Where there is more than one recognized method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all practitioners of good standing, a physician is not negligent if, in exercising his or her best judgment, he or she selects one of the approved methods, which later turns out to be a wrong selection, or one not favored by certain other practitioners. (CACI No. 506)
>
> ***
>
> A physician is not necessarily negligent just because [his/her] efforts are unsuccessful or [he/she] makes an error that was reasonable under the circumstances. A physician is negligent only if [he/she] was not as skillful, knowledgeable, or careful as other reasonable physicians would have been in similar circumstances. (CACI No. 505; mod.)

Differences of opinion about the desirability of one treatment course over another do not equate to negligence by the practitioner opting for a less popular method. (*Clemens v. Regents of the University of California* (1971) 8 Cal.App.3d 1, 16.)

Compliance with the standard of care is determined by whether the defendant's treatment fell within the *minimum level*

of care expected of reputable practitioners in good standing in the community based on expert witness testimony.

Further a patient's consent to a medical procedure must be "informed". [CACI 532.] A physician is required to disclose "all information relevant to a meaningful decisional process" by the patient. *Cobbs v Grant* (1972) 8 Cal.3d 229, 242.

The standard of care is not defined by or limited to what is **a safe course of treatment**, as medical treatments which are appropriately offered to patients carry risks. Additionally, **it is the patient's decision** after being informed of the risks and alternatives of recommended treatment to choose what treatment course they desire. For example, a patient may be advised they can manage their medical problem with medications (typically a conservative approach) but that surgery, with all of its attendant risks, is certainly an acceptable option of treatment. The patient after being informed of the alternatives and risks can certainly appropriately choose the "least safe" approach of surgery. Both approaches and options are within the standard of care. Therefore, the doctor acting within the standard of care can perform a medical procedure that is "less safe".

Thus, the following questions as set forth below are improper as they do not establish the standard of care required of a physician and certainly ignore the fact it is the patient's decision as to what medical care they wish to consent to.

"When a doctor has a choice of surgical treatments, the treatment option with the lowest risk should be recommended, right?" [Depo. [redacted] pg. 45:24-46:1]

"And a doctor can refuse to perform a procedure if they don't believe it is safe even if the patient demands it, right" [pg. 46:23-25}

"Well if you as a doctor know that the medical procedure that a patient prefers that you perform is not safe, and you know that you as a doctor could be facing a lawsuit if a procedure does not go well, are you saying that you would still because of the nature of their relationship that you just talked about perform the procedure?' [pg. 47:21-48:3]

"The surgeon can't be forced to perform a surgery if he does not believe it is the safest option for the patient, right?" [pg. 48:22-24]

"What is the Hippocratic Oath?" [Depo. pg. 7:6]

"Would you agree that the basic principle of medicine is patient safety?" [Depo. pg.7:10-11. Of import responded No - then stated he was not sure what counsel meant by "safety".]

"To do what's the safest for the client to care for their health?" [pg. 7:16-17.]

"Do you agree a doctor or a nurse is never allowed to needlessly endanger a patient?" [pg. 7:21-22.]

"Do you agree it is a **better practice** to confirm patient's understanding of the verbal discharge instructions given to them by asking them to repeat instructions back?" "Better for patient safety?" [pg. 30:8-16 see also pg. 31:23-32:1]

As so eloquently explained by Dr. , a physician has to make his recommendation based on what the treatment options are and also has to make his recommendation based on the

patient's expectations. The recommendation is a synthesis between the treatment options, what's practical, what's available, what's feasible, and the logistics available to the patients. "And importantly, perhaps even more importantly, what are the patient's wishes. So it's not unusual to choose a treatment that has a higher risk or even a poorer outcome based on the patient's wishes." [[redacted] pg. 46:4-17] In other words, a physician should discuss the recommended treatment, the risks and the alternatives - and even if it is not "the safest" approach the patient has a right to decide which method of treatment to which they wish to consent.

Medical professionals utilize their medical judgment based on the information available at the time of care. The standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession under similar circumstances. {CACI 501/502].

2. WHAT PLAINTIFFS' COUNSEL IS TRYING TO DO IN THE "REPTILE REVOLUTION" IS TO REDEFINE STANDARD OF CARE AND CAUSATION

Don Kenan, a plaintiff's attorney, and Dr. David Ball, a jury consultant, have advertised their book and seminars as the most powerful guide available to plaintiff's attorneys seeking to obtain high damage awards. Without going into the neuroanatomical assumptions of the primitive "reptile brain" or the higher-level limbic system as discussed in the book in essence what plaintiff's attorneys are instructed to do is to create a "safety rule", that the defendant did not chose the safe approach and that such is a danger to the individual and the community.

The safety rule attack is an attempt to redefine the standard of care and informed consent and is a "word game" which the witness needs to decide whether to accept or reject the language.

The types of safety rule questions that the book teaches include:

- Safety is always top priority
- Danger is never appropriate
- Protection is always top priority
- Reducing risk is always top priority
- Sooner is always better
- More is always better

Essentially this approach is simply a clever pretext for manipulating jurors' emotions, playing to their fears rather than to the facts and trying to redefine the law with a vague, incomplete hypothetical, that something must be safe, or not dangerous, or not risky to be within the standard of care.

By definition these questions are inherently flawed because they lack specificity to allow a specific answer. Clearly all of these questions are vague, ambiguous and overbroad. Further, they do nothing to show whether a physician met the standard of care in caring for and treating a patient. Thus, such questions are not relevant pursuant to Evidence Code §350. Only relevant evidence is admissible at trial. Relevant evidence is defined as evidence the either can prove or disprove a disputed fact that is of consequence to the determination of the action. Evidence Code §210. Thus, a question or argument regarding "safety", what is

"better", etc. which is not tied to the standard of care violates the long standing law that medical negligence is based on a physician's failure "to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful physicians would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.'" CACI 501/502.

Further the "reptile theory" as espoused in the 2009 Manual instructs plaintiffs' counsel to start preconditioning the jury in voir dire. [Chapter 10 pgs. 119-127.] "The first step in a Reptilian approach is to get **jurors personally involved** with the kinds of dangers your case represents." Reptile pg. 119. This is nothing more than advocating the Golden Rule.

It is well-settled in California that "golden rule" arguments and pre-conditioning in voir dire are prohibited. In *Brokopp v Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860, the Court of Appeal held that it was an improper for an attorney to ask the jury to award the amount of money that they would "charge" to undergo an equivalent disability and similar pain and suffering. Similarly, in *Newmann v Bishop* (1976) 59 Cal.App.3d 541,548, the Court ruled that arguments that suggest that the jurors step into the shoes of the plaintiffs are improper, as they may induce jurors to award higher damage amounts that they would otherwise award if they were objectively looking at the facts and circumstances of the particular case. In *Zibbell v Southern Pacific Co.* (1911) 160 Cal. 237, 255, the Supreme Court reiterated that "[i]t is, of course, improper for the jury to attempt to measure the damage occasioned by the injury and the sufferings attendant upon it, by

asking themselves what sum they would take to endure what plaintiff has endured, and must endure."

Asking questions in voir dire is appropriate; making suggestions to precondition a jury is not. Voir dire questioning should be designed to elicit information that would be useful in determining whether a juror or jurors might evince attitudes inconsistent with suitability to serve as a fair and impartial juror. By contrast, improper questioning includes:

> ". . . any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law." (Code of Civil Procedure §222.5)

Thus, questions such as "when selecting a doctor for yourself or your family, how do you choose?" "What kinds of concerns have ever made you change doctors?" [Reptile pg. 121]. As the authors state, the purpose of these questions is to get the jurors personally involved. The plaintiff's counsel is then instructed to continue this theme of personal involvement in opening statements.

3. GENERAL SAFETY QUESTIONS ARE MORE PREJUDICIAL THAN PROBATIVE

Evidence Code §352 provides for exclusion of evidence if the probative value is substantially outweighed by the probability the evidence will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury.

As these questions - what is safe, better, or less dangerous, have nothing to do with the standard of care or informed consent, they are meant to confuse the jury and as outlined in the *Reptile* to convince the jury they are threatened by violation of these "safety rules" and that damages will enhance their safety and decrease danger to them or their family. "Without full compensation, no one is safe."

Just asking such questions of the defendant or a witness - requiring defense counsel to object to the question as vague, ambiguous, overbroad and irrelevant - causes prejudice to the defendant. The jury would be forced to consider: why would the defense counsel not want the doctor to answer whether something was "safe".

4. CONCLUSION

The issue before this court is whether [redacted] met the standard of care as expressed in expert testimony. Plaintiffs' counsel should not be allowed to ask vague, overbroad questions about "safety", the Hippocratic Oath or the Golden Rule as this is a clear attempt to mislead the jury into believing if something is not safe then it is not within the standard of care, and it placed the plaintiff - and the jurors and their community - in danger. The question is only did [redacted] meet the standard of care required of him under the same or similar circumstances, and if such breach in the standard of care within a reasonable medical probability caused *Plaintiff* to suffer damages.

Accordingly, these questions are nothing more than an attempt to improperly change the legal definition of standard of care and causation, the requirement of informed consent so that

the patient can make an informed decision, to improperly precondition the jury to become personally involved, and improperly appeal to the jurors emotions. Such is not allowed and should not be permitted.

DATED: October ___, 2014

[redacted]

Filed 9/16/16 Certified for Publication 9/22/16 (order attached)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

[redacted],

Plaintiff and Respondent,

v.

[redacted],

Defendant and Appellant.

[redacted]

(Super. Ct. No. [redacted])

APPEAL from a judgment of the Superior Court of Riverside County, [redacted], Judge. Affirmed.

[redacted];

[redacted], for Defendant and Appellant.

[redacted] for Plaintiff and Respondent.

[redacted] hired [redacted] a landscape and pool contractor, to build a pool and spa at his home. [redacted], a [redacted] employee,

evidence in favor of [redacted] and give him the benefit of every reasonable inference. (*Howard, supra*, 72 Cal.App.4th at pp. 630-631.) Based on that standard and the record before us, there is substantial evidence to support of the judgment.

III. *Alleged Attorney Misconduct*

A. Additional Background

During closing argument, [redacted] counsel told the jury that its decision would impact the community. [redacted] counsel started off his argument by telling the jury members that acting as a juror is an important civic duty. He continued, "Your voice really is going to have an impact. [¶] . . . You are the voice. You are the conscience of this community. You are going to speak on behalf of all the citizens in Riverside County and, in particular, Coachella Valley. [¶] You are going to make a decision what is right and what is wrong; what is acceptable, what is not acceptable; what is safe, and what is not safe. You are going to announce it in a loud, clear, public voice. And that is going to be the way it is."

[redacted] counsel went on to state that "[t]hese courtrooms, these courthouses, exist for one reason: It's to keep the community safe. Period. That is the sole function of courtrooms, and it's why the state spends so much money on courtrooms. [¶] In the criminal part of the system, the jury identifies criminals and gets rid of them. . . . It's a matter of public policy, public safety. [¶] On the civil end of things, same function it's all about keeping the community safe. You identify bad conduct, negligent conduct. You don't send anybody to jail, but you announce what it is, and everybody is going to live by it. And in the civil end, you, the jury, tells the wrongdoer, 'You are going to compensate

the person you hurt.' [¶] . . . And you are going to tell the wrongdoer, 'If you do this stuff in our community, you are going to pay.' "

After a break and after [redacted] counsel had continued through a significant portion of his closing argument, [redacted] counsel objected, stating "[redacted] counsel is making a reptile argument where he's talking about the role of the jury verdict in enforcing the greater good for the general public." The trial court found the objection was untimely.

B. Analysis

[redacted] argues [redacted] counsel committed misconduct by urging the jury to base its verdict on protecting the community.

"The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." (*Martinez v. State* (2015) 238 Cal.App.4th 559, 566.) For example, "[a]n attorney representing a public entity commits misconduct by appealing to the jurors' self-interest as taxpayers." (*Ibid.*) "An attorney's appeal in closing argument to the jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796 (*Cassim*).)

To preserve a claim of attorney misconduct for appeal, a timely and proper objection must have been made at trial; otherwise, the claim is forfeited. (See *Cassim, supra*, 33 Cal.4th at pp. 794-795; *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211.) "In addition to objecting, a litigant faced with opposing counsel's misconduct must

either 'move for a mistrial or seek a curative admonition' [citation]" unless an admonition would have been inadequate under the circumstances. (*Cassim,* at p. 795.)

Here, although in our view the remarks from Regalado's counsel telling the jury that its verdict had an impact on the community and that it was acting to keep the community safe were improper, the comments were so brief that they were not prejudicial in our view. (See *Cassim, supra*, 33 Cal.4th at pp. 802-803.) Regardless, we need not reach the issue because [redacted] failed to timely object to the remarks and failed to request a curative admonition. There is nothing in the record that indicates an objection and admonition would not have cured the prejudice, if any, arising from those remarks. Accordingly, [redacted] forfeited his argument on appeal. (*Id.* at pp. 794-795.)

IV. *Collateral Source Rule*

A. Additional Background

[redacted] did not work for four years after the accident. He received worker's compensation benefits. [redacted] continued to pay his salary during that time. At an Evidence Code section 402 hearing, [redacted] testified that he continued to pay [redacted] because he knew worker's compensation benefits were less than the salary [redacted] regularly made and [redacted] was the only income earner in his household. According to [redacted], he continued to pay [redacted] to help [redacted] and [redacted] family. [redacted] hoped that if he was in the same position and the only person working in his household, someone would do the same thing for him. [redacted] did not expect to receive anything in return for paying [redacted] salary. [redacted] returned to work for [redacted] in June 2014, as a cost estimator.

DISPOSITION

The judgment is affirmed. [redacted] is entitled to recover costs on appeal.

[redacted], Acting P. J.

WE CONCUR:

[redacted]

[redacted]

Filed 9/22/16

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

[redacted],

Plaintiff and Respondent,

v.

[redacted],

Defendant and Appellant.

[redacted]

(Super. Ct. No. [redacted]

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in this case filed September 16, 2016 was not certified for publication.

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c); and

ORDERED that the words "Not to Be Published in the Official Reports" appearing on page one of said opinion be deleted and the opinion herein be published in the Official Reports.

[redacted], Acting P. J.

Copies to: All parties

Combating the Reptile Theory in Depositions of the Defendant's Key Witnesses

Earl K. Cantwell, Esq.
Hurwitz & Fine, P.C.

William S. Thomas
Pitzer Snodgrass, P.C.

I shall the effect of this good lesson keep,
As watchman to my heart. But, good my brother,
Do not, as some ungracious pastors do,
Show me the steep and thorny way to heaven;
Whiles, like a puff'd and reckless libertine,
Himself the primrose path of dalliance treads,
And recks not his own rede.

- William Shakespeare, Hamlet (1601), Act I, Scene III

The "Bard" himself, William Shakespeare, gets credit for creating the enduring phrase, "the Primrose Path," which we associate with someone being led down the eventual road to their ruin. No phrase could be more *apropos* when addressing the tactics used by plaintiff's lawyers across the nation to corner then spring a trap on defense witnesses with a seemingly inescapable strategy: *Reptile*. The "Reptile Theory," as developed by jury consultant David Ball, Ph.D. and plaintiff's lawyer Don Keenan,[1] is a ubiquitous threat to defendants and their witnesses across all types and nature of cases. It is loosely based upon the "studies" of scientist Paul MacLean, who theorized there are three different "portions" of the human brain which impact cognitive function.[2] The oldest portion, which governs our most basic instincts, is referred to as the reptile brain, which (the theory goes) governs fight/flight/freeze reactions to stimuli.[3] Ball and Keenan focused on triggering those basic survival instincts to motivate jurors and potentially influence (higher) verdicts.

When a juror is confronted with a threat to their safety, and/or the safety of the community, "reptile" instincts are triggered and jurors are expected to respond accordingly.[4] Their response presumably takes the form of findings of liability/aggravated liability, and enhanced, even punitive, damages. The goal is to create an atmosphere of risk and danger wherein damages can be used to punish safety lapses and prevent similar dangerous conduct. Eckenrode and Kanasky have described this scenario as the "…courtroom becom[ing] a safety arena wherein damage awards enhance safety and decrease the danger [to the jurors/community] posed by the defendant."[5]

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1 *See* DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009).
2 Ann T. Greeley, *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response,* ABA SECTION OF LITIGATION, 2015 SECTION ANNUAL CONFERENCE 1, 2 (2015).
3 *Id.* at 3.
4 *Id.*
5 Thaddeus J. Eckenrode & William Kanasky, Jr., *Defense Strategies to Confront the Reptile*, MEDICAL LIABILITY AND HEALTH CARE LAW 103, (2015).

For this tactic to succeed, plaintiff's attorney will demonstrate, through testimony of defense witnesses, that basic "safety rules" that "must" be followed to prevent danger and ensure safety, were violated, and that the violation just happened to injure their client, as opposed to any other member of society at large. The implication is merely a thinly veiled "Golden Rule" argument that, by luck or chance, jurors themselves, or worse their families, could have been exposed to the dangerous, injury causing conduct of the defendant. The reptilian theory "safety rule" is an absolute imperative – the defendant must do or not do "X" to be safe. The theory magnifies modern jurors' biases and negative perceptions against business corporations and insurance companies. However, safety rules are rarely so stringent and absolute. There are often thresholds, levels, definitions, ranges, and exceptions. Many "rules" also at some point constitute a judgment call on someone's part. That is where the REAL legal issue, the applicable legal standard of care, should come into play.

Is it really a "safety rule"?

To be effective, these safety rules should ". . . (1) be in English, (2) say what the person must do, (3) be easy to follow, (4) be agreed with, (5) follow logic such that not to agree with the rule would be perceived as careless or stupid, and (6) protect people in a wide variety of situations."[6] The attorney will then attempt to show how defendant violated the mandatory safety rule(s), posing a threat to the plaintiff, the jury, and the community at large. For example, plaintiff's attorney will ask a driver witness whether driving safely is always the top priority.[7] Once the witness agrees, the attorney then asks, "And your driving conduct was not safe because it resulted in an accident, correct?" At this point, the witness has fallen into the trap. Due to manipulation and psychological pressure, plaintiffs' attorney will attempt to repeatedly point out that defendant failed to follow presented safety/danger rules.

The reptile "introduction" starts with questions such as: "Safety should always be your top priority, right?" "You always have a duty to avoid risk, right?" Using these questions and responses as "anchors", the questioning may then get more case specific: "In this situation, the safest thing to do was _____?" "Important information should always be put on the _____ form to document and assure safety?"

"Danger: Reptile At Play!!!"

The reptilian process is relatively identical across the industry and across different litigated subject matters, from medical malpractice, to product liability cases, to trucking or transportation claims. The line of questions generally follows a similar format and protocol, like a funnel, that starts out very wide open and broad, and eventually narrows and dumps the witness down a singular path.

In a general liability case, the line of questions could go as follows:

- Does [the defendant] agree that [industry], through its employees, must follow [company/industry/general] policies and procedures when [doing their work]?

- Does [the defendant] agree with the statement that if a [similarly situated defendant], through its employees, fails to follow the [company/industry/general] policies and procedures when [doing their work],

[6] Greeley, *supra* note 2, at 3.

[7] Eckenrode, supra note 5, at 113.

and that failure to do so causes injury to someone, then the [similarly situated defendant] is responsible for harms and losses caused?

- Does [the defendant] also agree with the statement that, as a [similarly situated defendant], it must follow the policies and procedures set out in the [company/industry/general] when someone [engages with the defendant]?

- And does [the defendant] agree with the statement that if it fails to follow those [company/industry/general] policies and procedures, and that failure contributes to the cause of a person's injury, then the [defendant] should be responsible for the harms and losses caused to that individual?

In a product liability case, the line of questions could go as follows:

- Does [the defendant] agree that [product manufacturers] must make [product] that are free from defects in materials and workmanship

- So [the defendant] agrees that if a [product manufacturers] makes a [product] that has a defect in materials or workmanship, and someone is injured because of that defect, then the [product manufacturers] is responsible for the harms and losses caused?

- Does [the defendant] agree with the statement that [product manufacturers] must make their [product] so they operate the way the manufacturer represents they will operate?

- And if a [product] does not operate the way in which it is represented it will operate and a person is injured, then the [product manufacturers] is responsible for the harm caused to that person, isn't it?

In a medical malpractice case, the line of questions could go as follows:

- What is the first rule of being a doctor?
- A doctor must not needlessly expose a patient to an unnecessary danger, true?
- A doctor should never expose a patient to such unnecessary danger, true?
- It would not be reasonable for any physician to expose a patient to unnecessary harm, true?That would be completely unreasonable, true?
- It would violate the Hippocratic Oath, true?
- It would violate standards of care, true?
- You learned a long time ago that doctors should not needlessly endanger a patient, true?
- It's an important rule, true?
- It should be followed by all doctors, true?
- And it is a safety rule to protect patients' interests, true?
- It protected you when you were a patient, true?
- You, as a doctor, must follow this rule, true?
- You expect other doctors to follow that rule, true?
- The rule, when enforced, ensures public safety, true?
- The rule, when enforced, prevents harm to the public, true?
- Violation of safety rules by physicians can hurt anybody, true?

- They can be hurt seriously, true?
- They can even be killed or brain-damaged, true?
- If a safety rule is broken and a patient is harmed thereby, do you believe the rule breaker should be held responsible for the harm that was caused?
- Can you give me even a single example of a situation where a physician violates a safety rule, thereby causing harm to the patient, where you believe the physician should not be held responsible for the harm?
- Safety rules should be enforced, true?
- If safety rules are not enforced, those rules lose their value as a rule, true?
- If a doctor has more than one course of action to choose between, the doctor should choose the one that is safest for the patient, true?
- A doctor must not choose a dangerous course of conduct if a safer choice exists, true?

In a auto/transportation liability case, the line of questions could go as follows:

- You made a conscious decision to [specific vehicle movement] when you did, correct?
- You've been driving for a long time, correct?
- You understand there are certain rules that you must follow while driving?
- What are some of the things you are supposed to do in making a [specific vehicle movement]?
- One of the rules for driving is that you must pay attention at all times, right?
- Why are these things important?
- Could people get hurt if these rules aren't followed?
- Could people get killed?
- And you've known that since you were licensed to drive?

This theory and the questions it begets is effective because it recognizes and alters understanding about juror thinking.[8] Traditionally, plaintiffs' attorneys have focused on eliciting sympathy for the plaintiff from the jury.[9] However, this strategy put the plaintiff in the spotlight, making them susceptible to cross-examination and increased scrutiny.[10] The jury might scrutinize plaintiff's conduct and consider ways in which the plaintiff could have prevented or lessened the accident.[11] Additionally, some jurors are not comfortable issuing large awards if they have experienced similar situations or difficulties.[12] Reptile Theory shifts the focus away from the plaintiff entirely to the defendant and, more broadly, overall community safety. In short, Reptile Theory is a thinly disguised attempt to violate the "Golden Rule", and overtly seeks to put jurors/the community into the situation of the plaintiff confronted by a hazard or danger (lack of safety) caused by the defendant.

One key point is that plaintiff's attorney will be talking about strict and absolute "safety" and "security", and not the "standard of care", "reasonable precautions", or the "prudent person" standard. Reptile Theory requires absolute safety rules vs. a reasonable standard of care. To activate

[8] Greeley, *supra* note 2, at 3.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

the "reptile" brain, plaintiffs offer the jury "absolute safety" to the exclusion of all other considerations.

Strategies to Combat the Theory in Depositions of Defendant's Corporate Witnesses

Current literature and practice suggests certain mechanisms and ways to combat Reptile Theory which focus on presenting an alternative explanation for the situation at hand, and not letting safety themes overpower the case.[13] Defense counsel should offer opposing themes that downplay plaintiff's safety theory, and stay away from a confusing and overly technical defense.[14] Moreover, it is important that the defense's story be equally as relatable to the jury as the plaintiff's. However, attempting to defend each particular action of the defendant, or going overboard trying to "humanize" the defendant, can prove distracting and off point for the defense.

During depositions, attorneys utilizing Reptile Theory place great emphasis on the unprepared nature of witnesses, since many will not be familiar with or prepared for this line of questioning.[15] Plaintiff's attorney will assert control by first presenting general safety rules.[16] The witness is then "trapped" into agreeing with these overall safety principles. Plaintiff's attorney may then go into secondary or more specific safety principles pertaining to the relevant incident, site or industry. The goal is to show that the defendant company/industry violated safety rules and principles which the witness has accepted and endorsed.

Reptile Theory stresses safety/survival and seeks to minimize risk/danger. Plaintiff will argue that the defendant violated a known safety rule or regulation. Witnesses must be specifically prepared and rehearsed for this reptile style of questioning. In responding to reptile questions, it is also important that the defendant's witnesses, i.e., doctor-nurse, driver-safety director, foreman-worker, give consistent answers to the reptile "safety" questions, both in general and specific to the case at hand. If one or both give inconsistent answers, that confusion may also serve the plaintiff's purpose.

This strategy succeeds by "maximizing dissonance."[17] This is accomplished when the witness is cornered into agreeing with safety rules and principles with which the defendant company or industry does not always comply. For example, a witness is unlikely to disagree, without preparation, with the question, "Safety is always the top priority, right?"[18] Once the witness agrees with this principle, they have only two options. The witness could backtrack, which decreases credibility.[19] Alternatively, the witness could admit that the company could have "done more" to avoid the accident or safety failure because safety is always the top priority.[20]

To combat this technique, defense witnesses should be prepared for such lines of questioning prior to their deposition, and need to break the habit of "instinctively" agreeing with broadly stated and

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[13] *Id.*
[14] Eckenrode, supra note 5, at 121.
[15] Greeley*, supra* note 2*,* at 7-8.
[16] *Id.* at 8.
[17] *Id.* at 10.
[18] *Id.* at 9.
[19] *Id.* at 10.
[20] *Id.* at 10-11.

generic safety principles.[21] The defense must spend time with the witness to rehearse alternative responses to such questions.[22] Alternative answers must be more than a simple "Yes" or "No," and should note limitations, exceptions, practical concerns, and reasonable boundaries of "safety."[23] Plaintiff will attempt to impose "black and white" safety rules, but the real world (as well as the rule itself) may be vague, limited, situational, and vary depending on facts and circumstances.

Blocking the overly simplistic safety rule thwarts the reptile approach. No rule can fully prevent "danger". "Safety" concerns are balanced by real world concerns and tradeoffs. Surgery is an invasive, perhaps "unsafe" procedure, but it is done to promote betterment. We do not drive bubble-wrapped cars and trucks. "It depends", "Can you put that question in context", or "That statement is much too broad", are appropriate responses to many of the initial "reptilian" questions.

The reptile safety question typically lacks specificity and context. In response, replies such as "Not always", "It depends on the context and circumstances", and "I need you to be more specific with that question", are valid and appropriate. Some phrases which will clue a witness that an attorney is asking reptilian questions include words such as: safety, danger, all reasonable steps, avoid danger, top priority, sooner/more/safest, less/reduce/danger, and needlessly endanger.[24]

Traditional deposition preparation usually suggests that a corporate defense witness keep answers short, not volunteer information, and do not explain answers. This advice needs to be somewhat reversed upon facing reptile questions:

- Do not answer "Yes." State "I cannot answer that with a simple yes or no, and here is why . . . . "
- Reject the question and implicit assumptions that the "safety rule" is simple, absolute, or the only priority.
- In answering, know how and state why the defendant acted reasonably, or did not act unreasonably. The legal standard of reasonable care is not the same as absolute safety with no danger or hazard whatsoever.
- Do not admit that all violations of safety rules require punishment or justify monetary damages for enforcement.

Sometimes, the best answer is: "Not necessarily. That is why we have a legal system, to allow the jury to consider all of the facts and decide what caused the injury and who is responsible." Implicit in that answer is the fact that other proximate causes could account for the alleged injuries, such as the plaintiff's comparative negligence, discovery of defect and voluntary assumption of risk, improper use, misuse, or other intervening causes such as modifications, alterations, or conduct of other third-parties. Jurors will not decide the case in a vacuum, but should consider other factors which could have led to the incident.

Some safety rules are obvious and hard to disagree with, but it is the job of the defense attorney to convince the witness that they are not being dishonest or evasive if they fail to affirm such broad

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Eckenrode, supra note 5, at 106.

statements, or point out nuances, exceptions and caveats.[25] All safety rules have limits, definitions, and different applications. Many are themselves phrased in terms of "reasonable" precautions which offer options to stymie "reptile" questions. The witness must (1) listen to every word carefully, (2) take time to reflect upon the stated and hidden assumptions, (3) not concede anything, and (4) make responses that do not include crucial, binding concessions. Given the breakdown in limitations to lay witness opinions, prepare the witness for the scenario question: "If this safety rule or program had been followed, the accident/injury would have been prevented, right?"

A defendant's industry and operations usually present too many variables and events to concede general abstract questions concerning safety. Use the "standard of care" in questioning, and during opening and closing statements. Absolute safety is not the standard of care.

As an example, during a deposition concerning medical malpractice, a plaintiff's attorney may ask whether, "A doctor should take all reasonable steps to diagnose a patient's condition."[26] The witness should not respond with carte blanche affirmance. This is a situation where "it depends" can be utilized since much may depend on the patient history and diagnosis, how many visits the patient had with the doctor, whether diagnostic tests themselves pose risk, the nature of the possible condition, whether other diagnostic tests were previously performed, etc. The real point is what a reasonable physician would undertake or recommend, not medical perfection in a vacuum.

Sample responses to reptile questions might be formulated and conceived as follows:

- "That is a broad generalization that is not really yes or no . . . ."
- "That rule is not universally applicable, and is not even on point to this case because . . . ."
- That rule is not absolute, and is subject to many exceptions and limits in our industry . . . ."
- "I cannot comment on what an appropriate penalty would be, or whether damages should be assessed. Those are questions for judges and you lawyers . . . ."
- "I can't give an answer to that question since I would be speculating about a legal question or outcome . . . ."
- "That is not necessarily correct or strictly the case . . . ."

The "safety" rule is often presented by plaintiffs in hindsight: "If only the defendant would have done "X", no harm would have occurred?" Plaintiff's attorney will argue that "safety" rules were violated just because an accident or bad result occurred. Witnesses must be prepared to reject this way of thinking, and focus on conditions and events before the incident, and the relevant standard of care. Switch the discussion from hindsight to what the defendant knew, realized, saw, or was confronted with before the event. Do not allow hindsight to "prove" the safety rule or its violation.

Other possible responses to reptilian "safety" questions might include:

- "Safety is one of our goals. We strive for safety".
- "Safety is a broad area, please focus your question".
- "I cannot answer that in the abstract or hypothetical".
- "That is not standard or even general practice in our industry".
- "Are you referring to safety as an abstract question, or with reference to this case?"

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[25] Greeley, *supra* note 2, at 10-11.
[26] Eckenrode, supra note 5, at 107.

Responses to reptilian "danger" questions might include:

- "Please explain what you mean by danger ˜ to whom and from what source or activity".
- "There is always some element of danger in this job/in our industry, so that question is not answerable".
- "The real question is relative or reduced danger, and this is how we reduce and minimize the risk. . . ."

Conclusion

At every stage of litigation, the goal of Reptile Theory is to create a sense of danger that threatens a juror's own safety, and/or the safety of the community. In order to combat this theory, defense attorneys must focus on presenting alternative explanations and themes deflecting perceived threats to safety, or violations of safety, rules and procedures.

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Defeating the Reptile During Depositions

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Juror Confirmation Bias

Juror confirmation bias is a reality in any jury trial. Jurors generally make up their minds regarding for which side they want to find by the end of opening statements. They then view the remainder of the trial through the lens of the decision that they made at the outset. The reason for this is the concept of confirmation bias. Confirmation bias is the brain's innate tendency to come to a hypothesis about something and then search for anything that will support the hypothesis, while negating any information that goes against the validity of the hypothesis. In a trial, jurors therefore will look for evidence and testimony that supports their conclusion about who should win the case and they will minimize evidence and testimony that goes against their pre-formed conclusion.

The reason why juror confirmation bias matters in the deposition context is that, in trial, deposition testimony can be used at any time for any purpose. Gone are the days where deposition testimony was only used to impeach witnesses while they were on the stand. In today's litigation world, depositions are taken with any eye towards obtaining sound bites that can then be presented in opening statement to sway the jury towards the hypothesis that the other side should prevail in the case. Once the jury comes to that conclusion, it is nearly impossible to convince them that the plaintiff should not prevail. That is why every defendant must approach depositions with the same rigor and preparation as would be put into trial. Especially when the defense is facing the Reptile on the other side.

Know Before You Go…

Before any deposition, the following questions must be considered to be able to put yourself in the best position to defend against a potential Reptilian deposition:

- Is the case the type of case that is generally subject to Reptilian tactics?
    - Although any case can be turned into a Reptilian case if you have a Reptilian lawyer on the other side, there are certain types of cases that by their very nature are generally prone to Reptilian questioning (examples would include trucking, nursing home, bad faith, and products cases). If you are defending one of these types of cases, you should assume that some level of Reptilian questioning might occur in the deposition so you need to prepare accordingly.

- Is the plaintiff's lawyer a known Reptilian lawyer?
    - According to the book, Reptilian lawyers should turn any case, even the most minor of fender benders, into a Reptilian case because it maximizes the recovery for the

plaintiff and his lawyer. Therefore, if you have a known Reptilian lawyer on the other side, you must prepare for a Reptilian-style deposition, no matter what type of case you are defending.

- If you answered yes to either of the above questions, can the case be removed to federal court?

    - Federal court provides some important protections in depositions that many state courts do not, the most important of which is speaking objections. Many state courts now only allow attorneys to object in depositions with form objections that do not provide the deponent with any clue as to the basis for the objection. Federal courts still allow speaking objections during depositions, which is an important tool to defending against Reptilian depositions. Therefore, if you are facing a Reptilian lawyer or case, you will want to consider removing to federal court if you are in a jurisdiction that has limitations on deposition objections.

- Will the depositions be videotaped?

    - Many Reptilian lawyers will videotape all depositions that they take so that they have a visual sound bite for their opening at trial. If the deposition is going to be videotaped, it will mean that some important additional steps will need to be taken in the deposition preparation session to get the deponent "camera ready." Appearance and body language are as much a consideration for juror's decision-making on the truthfulness of witnesses as is the actual testimony. Therefore, additional time will need to be spent with witnesses who will be subject to a videotaped Reptilian deposition.

The Rules of the Road

When facing a Reptilian deposition, it is important to know the themes of the opposition's case and the counters to each of those themes. It is important that the witness being deposed is aware of the themes and counter themes and what evidence and testimony has been elicited regarding those themes and counter themes so that the witness knows where his testimony will fit in.

One in a Million

The Reptile case requires proof of **frequency**. The Reptilian deposition will always focus on trying to get the deponent to admit that the type of accident that is the subject of the case has happened many times before. Therefore, a prepared deponent must be able to explain that all cases are different, subject to their own facts and circumstances, making it impossible to answer general questions regarding what might happen in all cases. The deponent also should focus on how the accident in the case was just that - an accident - and not part of a series of accidents that have happened over and over again.

Safety First

The Reptilian deposition will always focus on **safety**. The Reptile attorney will try to get the deponent to agree that their conduct is subject to the potential of greater danger than what would normally be expected (as an example, trying to establish that it is more dangerous to follow too closely in a semi tractor trailer than it would be in a passenger vehicle). The Reptilian attorney will try to get the deponent to agree to absolutes regarding the dangers posed by certain actions. A deponent must be prepared to not respond in absolutes. There are no absolutes and everything depends on the facts.

The Reptile lawyer does not like to talk about the facts of the case, especially when it comes to safety rules. The Reptile theory requires the juror to be able to personally connect to the danger posed by the failure to follow the safety rule by the establishment that the violation of the rule could pose a safety hazard to the juror himself as a member of the general public. The Reptilian lawyer will spend an inordinate amount of time asking questions about general safety rules and the dangers associated with violating them, most of which are not even pertinent to the case facts. Again, remember that the book teaches to not focus on the case facts when asking about safety rules. The more discussion of broad and general safety rules for the Reptile lawyer, the better. Therefore, the deponent needs to focus on the facts of the case and how the perceived danger posed by the failure to follow the safety rule did not come to fruition in the case at issue and/or by pointing out that the safety rules being discussed are not relevant to the facts of the case. When the Reptilian lawyer wants to discuss broad and general safety rules, the deponent must bring the answers to the facts of the case.

Know the Code

The Reptile theory focuses on **codes** and playing to the juror's preconceived concepts regarding those codes. Therefore, it is important to identify the codes of the case and to work with the deponent to help him demonstrate during the deposition why he is either "on code" or "off code." As an example, some defendants enjoy good codes (doctors are an example). In a medical malpractice deposition, the Reptilian lawyer will try to establish that the doctor is "off code" (that the doctor was uncaring and unsafe). The defense preparation will therefore include assisting the doctor in presenting "on code." To the contrary, some defendants are plagued by bad codes (truck drivers are an example). The defense attorney therefore will need to assist the truck driver deponent with presenting "off code" for his profession. That is done by providing specific examples that will demonstrate to the jury that the truck driver is contrary to their pre-conceptions regarding the profession.

Accidents Will Happen

The Reptile theory teaches that accidents, inadvertence or mistakes are not food for the Reptile. Therefore, the Reptilian lawyer must establish that the "accident" was anything but - it was a choice by the defendant to violate a safety rule that harmed the plaintiff and could have harmed the rest of the general public. Therefore, the defense attorney must make sure that the defense witness is prepared to talk in terms of how the accident was the result of inadvertence or mistakes as opposed to calculated safety rule-breaking.

Don't Forget to Turn the Tables

The Reptile theory can be used against the **plaintiff** as well so defense attorney should be prepared to turn the tables in the deposition of the plaintiff. In cases of comparative negligence, the defense attorney should focus questioning the plaintiff not only on the specifics of the comparative conduct that the plaintiff engaged in but also on how that conduct could have harmed the general public.

The defense attorney also should appeal to the part of the juror's brain that automatically goes to the reason why the case before them would not happen to the juror deciding it. When faced with a particularly bad set of circumstances that happened to someone else, individuals automatically start thinking about how they would have reacted differently/made different choices if they were presented with the situation so that the outcome for them would have been different. The defense attorney needs to be in tune with these compensation mechanisms of the brain and then elicit that type of testimony from the plaintiff, demonstrating all of the other choices the plaintiff could have made to have avoided the damage being claimed.

Finally, the defense attorney must focus on the positive when it comes to the plaintiff. The Reptile theory teaches that plaintiffs should present specific examples of how they have been harmed by the defendant in ways that matter to the jurors (showing how the accident has caused the plaintiff loss of mobility, isolation and embarrassment). The defense attorney similarly should be prepared to establish specific examples of how the plaintiff has not suffered as much as he is claiming through impeachment evidence gathered prior to the deposition.

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Combating Reptiles at Trial

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Introduction

Defense counsel who desire to combat effectively the Reptile Theory at trial must first lay the groundwork for so doing well in advance of trial. Chief among these vital preparations are pre-trial motions. A defense lawyer intent on combating Reptiles at trial must have in his or her pre-trial arsenal a motion *in limine* to preclude the use of Reptile Theory tactics and ploys during trial. However, despite defense counsel's best efforts, and perhaps due, in part, to the relative novelty of the Reptile Theory, trial courts may not grasp the purpose and intent of the Reptile Theory or appreciate the substantial threat its use poses to a fair and just trial. If such is the case, the court may be inclined to permit use of the Reptile Theory, or may at least not order its wholesale exclusion before the trial begins.

Regardless of how the court rules, the motion *in limine* is only the first step in combating the Reptile at trial. Experienced plaintiff lawyers well versed in the Reptile Theory will no doubt weave its principles throughout their case theme and use its tactics at trial. Defense counsel must learn to recognize, and effectively respond to, the Reptile's sly schemes at each stage of the trial. This battle begins with jury selection.

Voir Dire

A trial can be won or lost in jury selection. Because it can make or break a case, defense counsel should treat *voir dire* as a crucial part of a trial. This is particularly important in cases where opposing counsel utilizes the Reptile Theory, as the Reptile lawyer will undoubtedly employ the theory in selecting a jury.

A plaintiff's lawyer fluent in Reptile will have three primary goals during voir dire: 1) *subtly* inculcate Reptilian thought (e.g., that the jury is responsible for protecting the community) in the collective minds of the venire; 2) impanel jurors who appear most susceptible to Reptilian thought; and 3) exclude from the panel jurors who appear most resistant to Reptilian manipulation. A skilled defense lawyer, on the other hand, aware of the Reptile-lawyer's strategy, must focus on thwarting these goals.

Since the Reptile's endgame is to persuade jurors to make fear-based decisions in making findings of fact and in awarding damages, the Reptile lawyer's questions at *voir dire*, whether attorney-conducted or through a written questionnaire, will be designed to awaken the fear-based thought process in each prospective jurors. The Reptile lawyer will do so by asking general, vague, or hypothetical questions such as the following:

- "Do you agree that a doctor should never needlessly endanger a patient?"
- "Do you agree that if a person needlessly endangers others and harms someone as a result, the person should be held accountable for those harms?"
- "Do you agree that a doctor's top priority should be the safety of his/her patient?"

- "Who here believes that the safest way to perform a medical procedure is the only way a medical procedure should be performed?"
- "Who here thinks that a truck driver should always follow the rules of the road?"
- "Who here thinks a hospital should always follow its own policies and procedures in providing health care services to patients?"
- "Do you agree that we live in a society where individuals and businesses should be responsible and accountable for their own actions?"

These and similar questions, including follow-up questions thereto, should elicit responses that reveal the respective jurors' relative vulnerability to Reptilian manipulation. A juror who answers any of the above questions with a simple "Yes" is likely in the Reptile camp, whereas a juror who responds with, "It depends on the situation" or "Could you explain what you mean by 'needlessly endanger a patient'?" is less likely a Reptile. Follow-up questions directed to specific jurors should assist in confirming defense counsel's suspicions either way.

The defense lawyer's primary objective is to keep Reptile jurors off the jury panel. In addition to listening to, and following-up on, plaintiff's counsel's questions and the jurors' responses thereto, defense counsel can best flush out Reptiles lurking among the venire by asking *reflective* questions of potential jurors, such as the following:

- "Who here feels that a physician's real priority needs to be to provide competent medical care and to treat every patient as a unique individual?"
- "Should guidelines, rules, and laws that are designed to keep people safe be followed no matter the circumstances?"
- "Who here has ever made a decision at work that you believed was the right and best decision under the circumstances although it may have violated company policy?"

The aim of defense counsel is to impress upon the jurors the importance of using logic, reason, and prudence in assessing situations and in making decisions. The ultimate goal for defense counsel is to impanel jurors who will make reasoned, logical, and prudent assessments of the defendant's conduct, rather than any juror whose verdict vote will be driven by fear that the defendant poses a threat to the community.

The ideal defense juror is one who rejects the idea that safety rules demand unwavering obedience, irrespective of the circumstances. The more reflective, contemplative, and deliberate jurors are in answering counsel's questions, the more likely they are to consider and appreciate the value of rational thought, practical experience, judgment calls, and the difficulty of making split-second decisions in critical situations (i.e., the more favorable they are to the defense). Remember, Reptiles reject reason. Fear drives their thoughts, beliefs, and decisions. The desire for safety will always trump rational thought in the mind of a Reptile.

If a potential juror has tunnel vision, or is obsessed with safety, they should be easy to spot. Identifying the others laying in the weeds is not so simple. Carefully crafted questions, attentive listening, and thorough follow-up during *voir dire* should help identify the Reptiles among the venire. You are looking for those potential jurors who are contemplative, open-minded, deliberative and careful in their thinking and answers.

Opening Statement

The opening statement gives each party an opportunity to tell their story to the jury by laying out the facts that they believe support their narrative. Generally speaking, the Reptile lawyer will tell a tale of a defendant who disregards safety rules, thereby threatening harm to the community at large and causing actual harm to the Plaintiff. Defense counsel's story, on the other hand, will be that the Defendant acted reasonably in a difficult situation, relying on his education, training, experience, and judgment under the circumstances.

The Reptile lawyer will use the opening statement to indict the defendant. He or she will likely begin by identifying the "safety rules" that purportedly govern the type of conduct at issue (*e.g.*, the practice of medicine, truck driving, etc.) and will then explain that anyone who violates those safety rules is responsible for any harm they cause by that violation. Having laid that foundation as the standard by which the jury must judge a person's conduct, the Reptile lawyer will then set forth the facts that, in his or her view, support the conclusion that the defendant violated these important safety rules and that the plaintiff suffered harm as a result. Again, the Reptile lawyer's intention is to stir up fear and anger relating to the defendant's conduct. The more "safety rules" the defendant violated, the more dangerous and egregious the defendant's behavior. The more dangerous and egregious the defendant's behavior, the more motived the jury should be in punishing that behavior. Expect the Reptile lawyer to hammer this theme in dramatic fashion, beginning with the opening statement and throughout the remainder of the trial.

It is important to note that although courts usually give lawyers wide latitude in their opening statements, a lawyer abuses this latitude by weaving argument or irrelevant facts into his opening statement. Though defense counsel should exercise prudence in doing so, they must be willing to make objections during the Reptile lawyer's opening statement if it goes beyond the permissible scope. Even if ultimately overruled, a defense counsel's objections during the Reptile lawyer's opening statement can have tremendous upside. Such an objection highlights for the court an example of the Reptile lawyer's tactics, makes a record for appeal, interrupts the Reptile lawyer's flow, and provides an opportunity to educate the jury. If used judiciously, objections are a useful tool in combating the Reptile during the opening statement.

As for the defense's opening statement, defense counsel must, of course, use the platform to humanize the defendant and to set forth the facts supporting the defense's case theme. Explain the true story of how defendant obtained his education, training, and experience in his field, and then illustrate how the defendant applied his knowledge, training, and experience in conducting himself reasonably in this case.

Defense counsel should also seize the opportunity to attack the Reptile Theory during the opening statement. Point out that Plaintiff's counsel talked a lot about "safety rules," that those rules exist to protect the safety of everyone in the community, and that the rules should *never* be violated. Then, referencing the anticipated testimony of your expert witnesses, contrast the Reptile lawyer's general safety rules with the true standard of care applicable in the case—what a reasonable person in defendant's position would do under similar circumstances.

If defending a doctor in a medical malpractice case, for example, inform the jury your expert will testify that medicine does not involve cookie-cutter or one size fits all care. Instead, even though there are certainly general standards and procedures that apply to performing a particular procedure

or treating a particular symptom, physicians are trained to utilize their knowledge and experience in providing patient care specific to each patient and specific to each situation. Explain also that your experts will take time to set out the relevant medicine and applicable science; explain how medical decisions are made; and explain how each patient presents a unique set of issues and challenges that requires patient-centered treatment. Your experts will furthermore illustrate the realities that medicine is not and cannot be practiced in a vacuum, and as a result, the defendant did not treat the plaintiff in a vacuum.

By appropriately objecting to the Reptile lawyer's opening statement, exposing the practical problems with demanding strict adherence to the Reptile lawyer's safety rules, and by illustrating how the defendant complied with the true standard of care, defense counsel can prepare the jury to carefully consider and assess the evidence they hear and render a verdict based on the facts and applicable law, rather than passion or prejudice.

Witness Testimony

In most cases, the Reptile lawyer will have already tried at depositions to trick or bully the defendant and defense experts into agreeing with, and adopting as their own, the Reptile lawyer's "safety rules." If the Reptile lawyer was successful in doing so, the case likely never made it to trial but resolved through a high-value settlement. Once the defendant adopts the Reptile lawyer's safety rules, the Reptile lawyer can methodically question the defendant into the proverbial corner, where he must then either admit that he breached the standard of care by violating the safety rule or waffle on his prior adoption of the safety rule, thereby undermining his own credibility. Either outcome is a win for the Reptile lawyer. Avoiding such a scenario during discovery is critical.

But even if the defendant or defense expert is "Reptiled" at their deposition, all is not lost. They can be rehabilitated. Whether the witness admitted liability or flip-flopped on his agreement with a safety rule, the cure is the same. Defense counsel must use that witness's trial testimony to shift the focus from the defendant's unfavorable answers to the Reptile lawyer's unsavory conduct at the witness's deposition. Defense counsel can use the witness to shed light on the Reptile lawyer's tactics for what they really are—a shell game, a despicable ruse designed to lull the defendant into complacency and trick or bully him or her into admitting wrongdoing when no wrongdoing was committed. Have the witness detail how the deposition, which began as a cordial, professional conversation, soon turned into a hostile interrogation. Exposing the Reptile lawyer as a bully or trickster should garner some leniency from the jury.

After establishing that he was tricked or bullied into giving answers that may have been imprecise or inaccurate (<u>but not dishonest</u>), the witness can then explain the facts of the case from her perspective. This approach gives the jury a legitimate reason to disregard the witness's prior testimony as unfairly tainted, and accept their trial testimony as more accurate. This is particularly so where the Reptile lawyer has exhibited at trial already similarly abusive or deceptive behavior during trial.

If, on the other hand, the defendant and defense experts were successful in parrying the Reptilian attacks during their depositions, they must not let their guard down at trial. A second wave of attacks will no doubt occur once they take the witness stand. The Reptile lawyer will put the screws to the defendant and defense experts at trial, suggesting they are dishonest, incompetent, disingenuous, obstructive, unreasonable, or even heartless if they refuse to answer certain questions

with a simple "yes" or "no." It is imperative that the witness hold their ground amidst these unrelenting attacks.

If properly trained, the defense witness will not relent to the intense pressure the Reptile lawyer applies during examination. Although witness training will vary depending on the type of case and the facts at issue, the following are some key rules defense witnesses should remember when answering questions from a Reptile lawyer.[1]

1. Treat Each Reptile Question as a Trap

The Reptile lawyer will try to lead the defense witness into a trap, one question at a time. Unless the witness is aware of the Reptile lawyer's intentions, the witness will not realize the danger until it is too late. Counsel must therefore train defense witnesses to assume that the Reptile lawyer is laying a trap with each question.[2] To illustrate this point, imagine each Reptile question represents a thread of spider silk. A single thread is of little or no concern to a spider's prey, but a series of threads, when methodically strung together, creates a web sufficient to bind and ensnare. The key to combating the Reptile during witness testimony is to train defense witnesses to treat each question as a trap.

The next two rules are methods by which the defense witness can disarm the Reptile lawyer's traps as they are being laid.

2. Ask for Clarification or Rephrasing of Reptile Questions

Perhaps the defense witness's foremost defense to Reptile questions is to not accept and answer the Reptile lawyer's questions as phrased. The Reptile lawyer's questions will likely be simple—too simple. For example, in a hypothetical medical malpractice case, the Reptile lawyer may ask a defendant surgeon the following: "Doctor, would you agree that a surgeon should never needlessly endanger a patient?" Unless trained to recognize the Reptile at work, the unwitting surgeon may very well answer this question with a simple "Yes." At first glance, the surgeon's answer may seem innocuous, even correct. However, depending on the facts of the particular case, by agreeing with the Reptile lawyer on this one point, the unsuspecting surgeon may be on the road to adopting the Reptile lawyer's other, more specific safety rules, and to eventually admitting to a violation of those rules, which the Reptile lawyer will then equate to a violation of the standard of care. Before the surgeon realizes what happened, he has admitted liability.

On the other hand, if the defendant surgeon is adequately trained to answer Reptile questions, he will likely respond to the Reptile lawyer's question as follows: "Well, I'm not sure what you mean by

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[1] There is no substitute for preparation. Defense counsel should begin preparing defense witnesses for their trial testimony at least two months in advance of trial. Ideally, the key defense witnesses will go through mock cross-examinations, on multiple days, conducted by another lawyer in defense counsel's firm who will play the role of the Reptile lawyer. These practice sessions should be video-recorded and then reviewed and analyzed with the witness following each session. The increased time and cost associated with this level of witness preparation will be justified by the successful trial testimony of the defense witnesses.

[2] Train witnesses to be on the lookout for questions containing comparative (i.e., better, safer) or superlative (best, safest) adjectives. The Reptile lawyer's entire case depends on his or her ability to prove that the defendant's conduct was deficient in some manner, so they will likely ask questions to which the defense witnesses may agree that there was a *better* or *safer* way for the defendant to conduct himself, regardless of whether that "better" or "safer" conduct was required by the applicable standard of care.

'needlessly endangering a patient.' Can you please explain or rephrase your question?" By asking for clarification of the Reptile lawyer's questions, the defendant is essentially rejecting the questions as phrased and asking the Reptile lawyer to try again with a fairer question. In order for this to be effective, the witness must do this consistently throughout the examination, and must do it in a way so as to not appear obstructive or incompetent. This is a fine line to walk, which is why witness training and practice are so crucial to a defendant's surviving the witness stand.

3. Qualify Answers to Reptile Questions

Once the defense witness has sought clarification or rephrasing of a Reptile question, the witness should then try to qualify his answers to the Reptile lawyer's questions. Simple "Yes" or "No" responses are precisely what the Reptile lawyer is hoping to elicit from defense witnesses at trial, so the defense witness must avoid giving such responses at all costs.

Whereas a defense lawyer's typical witness preparation instruction to a witness is to answer only the question asked of them—nothing more, the defense lawyer's instruction to a witness on answering Reptile questions should be the opposite—attempt to qualify your answer and then always offer an explanation. This demands an attentive, focused and well prepared witness.

Returning to our hypothetical medical malpractice case, if the Reptile lawyer asks, "Doctor, isn't an appendectomy the safest way to treat a patient suffering from acute appendicitis?" The doctor who has been trained to answer Reptile questions could offer the following response:

> Well, I am not sure what you mean by "safest way" to treat appendicitis. But I don't think I can answer that question with a simple "yes" or "no." Each patient is different, so each patient requires patient-focused care. Although an appendectomy is generally considered a safe and effective treatment of appendicitis, an appendectomy may be very unsafe for certain patients. For example, if a patient presenting to the ER with acute appendicitis takes anticoagulants for treatment of their coronary artery disease, an appendectomy may present a greater risk of complication or death than would starting the patient on an antibiotics regimen. It all depends on the circumstances, which is why I can't answer that question with a simple "yes" or "no."

A Reptile lawyer knows he will lose control of the witness if the witness answers questions in this manner, so the witness must expect the Reptile lawyer to cut them off during their qualified response and explanation. Defense counsel and the witness must not let the Reptile lawyer get away with this. The defense witness should calmly reply that he is trying to answer the Reptile lawyer's question, but that the Reptile lawyer has oversimplified the question. The question cannot be answered *accurately* with a simple "yes" or "no," which is why the defense witness should be allowed to give his complete answer. If the Reptile lawyer continues to interrupt and demand only "yes" or "no" answers, defense counsel should object and demand that the witness be permitted to answer the question fully. This is yet another opportunity to expose the Reptile lawyer's tactics.

4. Do Not Equate Safety Rules with the Standard of Care

The Reptile lawyer is not interested in carrying his burden of proof at trial, which requires that he prove the defendant breached the standard of care, and that the breach caused harm to the plaintiff. The Reptile lawyer knows that burden is often difficult to meet, particularly in cases where the standard of care is based on medical or scientific standards and principles. Therefore, instead of

trying to prove that standard, and what constitutes a breach thereof, the Reptile lawyer tries to supplant that standard with a series of simple safety rules.

Safety rules are, however, <u>not</u> the standard of care; but they can become the standard of care if the defense permits it. If the Reptile lawyer can get the defendant to agree that the safety rules are the standard of care, the Reptile lawyer does not need a standard of care expert at trial—the defendant, through his own words, has personally set the standard by which the jury will judge his conduct. Likewise, if the defendant admits that he violated a safety rule, the Reptile lawyer need not retain an expert to prove the defendant breached the standard of care because the defendant has already admitted liability. Safety rules, although they may not accurately reflect the applicable standard of care, make a Reptile lawyer's case much simpler to prove, which is one of the reasons why they are so appealing to plaintiff's lawyers

With the Reptile lawyer's strategy and end goal in mind, Defense counsel must train defense witnesses to never equate the violation of a safety rule with breaching the applicable standard of care. Safety rules usually do not accurately reflect the standard of care, no matter how much the Reptile lawyer tries to convince defense witnesses, the jury, or the court otherwise. Properly prepared expert witnesses can thus themselves call out and expose Reptile tactics. A properly prepared expert witness can respond, for example, that the "safety rules" referenced in the question are, in their opinion, not the appropriate standard of care. This is an opening to further expose Reptile tactics and refocus the jury on the correct standard of care.

These rules, if practiced during witness preparation and inculcated into the minds of defense witnesses, should provide a formidable defense to the Reptile lawyer during witness testimony, setting the stage for the final conflict—closing argument.

Closing Argument

Closing argument is the culmination of the Reptile lawyer's work. This is where the Reptile lawyer attempts to turn the jury's fears relating to personal and community safety into gold—both for himself and for his client. The goal is to make the jury believe (without expressly telling them to do so) that the violation of safety rules not only endangered and harmed the plaintiff, but that the defendant's violation of safety rules threatens the safety of the entire community, the jurors included; and that the defendant must be punished for his or her unsafe behavior. The Reptile lawyer will certainly argue that the jury stands as the guardian of the community and is charged with deciding what conduct will not be tolerated in this community and what price a person must pay if they choose to violate safety rules and, in so doing, cause harm to others.

From defense counsel's perspective, closing argument is the Reptile lawyer's last stand. At this point in the trial, defense counsel has hopefully exposed and undermined the Reptile lawyer's tactics, and it is now time to move in for the kill. The Reptile lawyer, if he goes down, will go down swinging, using his closing argument as a last-ditch effort to appeal to jurors' base survival instincts, trying to scare them into returning a plaintiff's verdict. Make no mistake, closing arguments represent the final round of a heavyweight bout. Defense counsel must look to land the knockout punch.

While defense counsel's attacks against the Reptile Theory during *voir dire*, opening statement, and witness testimony were indirect in many respects, closing argument is the time for defense counsel to launch a direct assault on the Reptile Theory, safety rules, and Plaintiff's failure to meet his burden of proof. What follows is an example of such a closing argument.

From the beginning of this trial, indeed from the moment each of you were interviewed as potential jurors, Plaintiff's counsel has tried to appeal to your base instinct to protect yourself, your families, and your community. He did this in an effort to manipulate you into deciding this case based on fear and emotion, instead of on the facts or the law. It's all a ploy, an extravagant ruse designed to trick you into making a decision they want you to make, regardless of what justice demands. If Plaintiff's counsel is so concerned with public safety, he should run for public office. The fact is, public safety is not at issue in this case. Neither is my safety nor is your safety. Although those are certainly important issues, they are but distractions from what you, the jury, have been tasked with determining in this case, namely whether the defendant's conduct was reasonable under the circumstances. Don't be distracted. Don't fall for Plaintiff's counsel's tricks.

Plaintiff's counsel has talked a lot about safety rules and has argued that a person is negligent if they violate safety rules. Importantly, what Plaintiff's counsel did not tell you is that safety rules are not the law. In a few minutes, the judge will give you instructions that you must follow in deciding this case. Please listen carefully to those instructions. I assure you, at no point will the judge instruct you that safety rules are the standard of care, the standard by which you are to judge the defendant's conduct. That is because safety rules are not the law. But don't take my word for it. Listen to the judge's instructions.

To win this case, the Plaintiff has to prove that the defendant breached that standard of care and that defendant's breach of the standard of care caused harm to the Plaintiff. The standard of care is defined by state law and has been explained to you in detail by the defense's experts. Plaintiff has not, and cannot, prove that Defendant breached this standard of care, and Plaintiff knows it. In fact, Plaintiff knew before this trial started that he could not convince you, the jury, that Defendant breached the standard of care. So what did Plaintiff and his lawyers decide to do? Rather than try to prove breach of the standard of care, they decided they would try to change the standard of care. They said, in effect, "If we can't win a game by following the rules, then let's change the rules." That's exactly what the Plaintiff is trying to do here. Plaintiff is trying to replace the standard of care with safety rules. But again, safety rules are not the law - they are just a trick, a distraction. Don't fall for it.

The evidence establishes that Defendant acted reasonably - that he complied with the true standard of care. Plaintiff has the burden of proving otherwise, and Plaintiff has failed to do so.

An effective closing argument is one that: (1) directly exposes the Reptile Theory and the Plaintiff's lawyer's attempts to use it during the trial, particularly the use of fear to manipulate the jury; (2) dismantles the Reptile lawyer's safety rules, characterizing them as the false standard of care; (3) sets forth the true standard of care, as defined by state law and explained by the defense's experts; and (4) establishes that Plaintiff failed to prove that Defendant breached the true standard of care, entitling Defendant to a defense verdict. A closing argument of that nature should land a decisive blow to the Reptile lawyer's case.

Conclusion

Defense counsel must anticipate and prepare for the Reptile to strike at each phase of trial. But with thorough preparation, implementation of the aforementioned strategies, tactics, and principles, and a little luck, defense counsel can effectively combat - and defeat - the Reptile at trial.

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Reptile Theory:
A Defense Response to the Legal "Reptile Theory"

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Introduction

The Reptile Theory, as applied in the legal field, was developed by jury consultant David Ball and plaintiffs' attorney Don Keenan.[1] Traditionally, plaintiffs' attorneys focused on eliciting sympathy for the plaintiff from the jury.[2] However, this strategy puts plaintiffs in the spotlight, making them susceptible to cross-examination and increased scrutiny.[3] The jury might scrutinize plaintiff's conduct and consider ways in which plaintiff could have avoided or minimized the impact of the accident.[4] Additionally, some jurors are not comfortable issuing significant awards if they have experienced similar situations or difficulties.[5]

Reptile Theory shifts the focus away from the plaintiff entirely to the defendant and, more broadly, to overall communal safety. In short, Reptile Theory is a thinly disguised attempt to violate the "Golden Rule" by asking jurors to "put yourselves in the plaintiff's shoes."[6] The theory only works if it implicitly puts jurors into the plaintiff's situation .

Ball and Keenan's Reptile Theory is based on "studies" of neuroscientist Paul MacLean, who theorized that the human brain has three different parts: limbic system, neocortex, and reptile brain.[7] Each part has a different function. Limbic system governs language, logic, and planning; the neocortex emotion, reproduction, and parenting.[8] Finally, the "reptile brain" governs basic human survival instincts.[9] Ball and Keenan focused on plaintiff attorneys strategically triggering those basic survival instincts at various stages of the case to motivate jurors and influence (higher) verdicts and settlements.

When a juror is confronted with a threat to their safety, and/or the safety of the community, "reptile" instincts are triggered, and jurors are anticipated to respond accordingly.[10] Their response, presumably, will take the form of findings of liability/aggravated liability, and enhanced, even punitive, damages. The goal is to create an atmosphere of risk and "danger" where damages can be used to punish safety lapses and deter dangerous conduct. The courtroom turns into "a safety arena" where damage awards increase safety and decrease danger created by defendant to the jurors and the whole community.[11]

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1 *See* DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009).
2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 Bethany Leigh Rabe, *"Golden Rule" Arguments Not Okay on Liability Issues*, ABA LITIGATION NEWS, (2013).
7 Ann T. Greeley, *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response,* ABA SECTION OF LITIGATION, 2015 SECTION ANNUAL CONFERENCE 1, 2 (2015).
8 *Id.* at 3
9 *Id.*.
10 *Id.*
11 Thaddeus J. Eckenrode & William Kanasky, Jr., *Defense Strategies to Confront the Reptile*, MEDICAL LIABILITY AND HEALTH CARE LAW 103, (2015).

For this tactic to succeed, plaintiff's attorney will present "safety rules" to the jury that "must" be followed to prevent danger and ensure safety. The safety rule is an absolute imperative – defendant must do or not do "X" to be safe. The theory purports to prey upon the jury's anger and fear. It also purports to prey upon modern jurors' bias and negative perceptions against business corporations and insurance companies. However, safety rules are rarely so stringent and absolute. There are often thresholds, levels, definitions, ranges, and exceptions. Many "rules" constitute a judgment call on someone's part. That is where the REAL legal issue, the applicable legal standard of care, should come into play.

To be effective, these safety rules should ". . . (1) be in English, (2) say what the person must do, (3) be easy to follow, (4) be agreed with, (5) follow logic such that not to agree with the rule would be perceived as careless or stupid, and (6) protect people in a wide variety of situations."[12] The attorney will then attempt to show how defendant violated the mandatory safety rule(s), thereby posing a threat to the plaintiff, the jury, and the community at large.

For example, plaintiff's attorney will ask a driver witness whether driving safely is always the top priority.[13] Once the witness agrees, the attorney then asks, "And your driving conduct was not safe because it resulted in an accident, correct?" At this point, the witness has fallen into the trap. Due to such manipulation and psychological pressure, plaintiff's attorney will attempt to repeatedly show that defendant failed to follow mandatory safety/danger rules.

The reptile "introduction" starts with questions such as: "Safety should always be your top priority, right?" "You always have a duty to avoid risk, right?" Using these questions and responses as "anchors," the questioning will then become more case specific: "In this situation, the safest thing to do was _____?" "Important information should always be put on the _____ form to document and assure safety in this instance?"

This theory is effective because it recognizes and alters understanding about juror's thinking.[14] One key point is that plaintiff's attorney will be talking about strict and absolute "safety" and "security," and not the "standard of care," "reasonable precautions," or the "prudent person" standard. To activate the "reptile" brain, plaintiff will be seeking "absolute safety" to the exclusion of all other considerations.

Strategies to Combat the Theory

To combat Reptile Theory, the focus should be on presenting an alternative explanation for the situation at hand, and not letting safety themes overpower the case.[15] Defense counsel should offer opposing themes that downplay plaintiff's safety theory, but stay away from a confusing and overly technical defense.[16] Moreover, it is important that the defense's story be equally as relatable to the jury as plaintiff's. However, attempting to defend each particular action of defendant, or going overboard trying to "humanize" defendant, can prove distracting for the defense.

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[12] Greeley, *supra* note 2, at 3.
[13] Eckenrode, supra note 5, at 113.
[14] Greeley, *supra* note 2, at 3.
[15] *Id.* at 5-7.
[16] Eckenrode, supra note 5, at 121.

Jury Selection

Jury selection is an initial opportunity where plaintiff's attorney may infuse Reptile Theory themes into the minds of potential jurors. The attorney lays the foundation which will be utilized later at trial through a technique called "priming."[17] Priming is a primary memory effect in which exposure to a stimulus influences response to the same or a similar stimulus at a later date.[18] Priming utilizes terms, language, and definitions early on which are later recognized and mentally processed by jurors at trial.[19] The terms, language, and definitions are used to trigger an association with defendant company or industry, and are meant to "evoke themes of safety, [and] danger," e.g., defendant = failure to follow safety rules = gross carelessness.[20] For example, in voir dire questioning, plaintiff's attorney will refer to a truck driver's behavior as careless or negligent. The goal is that jurors will then later "instinctively" associate trigger words "careless" or "negligent" with the truck driver.

When confronted with this strategy, defense counsel should "strip and re-prime" the jurors with the defense's own terms, language, and definitions.[21] For example, plaintiff's attorney may ask, "Who here feels that physicians should always make patient safety their top priority?"[22] Note that the way the question is phrased, the response must inevitably be to agree with the underlying premise of the question.[23] A defense attorney can counter by asking, "Who here feels that a physician's *real* priority is to treat every patient as a unique individual, and avoid needlessly harming the patient, or exposing them to unnecessary tests, treatment or medicine?"[24] Defense counsel thus offers jurors an alternative, and diverts attention from plaintiff's safety theme to the appropriate medical standard of care. Defense counsel may also counter the reptile "survival" motive with other reasons that support the defense, such as a defendant company producing useful and popular products, a skilled doctor performing healing surgery, a local contractor building a new development with a local workforce from the community, etc.

Depositions

During depositions, attorneys utilizing Reptile Theory take advantage of unprepared witnesses who are not familiar with or prepared for this line of questioning.[25] Plaintiff's attorney will assert control over the witness by first presenting general safety rules.[26] The witness is then "trapped" into agreeing with these overall safety principles.[27] Plaintiff's attorney may then go into secondary or more specific safety principles about the related incident, site or industry.[28] The goal is to show that defendant company/industry violated safety rules and principles, which the witness has accepted and endorsed.

Reptile Theory stresses safety/survival, and seeks to minimize risk/danger. Plaintiff will argue that defendant violated a known safety rule or regulation. This is accomplished through "maximizing dissonance" when the witness is cornered into agreeing with safety rules and principles with which

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[17] Eckenrode, supra note 5, at 120.
[18] *Id.*
[19] Eckenrode, supra note 5, at 121.
[20] Greeley, *supra* note 2, at 12.
[21] Eckenrode, supra note 5, at 120.
[22] *Id.* at 121.
[23] Greeley, *supra* note 2, at 13
[24] Eckenrode, supra note 5, at 120
[25] Greeley, *supra* note 2, at 7-8.
[26] *Id.* at 8.
[27] *Id.*
[28] *Id.*

the defendant company or industry does not always comply. [29] For example, a witness is unlikely to disagree, without preparation, with the question, "Safety is always the top priority, right?"[30] Once the witness agrees with this principle, they have only two options. First, the witness can backtrack or provide clarification, but once the admission is on record, plaintiff can use the inconsistent testimony for impeachment and severely damage defendant's credibility at trial.[31] Alternatively, the witness could generate more harmful testimony by admitting that the company could have "done more" to avoid the accident or safety failure because safety is always the top priority.[32] By manipulating defendant into giving damaging deposition testimony, plaintiff's attorney can create a foundation for high value settlements.[33]

Defense witnesses should be prepared and rehearsed for the reptile style of questioning before their deposition. They will need to break the habit of "instinctively" agreeing with and accepting broadly stated and generic safety principles.[34] The defense attorney must spend time with the witness to rehearse alternative responses to such questions.[35] Alternative answers must be more than a simple "Yes" or "No," and should note limitations, exceptions, practical concerns, and reasonable boundaries to "safety."[36]

The reptile safety question typically lacks specificity and any context, and strategic response to the seemingly simplistic safety rule thwarts the reptile approach. Plaintiff will attempt to impose "black and white" safety rules, but the applicability of such standards in the real world (as well as a rule itself) may be vague, limited, situational, and vary depending on facts and circumstances. No rule can completely prevent all "danger" or risk. "Safety" concerns must be balanced by real world considerations and tradeoffs. For example, surgery is an invasive, perhaps "unsafe" procedure, but it is done to promote a patient's overall betterment.

Appropriate responses to many of the initial "reptilian" questions include: "Not always" "It depends on the context and circumstances" and "I need you to be more specific with that question". Terms such as safety, danger, all reasonable steps, avoid danger, top priority, sooner/more/safest, less/reduce/danger, and needlessly endanger, should clue the witness that an attorney is asking "reptilian" questions.[37]

Traditional deposition preparation usually stresses that a corporate witness keep answers short, not volunteer information, and do not explain answers. This advice needs to be relaxed when facing reptile questions:

- Do not simply answer "Yes." State "I cannot answer that with a simple yes or no, and here is why . . . . "
- Reject and question the implicit assumptions that the "safety rule" is simple, absolute, or the only priority.

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[29] *Id.* at 10.
[30] *Id.* at 9.
[31] Ryan A. Malphurs & Bill Kanasky Jr., *Confronting the Plaintiff's Reptile Revolution Defusing Reptile Tactics with Advanced Witness Training*, COURTROOM SCIENCES Inc. 1, 3 (2014) .
[32] Greeley, *supra* note 2, at 10-11.
[33] Malphurs, *supra* note 31.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Eckenrode, supra note 5, at 106.

- In answering, state how and why the defendant acted reasonably or did not act unreasonably. The legal standard of reasonable care is not the same as absolute safety with no danger or risk whatsoever.
- Do not admit that all violations of safety rules require punishment, or justify enforcement of a penalty.

Some safety rules are obvious and hard to disagree with, but it is the defense attorney's job to convince the witness that they are not dishonest or evasive if they fail to affirm such broad statements, or point out nuances, exceptions, and caveats.[38] All safety rules have limits, definitions, and different applications. Many are themselves phrased in terms of "reasonable" precautions, which offer options to divert and stymie "reptile" questions.

To combat the reptile strategy, the witness must (1) listen to every word carefully, (2) take time to reflect upon the stated and hidden assumptions, (3) not concede anything, and (4) make responses that do not include crucial, binding concessions or admissions. Given the relaxation in limitations to lay witness opinions, prepare the witness for the scenario question: "If this safety rule or program had been followed, the accident/injury would not have happened, right?"

A defendant's industry and operations usually present too many variables, processes, and events to concede general abstract questions concerning safety. As an example, during a medical malpractice deposition, a plaintiff's attorney may ask whether, "A doctor should take all reasonable steps to diagnose a patient's condition."[39] The witness should not respond with an automatic yes. In this situation, "it depends" can be utilized since much may indeed depend on the patient's history and diagnosis, how many visits the patient had with the doctor, whether diagnostic tests themselves pose a risk, the nature of the possible medical condition, what other diagnostic tests were previously performed, etc. The real point is what a reasonable physician would undertake or recommend in that situation, not medical perfection in a vacuum.

Sample responses to reptile questions might be formulated and conceived as follows:

- "That is a broad generalization."
- "That is not really yes or no . . . ."
- "That rule is not universally applicable, and is not even relevant to this case because . . . ."
- "That rule is not absolute, and is subject to many exceptions and limitations in our industry . . . ."
- "I cannot comment on what an appropriate penalty would be, or whether damages should be assessed. I suppose, those are questions for judges and lawyers . . . ."
- "I cannot give an answer to that question since I would be speculating about a legal issue or outcome . . . ."

Plaintiffs often present the "safety" rule in hindsight: "If only the defendant would have done "X," no harm would have occurred?" Plaintiff's attorney will argue that "safety" rules were violated just because an accident or bad result occurred. Witnesses must be prepared to reject this way of thinking, and focus on conditions and events before the incident, and the relevant standard of care.

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[38] Greeley, *supra* note 2, at 10-11.

[39] Eckenrode, supra note 5, at 107.

Switch the focus from hindsight to what the defendant knew, realized, saw, or was confronted with before the event. Absolute safety is not the standard of care, and do not allow hindsight to "prove" the safety rule or its violation.

Other possible responses to the reptilian "safety" type questions might include:

- "Safety is one of our goals. We strive for safety."
- "Safety is a broad area; please focus your question."
- "I cannot answer that in the abstract or hypothetical."
- "That is not standard or even general practice in our industry."
- "Are you referring to safety as an abstract question, or as applicable to this case."

Responses to reptilian "danger" questions might include:

- "Please explain what you mean by danger - to whom, and from what source or activity."
- "There is always some element of risk in this job/our industry, so that question is not answerable."
- "The real question is a relative or reduced danger, and this is how we reduced and minimized the risk. . . ."

Finally, in responding to reptile questions, it is also important that the defendant's witnesses, i.e., doctor-nurse, driver-safety director, foreman-worker, give consistent answers to the reptile "safety" questions, both in general and specific to the case at hand. If one or both give inconsistent answers, that confusion may also further plaintiff's interests.

Opening Statements/Closing Statements

A Reptile Theory opening statement is filled with the theme of "broken safety rules" and putting "people at risk." Remember, Reptile Theory is effective because jurors are confronted with a "threat" to safety, and jurors will punish those who endanger their safety.

A defense attorney should not simply counter each accusation made in plaintiff's opening statement; this is falling into the "reptilian trap."[40] Jurors do not want to hear excuses.[41] Standard tactics such as directing the jury's attention to the law, or asking them to wait until all the evidence has been presented, are too late and are "weak attempts" to combat this strategy.[42] Instead, defense counsel should offer an alternative explanation of the events, one that does not involve their client or violation(s) of the alleged safety rules.[43] During opening statement:

- Portray your defendant as an honest, hard-working company that employs a variety of talented people.
- Introduce and personalize your client's trial representative. Tell the jury who they are, why they are present, and that they want to be present.
- Stress that the jury/court should only assess liability to the extent of defendant's responsibility and culpability, not out of bias against defendant or its industry, or just because an accident occurred.

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[40] Greeley, *supra* note 2, at 14.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 16.

As an example, take the previous statement that a doctor should take all reasonable steps to diagnose a patient's condition. Opening and closing arguments are perfect places to present and reinforce defense counsel's opposing view that further diagnostic measures were not warranted, not indicated, not standard, and not part of customary medical custom and practice. Defense counsel must provide the jurors with an alternative to plaintiff's safety story, one that is digestible and clear, and focus on the doctor and his/her notes and thought process.

The Reptile Theory is based on primitive survival. It is not based on emotion - that is governed by limbic system of the brain. Therefore, another defense counter may be to stress emotions in favor of their client- the innocent driver, the well-meaning doctor, the company employees working hard on a job site.

Prepare defense witnesses to reject or modify broad safety rules, point out situations where the rules do not apply or require interpretation, and defend the defendant's conduct based on reasonable and current industry standards of care and operation. Defendants do not create danger by a violation of safety rules - they are diligent, caring, necessary, helpful, and productive.

Other concepts to counter reptile tactics include:

- Defendant knows and follows safety rules, and adheres to policies and procedures.
- Show that defendant is considerate of the safety of its employees, workers, and third parties.
- Prepare to deal with charges and allegations made by former employees if they are known.
- A safety rule is not the defined or appropriate standard of care.
- The accident may have been the result of a unique situation or third party intervention that no safety rule would have anticipated or prevented.

Conclusion

At every stage of the litigation, the goal of Reptile Theory is to create a sense of danger that threatens a juror's own safety, and/or the safety of the community. Defense counsel must respond to the strategy at various stages of the case to minimize the risk of a higher verdict or settlement. To combat this theory, defense attorneys must focus on presenting alternative explanations and themes deflecting perceived threats to safety, or violations of safety rules and procedures.

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Reptile Theory:

Preparing The Corporate Witness
For a Reptile Deposition

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Reptile Theory – David Ball & Don Keenan,

Reptile: The 2009 Manual of the Plaintiff's Revolution (2009)

When a juror is confronted with a threat to safety, "reptile" instincts are triggered to protect the public, prevent a re-occurrence, and punish the wrongdoer.

- **SAFETY + DANGER = RESPONSE**
  - *LIABILITY FINDINGS*
  - *HIGHER DAMAGES*
  - *PUNITIVE DAMAGES*
  - *REDRESS MORE THAN PLAINTIFF'S INJURY*

The "science" behind Reptile Theory is very questionable and largely debunked. The concept is still helpful to plaintiffs because it:

- Provides a powerful, cohesive case theme;
- Focuses attention on the defendant, and away from the plaintiff (comparative fault); and
- Exploits modern bias and distrust of business corporations and insurance companies.

Actually, Reptile Theory has been battled by the legal profession for a long time …

Raymond Burr ("Perry Mason") starred as "Steve Martin" in the 1956 English language release of "Godzilla: King of the Monsters".

Reptile Theory:
Plaintiff's Deposition Goals

- Establish general "safety rules" that "*must*" be followed.
- Obtain witness acceptance and "buy in" of the safety rules.
- Gain admissions that defendant did not comply with all aspects of the safety rules.
- Get witness to concede that violation of safety rules warrants response and punishment, i.e. damages.

How to Prepare

- Know the safety rules.
- The safety rules are often not absolute or nuance-free.
- The legal standard is reasonable care, not absolute safety or a total absence of risk.
- Direct answers and steer comments to the specifics of the case at hand.

Do not say "YES."

- Do not agree with plaintiff's hypotheticals.
- Most safety rules have thresholds, definitions, limitations, exceptions, and different applications.
- Many safety rules to some extent involve "reasonable" precautions or interpretations.
- A defendant business has other important "priorities," such as paying taxes, fees, and licenses; compensating and fairly treating its employees; satisfying customer demands and contracts; planning for future expansion and operations; and corporate charitable and civic activities.

Question No. 1:

"Safety is always your top priority, right?"

Sample Responses

- *"I cannot answer that in the abstract or hypothetical. Safety is a broad topic, please focus your question."*
- *"Safety is one of our many interrelated business goals. We strive for safety, just as we strive to satisfy our customers and contracts, pay our taxes and bills, treat our employees fairly, and perform our work well."*
- *"That is an overly broad question. Safety is one of many important priorities, and is often situational. We do not drive bubble-wrapped cars. Trucks are not driven 10 mph. Surgery and medical procedures involve some elements of risk, but thousands of surgeries are performed every day."*

Question No. 2:

"Failure to adhere to this safety rule places workers and/or the public needlessly in danger, does it not?"

Sample Responses

- *"Please explain what you mean by danger – to whom, and from what source or activity?"*
- *"I cannot answer that question since I would be speculating. We believe usual and reasonable safety measures were in place and followed in this particular instance."*
- *"I cannot answer that. Accidents happen when a safety rule is being followed and sometimes when it is not. Accidents often happen for reasons not at all related to a safety rule. Whether and to what extent a safety rule would be applicable is often a situational, case-by-case analysis."*

- Usual deposition preparation stresses short responses, and not explaining answers. **This is relaxed for reptile depositions.**

- Question the implicit and hidden assumptions of the "safety" questions and explain your answers.

- Total, absolute, 100% safety is not the legal standard, and often not possible in normal business operations.

- "*That question cannot simply be answered with a simple yes or no, and this is why ….*"

Question No. 3:

*"If only the defendant would have done "**X**", no harm/accident would have occurred, correct?"*

Sample Response

- Do not let hindsight "prove" the safety rule or its violation. Simply because an accident occurred does not establish, or even indicate, a safety violation.

- *"There were reasonable and usual safety measures in place. Whether doing/not doing "X" would have prevented the accident is really speculative and hypothetical, and I just cannot say."*

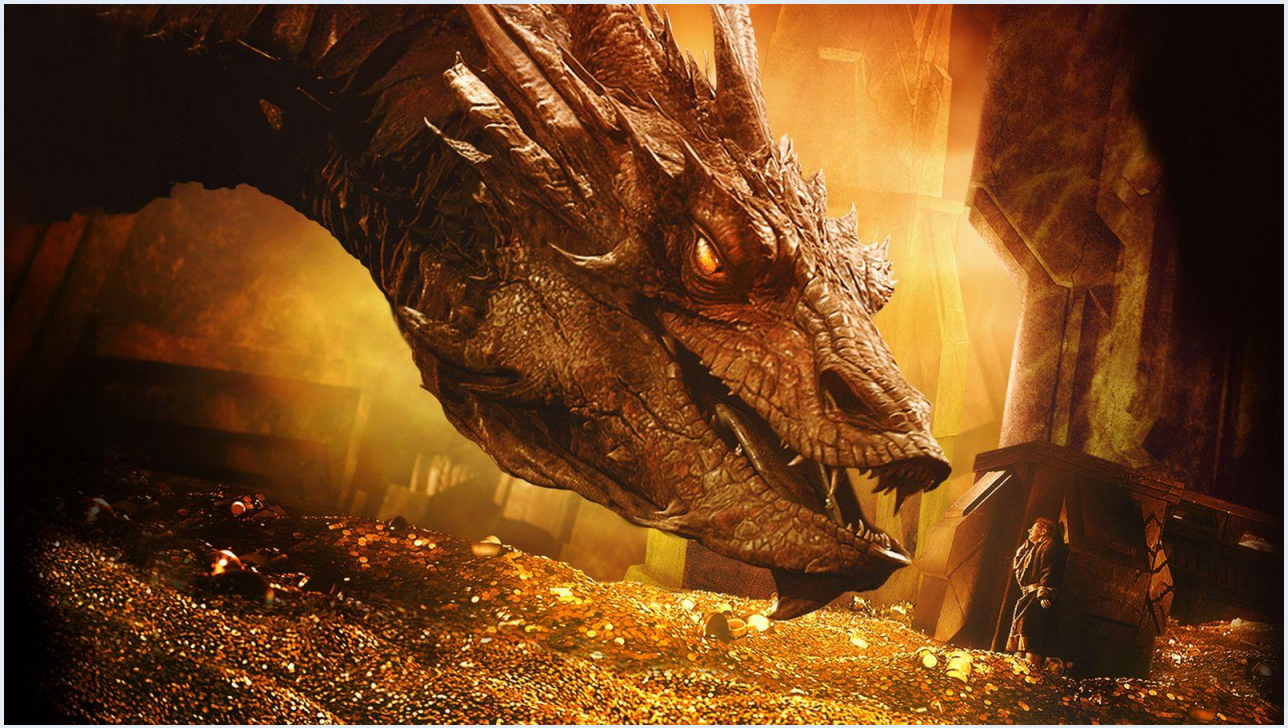
Question No. 4:

"These safety rules are intended to keep plaintiff/the public safe, correct?"

Sample Response

- *"That is incorrect and I believe an invalid over-generalization. Some rules are intended to protect physical property, locations, and things like roads and public areas. Some rules exist mainly to assist law enforcement, regulators, or collect taxes and fees. Certain rules exist primarily to benefit or protect our own employees. And there are some rules that seem to defy any identifiable sense or purpose."*

Question No. 5:



"If a safety rule is violated, you would punish those responsible, including with penalties and damages, and that helps protect the public, does it not?"

Sample Responses

- *"I cannot comment on when a penalty is warranted or whether damages should be assessed. That is for the judicial process to decide."*

- *"I can comment on how we as a company would address a safety violation, but I cannot speak for law enforcement, any regulatory agency, or the courts and legislature."*

- Remember: A safety rule is not the relevant legal standard of care.

Other Strategic Considerations

- Know which safety rules and regulations arguably apply, and have facts and positions ready to refute them or their application to the case. Show that no safety rule was violated.
- Make sure that your company's witnesses – doctor and nurse, driver and safety director, foreman and worker – give consistent answers and responses.

- The incident may have been caused by an unexpected event, or intervention by a third party which was not foreseeable, and the safety rule could not have prevented it. A true accident does not invoke the “reptile” response.
- In many industries and occupations, there are elements of risk that may always be present, and cannot be completely eliminated. Equipment moves, people work, and machines run.

    - ***The question is and should be whether there was unreasonable or unusual risk.***

    - ***Prepare for charges or accusations made by former employees, if they are out there.***

Prepare for the reptile "trick words":

- Safety
- Danger
- High/top priority
- More/less safe, more/less danger
- Needlessly endanger

Remember, Reptile Theory is just a thinly disguised attempt to violate the "Golden Rule" – it seeks to put jurors into the "shoes" of the plaintiff, threatened by a hazard or danger allegedly caused by the defendant.

Using these concepts and this information, you and your witness can have the "Reptile Deposition" well in hand.

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