Personalizing the Corporate Client: Reversing the Reptilian Theory in High-stakes Litigation

Sonya D. Naar, Vice President– Senior Claims Counsel, Attorneys' Liability Assurance Society, Inc.
Hildy Sastre, Partner, Shook, Hardy & Bacon L.L.P.
Todd Silberman, General Counsel, Mesilla Valley Transportation
Miranda Lundeen Soto, Partner, Shook, Hardy & Bacon L.L.P.

Why do corporations lose in high-stakes litigation before juries? A number of factors may be to blame—including plaintiffs portraying corporations as uncaring monsters long before any parties set foot in the courtroom. For many years now, the Plaintiffs' Bar has used litigation tactics consistent with the "Reptile Theory" to gain an advantage in the litigation and influence the ultimate outcome in the courtroom. In this presentation, we will address ways to combat these tactics by transforming the perception of the company from the inception of the case.

THE DANGER IS REAL

Despite countless articles and presentations "debunking" or otherwise warning corporate litigants about these tactics, the Plaintiffs' Bar continues to use the "reptile" to litigate and try cases. They base their affirmative case on "facts" that have little to do with the plaintiff's personal situation and more to do with the defendant's overall failures and the dangers they may cause. All of this is done to appeal to jurors' fears and prejudices and force them to focus on thinly-veiled community conscience arguments; jurors are lead to believe they are not just protecting the individual plaintiff's safety but also are protecting the entire community (including themselves). If this strikes you as improper, you are not alone. But, the tactic continues to be employed and works. The Plaintiffs' Bar boasts that more than 50 verdicts or settlements exceeding $1 million have been obtained in this manner in 2015 alone. *See* www.reptilekeenanandball.com. Many of these verdicts or settlements were well over $5 million:

- California – Plaintiff reports a $12,569,854 verdict against Toyota in a car crash case

- New York – Plaintiff reported a $28.2 million verdict against the NYPD for pedestrian struck by the car being chased in a high-speed pursuit

- Florida – Plaintiff received a $23 million verdict against Looper in a case involving a brain injured premature baby; the jury deliberated for less than 3 hours

These results paint an alarming picture. Plaintiffs are portraying companies as uncaring monsters and are appealing to jurors' emotions and fears to command increasingly high verdicts or to push companies to unfavorable settlements.

AN OVERVIEW OF THE REPTILE THEORY

The reptile theory emerged in a book entitled Reptile: The 2009 Manual of the Plaintiff's Revolution, written by Don Keenan (an attorney) and David Ball (a jury consultant).

What is it, generally?

In a nutshell, the "reptile" strategy is a round-about way to violate the "Golden Rule" and put the jurors in the plaintiff's shoes.[1] The strategy starts at the inception of the case and uses concepts like *codes*, *harms and losses*, and *safety rules* to influence the outcome of the trial. The theory is designed to instill a sense of "danger" in the jurors' minds to suggest that unless they render a large verdict against the defendant, they are doing a disservice to the community and needlessly endangering the public as a whole—themselves included.

Executed properly, the "reptile" strategy tears the defendant down when it matters the most—in front of the jury. The ultimate goal is simple: convince a jury that it should punish the defendant and render a verdict above and beyond the actual damages because that is the *safest* decision for the jurors themselves and for the greater good of the community.

The "reptile" strategy is premised on three simple concepts:

1) Establish in the jurors' minds that there is a danger to the community and the defendant caused it;

2) Empower the jurors to fight for the community's safety by rendering a verdict to eliminate or reduce the dangerous situation or conduct created by the defendant; and

3) Frame the case and facts to focus on the defendant's behavior, making it appear the defendant consciously decided to violate a safety rule designed to protect the community and is unwilling to accept responsibility for the dangerous situation it caused or created.

Ball and Keenan believe that instilling a sense of danger in the jurors' minds will cause them to use their "reptile brains" to protect themselves from harm. The pseudoscience underlying this theory has largely been debunked. But, when executed properly, the tactics are still very persuasive (even if condescending). The efficacy is enhanced when defendants fall victim to plaintiffs' traps.

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[1] Ball and Keenan adamantly deny this. But, their denials are in stark contrast to the scripts provided in their book that do just that.

How does this play out?

The tactics begin early in the case—typically during discovery. At depositions, plaintiff's counsel will ask questions designed to pin the company down on broad, generalized "safety rules" that are only hypothetically applicable to the case. These "safety rules" share certain characteristics: (a) they prevent danger; (b) they protect people in a wide variety of situations, many of which are unrelated to the case; (c) they are framed in plain English and in a manner that would make the defendant seem stupid, careless, or dishonest unless it agrees; and (d) they seem, on their surface, practical and easy for the defendant to have followed. A few examples may be helpful.

- A reasonably prudent person would never needlessly endanger the public.
- Safety is a top priority for the company.
- Dangerous conduct or behavior is never appropriate.
- The defendant always follows the safety laws and regulations.

Once the plaintiff gets a company to commit to an unqualified statement of the general safety rule, it is only a matter of time before the company essentially admits liability. At a deposition, you can imagine the following line of questioning:

- Q: Truck drivers must be trained to drive their rigs in order to protect all people in the community, correct? A: Correct.
- Q: The company trains all of its truck drivers in order to protect all people in the community, correct? A: Correct.
- Q: The company has a strict policy of requiring every driver to complete every required safety training in order to protect all people in the community, correct? A: Yes.
- Q: Because the protection of all people in the community is so important, the company would never let an untrained driver operate a semi on a highway, correct? A: I think that's right.
- Q: But, the driver in our case never completed [some particular] safety training, did she? A: Um . . .

It is very difficult to clean up the last question. The damage is done. Now the plaintiff will use this line of questioning at mediation to attempt to extract a huge settlement. And, the defendant knows that if the case goes to trial, the witness will be unable to offer contradictory testimony or an explanation for his or her answer.

COMBATTING REPTILE TACTICS

Effectively combatting reptile tactics involves the three Ps: Preparation, Presentation, and Preservation.

Preparation

One way to mitigate the risk that a plaintiff will engage in "reptile" tactics or otherwise use the low public perception of big companies against your company in a lawsuit is to carefully manage the brand and public image *before* a dispute arises. For example, you can:

- ❑ Use positive, community service based advertisement campaigns to bring awareness to the public of the "good deeds" in which the company is engaged and that it promotes on a regular basis.

- ❑ Develop a company mission statement, values statement, or motto that highlights commitment to good citizenship and corporate responsibility.

- ❑ Humanize the company. Companies are made up of people, families, colleagues, and friends. Companies are active participants in their communities.

Once the dispute is underway, preparation continues to be a major key to success. This is particularly true with corporate representative depositions. Not only is it important to carefully choose the right corporate representative, that person must also be thoroughly prepared not just on the substance about which he or she will be asked but the tactics plaintiff's counsel will employ. Companies should consider designating one or two witnesses to testify in any case involving common safety or policy questions. If this is done well in advance, there will be plenty of time to ensure that the witness can give credible testimony and will appear likeable and trustworthy to a jury. It also allows the witness to become thoroughly familiar with the issues and potential traps that lie ahead.

It is also important to give your corporate representative the tools she or he will need to effectively combat plaintiffs' tactics.

- ❑ Many of the deposition questions may elevate form over substance. Remember that questions that seem innocuous (e.g., "Is safety always the company's number one priority?") may be a set up to make the deponent look bad later

- ❑ Recognize and avoid the global safety question. It does not need to be answered "yes" or "no."

- ❑ Put answers in context by using alternatives such as: generally; in many cases, but not all; it depends on the particular facts; safety is certainly one of our priorities, but I would need more facts to answer your question.

- ❑ Ignore the emotional and personal attacks intended to make the witness respond in such a way so as to obtain the questioner's approval. Teach witnesses that such attacks are unfounded and not personal, and that plaintiff's counsel will never agree with the company's position so do not look for approval.

- ❑ Remind witnesses that violations of a rule or policy do not necessarily mean that the company is liable for damage or otherwise breached the standard of care. Use state jury instructions to assist in preparation.

- ❑ Hire a witness coach who can help the witness recognize global safety or danger questions, break the habit of agreeing with those questions, without reservation, and be comfortable they are not betraying their professional identity and training by offering qualified or alternative answers.

- ❑ Use the company's mission statement, vision statement, or motto as a theme. For example, Apple used the motto "Think Different" for many years. If the deponent keeps that motto in mind, she will remember (and testify) that Apple has approached problems from different perspectives and so just because something works at one company does not mean Apple would take the same approach. This type of motto therefore can help the deponent avoid generalized, vague questions about what an esoteric company ought to do.

Be on the lookout for reptilian tactics during written discovery as well. Document requests that concentrate heavily on seeking every policy, rule, procedure and standard suggest that plaintiff's counsel is preparing a reptile deposition or trial presentation. Similarly, requests to admit concerning the importance of safety standards or industry norms should be carefully answered with appropriate qualifiers.

In particularly high-stakes litigation (or if similar issues are likely to arise again), consider mock trials or jury exercises. These can be great ways to gauge reactions to arguments and lines of questioning, and test the effectiveness of different responses to reptilian tactics.

Presentation

The depositions are over and the trial is about to begin. Now what? Before the jury even steps foot into the courtroom, consider using motions *in limine* to combat plaintiff's reptilian tactics. Recently, some courts have been granting these types of motions *in limine*—particularly if you can show the obvious link between the reptile approach and violations of the Golden Rule.[2] It is important to know the law in your jurisdiction as to

[2] *See e.g.*, *Pracht v. Saga Freight Logistics, LLC*, No. 3:13-CV-529-RJC-DCK, 2015 WL 6622877, at *1 (W.D.N.C. Oct. 30, 2015) (granting Defendants' motion to prohibit any Golden Rule argument and/or Reptile Theory questions); *Turner v. Salem*, No. 3:14-CV-289-DCK, 2016 WL 4083225, at *2 (W.D.N.C. July 29, 2016) (granting in part and deferring in part Defendant's motion to prohibit Golden Rule argument and Reptile Theory questions and argument).

what constitutes improper Golden Rule argument because jurisdictions differ. Even if the court does not grant the motion, it will now be primed to recognize the reptilian arguments as they are made and will be more receptive to stopping them in their tracks.

For example, in *Hensley v. Methodist Healthcare Hospitals*, No. 13-2436-STA-CGC, 2015 WL 5076982, at*4–5 (W.D. Tenn. Aug. 27, 2015), the court denied a motion *in limine* seeking to preclude plaintiff from offering testimony or evidence concerning violations of safety rules or any other "scare tactics" in order to establish the standard of care. The court explained that the motion was denied because the defendant did not identify the specific evidence to be excluded. Even though the motion was denied, the court noted that it would "be cognizant of appeals to the juror's prejudice, and any attempt by either party to appeal to the prejudice or sympathy of the jury will not be condoned."

When it is time for trial to start, the first step is voir dire. During voir dire, the plaintiff may ask questions from the Reptile script, such as:

- "Who here feels that doctors should always put safety as their top priority?"
- "Doesn't the community deserve that?"

Traditional wisdom would suggest the defendant should then ask questions about whether the jury will be able to consider only the facts of the case and the law as instructed by the judge. But, these generalized questions are not enough to combat the seed plaintiff's improper questions planted in the jurors' minds. Instead, flip the script and suggest to jurors that there are other powerful principles (like responsibility or fairness) at stake: "Who here feels that a doctor's real top priority needs to be to treat every patient as a unique individual?" Voir dire is the time defendants can determine whether jurors will be able to accept alternate theories of the case. By reframing the issues, defendants can plant a seed that broad-stroke rules are not enough when the jury is charged with deciding an *individual* case based on the specific facts, science, and evidence being presented.

Once the jury is seated, the plaintiff will make an opening statement that (if counsel follows the reptile theory faithfully) will be filled with improper argument about general principals of safety and responsibility. Defense counsel should object to these statements, but should resist the urge to deny them one-by-one in their own opening statement. Instead, use the first few minutes of the opening statement to jump to the alternate theory of the case. Spoil the ending. Put the issue in front of the jury as soon as possible. That way the jury can understand the opening statement through the defense lens rather than focusing on how different the story is from the version the plaintiff just told.

For example, after the plaintiff's attorney has spent an hour (or more) harping on how a defendant has failed to live up to some broad-stroke safety rule, a knee-jerk response may be to deny the allegations. But doing that just re-emphasizes plaintiff's arguments. Instead, if the defense strategy is to point to another party's fault, explain that immediately. Let the jury hear the defense theory about who *is* liable. Explain why

generalized safety rules are irrelevant to the inquiry. Then the jury can start to understand the defendant's version of the facts in a way that supports the alternate theory of liability and the appropriate standard of care.

During the presentation of evidence, witnesses should be properly prepared to avoid trick questions that are set-ups for the reptile approach. One key to this is to remind them that plaintiff's attorneys will try to lull the witness into a hasty answer by asking a series of innocuous questions to build a cadence. When the witness is in the habit of quickly answering these questions, then comes the whammy. But, the plaintiff's lawyer won't stop there. If there is any pause in the witnesses' answers, the lawyer will suggest that the witness is stupid or confused because the question should not require a lot of thought. This can be humiliating to the witness. Remind witnesses that this is all part of the act. If they need to take a brief moment to understand the question before answering, that is fine.

Demonstratives can also help mitigate the risk of reptile tactics. They can remind the jury of alternative liability theories. For example, a demonstrative left visible during a witness's testimony that summarizes facts showing the plaintiff was actually at fault for the alleged injury (or that it was caused by another accident) will focus the jury on the defense theory. Demonstratives also can help to demystify products, processes, and places that plaintiffs will try to present as "dangerous." These can be a great way to *show* the jury that the plaintiff is making safety arguments that just have no basis.

Now it's time for closing arguments. This is the defendant's last opportunity to expose the plaintiff's tactics for what they are. Let the jury know that the plaintiff has been trying to trick them based on an unfounded fear that something horrible will happen to somebody *other than the plaintiff*. But, this jury is too smart for that. The facts of this case dictate a verdict for the defense.

Preservation

The third prong to combatting reptile tactics is to make objections and preserve errors. And there will be many. The reptile theory is nothing but a golden rule or community conscience violation in sheep's clothing. Object when plaintiff tries to argue to the jury during voir dire. Object to argument during the opening statement. Object when hypothetical umbrella safety questions are asked. Object during closing when the plaintiff's attorney uses a line right out of the Reptile script and violates the golden rule or asks the jury to act as the community conscience.

Every Defendant should be afforded the right to due process under the law and not arbitrarily punished for *reptilian* strategies implemented by the Plaintiffs' Bar. There is well-established case law that prevents using punitive damage awards for the purposes of punishing a Defendant for the harms of others. *See Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Despite this law, a jury still may fall victim to savvy Plaintiff's attorneys who elicit sympathy, provoke a false sense of danger and fear, and supply the panel with a healthy dose of righteous indignation.

If there is a verdict for the plaintiff, consider moving for a new trial. Not only does it preserve issues for appeal, it gives the court another opportunity to consider the issues raised in the earlier motions *in limine* warning that the plaintiff would try these reptilian arguments.

In *Wahlstrom v. LAZ Parking Ltd., LLC*, No. SUCV20101022, 2016 WL 3919503, at *4 (Mass. Super. May 19, 2016), the court was advised before trial that plaintiff would likely try these reptile stunts. When the jury returned a $5 million verdict for the plaintiff, the judge candidly admitted, "Both before and at trial, I paid little attention to Mr. Keenan's philosophy, instead focusing on particular actions of Plaintiff's counsel without considering whether they were products of that philosophy." The court then went on to identify numerous instances in which plaintiff's counsel made arguments that could have come directly from the reptile theory playbook:

- During opening statements, Plaintiff's counsel told the jury about an "uncomfortable" meeting with the plaintiff's rapist suggesting the rapist said added security guards or lighting would have prevented the rape. To make it worse, counsel then suggested that the court was attempting to conceal these facts from the jury by saying, ". . . that is all I am allowed to tell you about that right now."

- Plaintiff's counsel mischaracterized video recordings of the rape of another woman (who was not a party to the lawsuit) in the same parking garage. Plaintiff's counsel suggested that one of the defendant's security guards actually witnessed a prior rape and did nothing to stop it. That was untrue, but left the jury to believe that the defendant company did nothing to stop rapes from occurring on its property.

- Plaintiff's counsel also improperly questioned witnesses about the sale price of the parking garage in a manner suggesting that defendants could easily sustain a sizable verdict.

The Court had no problem concluding that these arguments were improper and warranted a new trial.

Don't let these issues slip by. Unless defendants and their counsel begin to combat these tactics head-on, plaintiffs will be incentivized to continue these antics.