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THE REPTILE: IT'S COMING TO A COURTROOM NEAR YOU

In 2009, trial consultant David Ball and attorney Don Keenan teamed up to author a trial advocacy book entitled "Reptile-The 2009 Manual Of The Plaintiff's Revolution". The book is perhaps the plaintiff bar's answer to the impact of tort reform on verdicts. Keenan is a successful trial lawyer who early on in his career became heavily involved in the use of jury focus groups. Ball has authored various trial advocacy books such as "Damages", "Theater Tips and Strategies for Jury Trials" and "How to Do Your Own Focus Groups".

Keenan and Ball have taken their work on the road and offer "reptile" seminars across the country. Some are tailored to specific types of cases, such as those involving 18 wheelers. The two have published a new book, "Reptile in the MIST and Beyond" for use in "small cases", but that book is not available for review. A few years ago an article appeared which claimed that a defense lawyer used Keenan's "Reptile" book against him in a trial. Now the "Reptile" authors' website makes it clear that "sale of this product will not be completed or shipped until the purchaser is verified as a Plaintiff's lawyer or as a member of a Plaintiff's firm". Also a confidentiality agreement must now be signed in order to purchase this book or to attend any of the "reptile" seminars.

The original book contains a caveat which advises that terms used in the book such as, "Reptile," "Code," and "Tentacles of Danger," *are not for the jury*. Evidently, the authors are afraid that this might tip some jurors off to the fact that they are being manipulated.

The reptile strategy is based upon an alleged scientific theory that the primitive part of the brain (reptile brain), which is designed to ensure survival against threats, is activated in jurors through certain methods used in the presentation of evidence. The strategy is to focus upon getting the defendant to agree to a broad safety rule designed to protect the public in general. In theory, the attorney is then able to convince the jury that the "rule" protects the community and, in turn, the juror. The goal is to overcome the conditioning jurors have undergone through tort reform that "large verdicts" are bad and to instead obtain a large verdict because the defendant has endangered the community and the juror.

The "reptile" litigation approach is used to convert an alleged negligent act of a defendant into a "community danger". The formula used is: **Safety Rule + Danger = Reptile**. Keenan and Ball advise lawyers to answer three questions for the jury:

-How likely was it that the act or omission would hurt someone?

-How much harm would it have caused?

-How much harm could it cause in other kinds of situations?

Reptile, at 31-34, 38. The answers to these questions are intended to give a jury the impetus to find fault because, in the authors' words, "the tentacles of danger" extend outward to threaten the entire community as well as the individual juror. *Id.* at 35. The theory is that such a presentation will cause a jury to award higher damages in a case because the actual harm caused is no longer the yardstick to be used. Instead, they are convinced to base damages upon the maximum damages a defendant "could have caused".

One other key part of the reptile strategy is to suggest to the jury that returning a large verdict is a way for them to eliminate or reduce the dangerous conduct. The reptile strategy is a clever way of breathing new life into the "Golden Rule" which most courts have disallowed. Appendix B-1 of Keenan and Ball's book analyzes Golden Rule opinions in virtually every state for a total of 59 pages. The authors understand fully the underlying premise for their theory. This is an area in which the theory is vulnerable to attack through motions in limine which will be discussed below.

The reptile strategy has resulted in larger settlements and larger verdicts as the technique works when used properly. It is debatable, however, whether the "science" involved is valid. This article will not delve into the scientific research that gave rise to this new "trial tactic", but will instead set forth the methods used for creation of "safety rules", the potential strategies for use in challenging these types of tactics, and

methods that have been used to try to keep the reptile strategy out of the courtroom.

Tips for spotting the reptile

Teresa Beck's article in *The Voice*, "How to Tell If You Are Getting 'Reptiled' Prior to Trial" (Vol. 12, Issue 37) provides several useful tips for spotting the strategy and for dealing with the reptile tactics. The reptile strategy can begin as early as the first paper discovery in the case. Be on alert for overbroad discovery requests that ask very general questions about safety and safety rules. Requests for information that seem overbroad and unrelated to the case, but which might deal with safety, may be another sign that the tactic will be used in the case. Requests for admissions may be served which are overbroad and seek to elicit an admission that some broad, general safety rule applies. Examples may be:

- Safety is not an option at the ABC Company.
- Your truck drivers are not allowed to needlessly endanger other motorists.
- A company should never needlessly endanger the public.

Since Plaintiff experts are often role players in the reptile strategy, one needs to be aware of signs that they are on board the reptile train. You will see this when they are present at sight or equipment inspections when they pay a lot of attention to safety signs that may be posted. You will also find evidence of this in their files when they are produced.

Ms. Beck's article also lists key words or phrases to keep an eye out for such as: **good health, mobility, endanger, safety, policy, procedure, potential harm, and community safety.** Other words or phrases to look out for are **needlessly endanger,**

duty to provide a safe environment, safety rules, require or reasonable. Keep in mind that Keenan and Ball know that the defense bar is starting to tune in to the reptile litigation strategy, so they are refining the terms used in an attempt to disguise the tactic.

The reptile strategy begins with establishing an “umbrella safety” rule, typically one that uses the phrase “needlessly endanger”. You can plug in anyone of the following and apply it to almost any type of case: “A [driver, physician, plant owner, property owner] cannot (should never) needlessly endanger the public [patient/other motorists/patrons/tenants].”

Once the umbrella safety rule is established, the questions then become a little more specific. A series of questions which typically use the word “must” will be used in questioning your witnesses. The goal here is to create a new safety rule that the defendant is forced into agreeing with. This then makes it an easy task to convince a jury that this “safety rule” is the standard of care the defendant violated.

At one point, Keenan and Ball had a link that would allow you to find out who their “reptile Allstars” were so you could determine if a particular lawyer was recognized for using the reptile. The link appears to no longer be available.

The Reptile Deposition

Much of the damage is done in depositions, however. Keenan and Ball list specific types of questions that are to be asked during depositions. The goal is to get each witness to agree to a general safety rule and that a violation of the rule would needlessly endanger the community. The questions are phrased in such a manner that they are difficult for most lay witnesses to

handle correctly. This in turn causes difficulty for defense counsel in preparing the witnesses for deposition. Keep in mind the goal of the strategy is to create sound bites for use at mediation to command larger settlements and to lock in the defendant or its employees to the “umbrella safety rule” for trial.

Rules of the road, a stepping stone to the reptile:

Keenan and Ball recommend reading “Rules of the Road” by Patrick Malone and Rick Friedman, in conjunction with their Reptile book.

A “rules of the road” deposition will have questions like these:

Q. Do you consider yourself to be a professional driver?

Q. Is driving an essential part of your job description?

Q. When you are driving do you follow the rules of the road?

Q. By rules of the road, do you understand that to mean the traffic safety laws of Texas?

Q. Do you agree that rules of the road exist to keep drivers safe?

Q. Some examples of the rules could be stopping at a red light or driving at or below the speed limit, right?

Q. Do you agree that drivers must keep a proper lookout at all times?

Q. Do you agree that drivers must control their speed at all times?

Q. Do you agree that drivers must keep a safe distance from other vehicles at all times?

Q. Do you agree that drivers must obey traffic signals and traffic lights at all times?

Q. Do you agree that the rules of the road should be followed at all times?

Q. Do you agree that if all those rules I just mentioned are followed, accidents like this one shouldn't occur?

Q. And this accident happened because one of those rules wasn't followed, right?

Reptile Questions:

Safety (sometimes questions are even more general such as these)

Q. Safety is your top priority, correct?

Q. You have an obligation to ensure safety, correct?

Q. You have a duty to put safety first, correct?

Danger

Q. It would be wrong to needlessly endanger someone, correct?

Q. You would agree that exposing someone to unnecessary risk is dangerous, correct?

Q. You always have a duty to decrease risk, right?

Specific questions that follow the general questions

Q. You agree you did not put safety first when you.....,correct?

Q. You agree that by doing (not doing) (*example:* checking your brakes).....you violated the safety rule?

Q. You agree that you exposedto unnecessary risk, correct?

Questions that establish the maximum amount of harm that can be caused

Q. How much harm could your faulty brakes have caused?

Q. This wreck could have occurred anywhere, on any roadway, in a small town or in a big city?

Q. These faulty brakes could have resulted in a deadly wreck where parents and even children could be killed?

Defensive Strategies

Once you have determined the likelihood that the reptile strategy is being used in your case you must develop a theme of your own which can be used to undercut the reptile. This involves identifying the general safety rule the other side is going to try to use and then developing your own theme, typically a theme of reasonableness under the circumstances. One must keep in mind that the standard of care is reasonableness and not the general safety rule made up by the plaintiff's counsel. The difficulty is in coming up with ways to "sell" the reasonableness standard. That must be done by developing evidence as the case progresses which support your position. Potential themes that can be used are: "A physician should be judged on the reasonableness of his actions under the circumstances presented" or "A truck driver must operate his vehicle reasonably under the existing circumstances".

The plaintiff attorney's goal is to try to make the questions such that anything other than the desired answer will make the witness look bad or in Keenan and Ball's words "stupid". So, both lay witnesses and experts will require extra preparation in order

to effectively deal with the general safety rule questions that will be thrown their way. Although witness preparation can be very difficult and can be a subject for an additional article, some tips do follow.

Witnesses should be instructed to avoid agreeing with generalizations. They should be taught to deal with a hypothetical question with the response “it depends”. Whenever possible they should bring the discussion back to the facts of the case. Witnesses should be prepared so that they understand that a “safety rule” that may be posed by the plaintiff attorney is not the standard of care. An important part of witness preparation will also involve making sure they can explain why their actions depended upon the specific situation that they encountered.

Examples of how to counter “Rules of the Road” type Questions:

Q. Do you consider yourself to be a professional driver?

A. I am not sure what you mean by that, my job does involve some driving.

Q. Is driving an essential part of your job description?

A. I am not sure what you mean by that, please explain.

Q. When you are driving do you follow the rules of the road?

A. I don’t understand your question, can you rephrase?

Q. By rules of the road, do you understand that to mean the traffic safety laws of Texas?

A. That’s a broad question, can you be more specific?

Q. Examples could be stopping at a red light or driving at or below the speed limit.

A. Could you be more specific? I don’t see how that applies here.

Q. Do you agree that the rules of the road should be followed at all times?

A. That’s a broad question. You’d have to be more specific as it depends upon the circumstances.

Or “Not necessarily in every situation, again that is a very general question.”

Or “It can in certain circumstances-every situation can be different.”

Examples of how to counter “reptile” questions:

First, recognize that these general questions are just that. They lack the proper specificity to allow a specific answer. Therefore, the only honest answer to a vague general question is a vague general answer.

Safety:

Q. Safety is your top priority, correct?

Q. You have an obligation to ensure safety, correct?

Q. You have a duty to put safety first, correct?

Possible answers:

A. It depends upon the circumstances.

A. Not necessarily in every situation.

A. Not always.

A. Sometimes that is true, but not all the time.

A. It can be in certain circumstances. Every situation can be different.

Danger

Q. It would be wrong to needlessly endanger someone, correct?

Q. You would agree that exposing someone to unnecessary risk is dangerous, correct?

Q. You always have a duty to decrease risk, right?

Possible answers

A. I don't understand what you mean by "needlessly endanger"; that is very vague.

A. I don't understand what you mean by "unnecessary risk?"

A. That is a very broad question. What specific circumstance are you referring to?

A. Can you be more specific?

Use of Motions and Educating Judges

Despite several articles published on this topic and seminars addressing the use of the "reptile", most lawyers that I have asked are not familiar with the reptile strategy. If that is true, then your trial judge is probably not familiar with the reptile either. Most likely you will not be in front of the judge on anything "reptile" related until your pre-trial. One approach that can help is to file a motion to exclude under TRE 104 and to set it for oral hearing in advance of trial.

"The court must decide any preliminary question about whether ... evidence is admissible."

This will be your first opportunity to educate the judge on the reptile strategy and you should fully expose the strategy with quotes from the "Reptile" book, examples of the questions asked in depositions, and be armed with case law which supports

exclusion of "Golden Rule" arguments. You must be prepared to meet counter arguments that the "Golden Rule" only deals with jury argument and not evidence at trial. You have to tie in the use of the "general safety rule" as part of a strategy designed to circumvent the relevant standard of care in the case and show that this "safety rule" will be used to then equate the defendant's conduct as a "community threat", thus invoking the "Golden Rule".

So far we have found only one appellate opinion which discusses the "reptile strategy", *Regaldo v Callaghan*, __P.3d __ (Court of Appeal, Fourth App. Dist, CA, Sept. 16, 2016). The appellate court found the closing argument "urging the jury to base its verdict on protecting the community" amounted to misconduct of plaintiff's counsel, noting that "The law, like boxing, prohibits hitting below the belt. The basic rule prohibits an attorney to pander to the prejudice, passion or sympathy of the jury." Unfortunately, the appellate court found that the defendant waived the point by failing to timely object and to ask for a curative instruction.

We have found state court rulings on motions in limine and motions for protection filed as to anticipated reptile strategy, evidence or questioning of witnesses involving cases in Arkansas, California, Florida, Kentucky, Washington, Wisconsin, West Virginia, and Wyoming. Please note that DRI's Trial Tactics group has a library online with a few reptile motions in limine available. There are at least two in the library worth taking a look at because the defense attorney in each of those motions cited to excerpts from the Reptile book. Excerpts from one such motion filed in a California case is set forth below:

“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 or schools 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.

The motion in limine needs to make clear that the “reptile strategy” evidence/questioning of witnesses is an attempt to present evidence that is not relevant. It is important to stress that allowing such a strategy to be used will result in prejudice to the defendant because the plaintiff is seeking to offer evidence of potential harm to the community, which is not the issue to be decided by the jury. The motion should point out that the very goal of the reptile strategy is to prejudice the jury against the defendant, while at the same time creating an “umbrella safety rule” so as to avoid the actual standard of care that applies.

“Read the book, Judge...

“A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients].” (Id. at p. 55.)

The motion should also address how this “umbrella rule” is used to avoid expert testimony that sets forth the actual standard of care. The “Reptile” explains how this is to be accomplished:

“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:

The motion in limine should quote actual portions of the “Reptile” book in order to educate the judge on how the plaintiff attorney is attempting to avoid the standard of care while at the same time causing prejudice among the entire jury panel. The “Reptile” advises lawyers that their trial goal is to put a juror’s mind in a “reptile protective mode” and *“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.” (Reptile. at p. 19.)*

The motion in limine should also give specific examples from the “Reptile” on the “umbrella rule” and how it is used to avoid the actual legal standard of care:

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.)

The motion should also use deposition excerpts illustrating how opposing counsel has questioned witnesses by repeatedly raising a general safety rule and dwelling on questions involving protection of the community, as opposed to focusing on the actual case facts. Such questions are not relevant and are designed to divert the jury's attention from the facts in the case and to instead focus them on the "safest possible action" and potential harm to the community.

The reptile strategy takes the "Golden Rule" argument and permeates the entire case with improper comments from voir dire through the very end of the trial. The improper argument no longer begins at the end of the case. The "Golden Rule" argument asks a juror to put themselves in the shoes of the plaintiff and to "act as the conscience of the community" in arriving at a verdict. The concept is to ensure a finding of fault, as well as enhance damages. Judge Gray Miller of the Houston Division of the

Southern District includes the following in his standing order in limine:

23. Golden Rule. Any argument or suggestion that the jurors should put themselves in the position of a party.

The Fifth Circuit issued an opinion condemning "community conscience" arguments. See *Westbrook v General Tire & Rubber Co.*, 754 F.2d 1233, 1268 (5th Cir. 1985). In *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), the Supreme Court invoked the Due Process Clause in holding that a punitive damage award could not be used to punish a defendant for injury that it inflicts upon non-parties...i.e., those who are strangers to the litigation.

Be sure to preserve error

If you are not successful in excluding the "reptile strategy" at the pre-trial stage, you need to be prepared to object every time an offer is made of "umbrella safety rule" questions or testimony on the grounds that it is not relevant (TRE 401) and also that the

probative value is outweighed by the prejudicial effect (TRE 403).

A party is entitled to an impartial jury. Therefore, voir dire questions which ask or suggest that “we are better protected when a jury holds a company responsible for

violating safety rules that cause harm” are improper. In the Reptile book, Chapter 10 is devoted to voir dire and questions designed to indoctrinate the jury panel to the reptile strategy. Some of the suggested questions in a motor vehicle case are:

“Some folks feel that highway travel is safer these days than, say, ten years ago. Others think it is less safe. From your own experience, which are you closer to?”

“When you drive, what do you want other drivers to do in terms of safety?”

“What dangers have you found yourself in-close calls or even wrecks-because someone else did something dangerous?” *Id.* at pp.121-122.

In all cases the book suggests other questions such as these:

“What local cases can you think of whose outcome had an effect on the community?”

“Some folks are uncomfortable about making decisions on a jury that might have an effect on the community. Others are ok with it. Which are you closer to?” *Id.*, at p. 124.

In opening statements, the reptile strategy calls for emphasizing the violation of safety rules and how the defendant’s conduct needlessly endangered others. The opening will also suggest the maximum amount of potential harm that could be caused. The reptile strategy directs the lawyer to dwell on these points as opposed to discussing the actual facts involved in the case.

You will need to object during opening statement, trial and closing argument. Be sure you know the case law which prohibits “Golden Rule” arguments and have the case law handy. Do not back down from requesting limiting instructions followed by a motion for mistrial.

Using the reptile strategy against your opponent

An interesting article by Kyle J. White appeared in the DRI Product Liability

Section’s “Strictly Speaking” publication entitled “*Can Defense Lawyers Co-Opt the Reptile Strategy?*” Mr. White suggests ways that the reptile strategy can be turned on plaintiff counsel in the appropriate type of case where affirmative defenses exist. The same strategy is used to show the existence of a safety rule the plaintiff was required to follow which also was designed to protect others. The next step is to show that the plaintiff “needlessly endangered” others when he violated the “safety rule.” The downside, of course, in using this strategy is that you can be undercutting your ability to object to the use of the strategy against you, as well as preserving error in the event you are on the losing end of a verdict.

One of the examples in White’s article involves a worker who has filed suit because of an on the job injury (must have been a non-subscribing employer). Some

suggested reverse reptile questions for the employee “plaintiff” are as follows:

-Mr. Doe, you would agree that it is never ok to needlessly endanger yourself or your co-workers?

-Your employer gives you safety information which tells you how to avoid needless danger to yourself and your co-workers?

-The plant that you work at has people from the community come in to look around every now and then-students, employees’ spouses, and customers?

-And you are never allowed to needlessly endanger visitors to the plant?

-And the safety information your employer gives you is in writing and you should read it?

-And this safety information you were given by your employer told you to read the machine’s operation manual before using it?

-And you admit that you did not read the section of the manual that told you to.....?

The article goes on from there to paint a picture of how to use the “reptile” in presenting your affirmative defense. The article suggests other ways of casting a defendant company in a good light before a jury.

Below I have listed in the notes several articles that are recommended reading on the “reptile strategy” and how to defend against it. The most difficult task for defense lawyers remains properly preparing

witnesses for this new litigation strategy that is growing in popularity across the country.

Notes:

Teresa M. Beck, “How to Tell if You Are Getting ‘Reptiled’ Prior to Trial”, DRI The Voice, Vol. 12, Issue 37 (9-18-13);

Jill Bechtold, “Reptile Tactics: A Defense Guide to the Reptile Strategy in Discovery”, RX for the Defense, DRI Drug and Medical Device Committee, Vol. 23, Issue 2 (3-26-15);

Bill Kanasky, “Debunking and Redefining the Plaintiff Reptile Theory”, DRI For The Defense (April 2014);

Ken Lopez, “Repelling the Reptile Trial Strategy as Defense Counsel-Parts 1-5, The Litigation Consulting Report-on line blog posts 2015;

David C. Marshall, “Lizards and Snakes in the Courtroom”, DRI For The Defense (April 2013);

Minton Mayer, “Make Boots Out of That Lizard-Defense Strategies to Beat the Reptile”, DRI The Voice, Vol. 12, Issue 38 (9-25-13);

Carlos Rincon, “Coaxing the Reptile Back Under the Motor Carrier Rock”, Presentation at FDCC Winter Meeting (March 2013);

Kyle J. White, “Can Defense Lawyers Co-Opt the Reptile Strategy”, DRI Product Liability Section-Strictly Speaking.

