

DISCOVERING THE REPTILE

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DISCOVERING THE REPTILE

WARNING: The Reptile strategy and techniques are being effectively used by more of the Plaintiff's Bar across the country. The Defense Bar, Corporate America, and the insurance industry must recognize that the "Reptile" strategy is designed to produce nuclear-sized verdicts. According to the Reptile website, the "results produced through the skilled practice of Reptile methods are nothing short of revolutionary. With each year that passes, more Plaintiff attorneys are learning Reptile and adopting it into their practices." As of February 28, 2018, there have been "8 billion dollars in Reptile verdicts and 34 million dollars in verdicts were reported last week." <http://www.reptileverdicts.com/>.¹ This paper will discuss ways to combat Reptile tactics during the pleading and discovery stage of litigation.

I. The Reptile plaintiff attorney wants to show that your client endangers the community by breaking safety rules.

In 2009, David Ball and Don C. Keenan co-authored *Reptile: The 2009 Manual of the Plaintiff's Revolution*. This book is based on a concept by neuroscientist Paul MacLean that people are driven by the reptilian portion of their brains. David Ball and Don C. Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, 13 (1st ed. 2009). Dr. MacLean labeled this part of the brain the "R complex" or "reptilian brain" because it is identical in function to the brain of reptiles. This reptilian part of the brain is the "oldest part of the brain." *Id.* "Over millions of years of evolution, the R-Complex gave rise to the rest of the brain: the parts that think and feel." *Id.* "The Reptilian brain houses basic life functions, such as breathing, balance, hunger, the sex drive, and the fundamental life force: survival." *Id.* at 17. According to the authors, "the Reptile

¹ More than \$700 million during the last year, according to the Reptile proponents.

invented and built the rest of the brain, and now she runs it.” *Id.* The authors contend that the Reptile’s primary function in the human brain is self-preservation. The purpose of the Reptile book is to teach plaintiff attorneys how to awaken the reptilian part of the jurors’ brains.

The Reptile strategy boils down to a simple formula: **Safety Rule + Danger = Reptile.** The authors warn plaintiff attorneys to “never refer to Defendant conduct as accidental, a mistake, a misjudgment, or inadvertent. Be strict about this with yourself and your witnesses.” *Id.* at 53. Why? Because “no one can prevent inadvertence” so “the Reptile ignores it.” *Id.* A “car crash might have been ‘accidental,’ but it happened because someone chose to violate a safety rule – such as ‘A driver has to watch where he’s going and see what’s there to be seen.’”² *Id.* at 54. As applied to trucking cases, the authors say that the following rule is a “loser”: “The trucker missed the light.” But a “winner” is the following safety rule: “The trucker violated the public-safety rule to watch where he was going.” *Id.*

The authors recommend a three-step process to awaken the jurors’ collective reptilian brain. First, take a specific safety rule and widen its scope so that it becomes an “umbrella rule.” *Id.* at 51. The authors give an example of a coal mining company. A safety rule for a coal mining company would be the following: “A coal mining company is not allowed to turn off the lights while workers are in the mine.” *Id.* The authors note that this kind of safety rule is only understood by coal miners and, unless all of your jurors are coal miners, this safety rule will not activate the reptilian part of the jurors’ brains. To make the safety rule “useful,” the authors recommend generalizing it. As applied to the coal mining company, the authors recommend widening the scope of the safety rule: “A company must not needlessly endanger its employees” or “A company is never allowed to remove a necessary safety measure.” *Id.*

² The authors do not cite any statutory or case law authority for these “safety rules.”

The umbrella rule is “the widest general rule the defendant violated – wide enough to encompass every juror’s Reptile.” *Id.* at 55. The authors provide the following umbrella rule for almost every plaintiff’s case: “A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients].” *Id.*

After getting the defendant to agree that they are not allowed to needlessly endanger the public (umbrella rule), the next step is to get the defendant to agree that they violated a specific safety rule. According to the authors, a specific safety rule is the following: “A commercial truck driver must have his brakes inspected every 24 hours.” *Id.* at 58. Once the defendant agrees that they cannot violate the umbrella rule (e.g., cannot needlessly endanger the public) and after they agree that they violated the specific safety rule (e.g., must have breaks inspected every 24 hours), the next step is to spread “the tentacles of danger.” *Id.*

To do this, the plaintiff attorney is supposed to ask, “Do you drive as carefully at other times as you were driving when you hit John?” *Id.* at 59. “If the defendant says yes, a juror who decides the defendant was negligent in this case now sees him as a general danger. If the defendant says no, he’s admitting he needlessly endangered John. If he answers, ‘I don’t know,’ you can get both benefits.” *Id.*

The authors recommend this three-step process for one reason only: to show jurors that your client is dangerous and that his actions endanger the community (i.e., the jurors and their families). The logic behind the Reptile strategy is appealing. After all, who would agree that someone is allowed to needlessly endanger the public? But the fact of the matter is that every case is different and has unique facts. Corporate defendants are not in the business of harming people. Otherwise, they would not be in business for long.

For pleading and discovery purposes, we recommend combatting the Reptile strategy by telling a different story. Dr. Kanasky, in his groundbreaking article, “Debunking and Redefining the Plaintiff Reptile Theory,” calls this “re-priming.” Bill Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, For The Defense, April 2014, at 18. For example, if a plaintiff attorney says that a “physician should always put safety as their top priority,” you can say that a “physician’s real priority needs to be to treat every patient as a unique individual.”³ *Id.*

Below, we discuss strategies for answering reptilian complaints, interrogatories, and requests for admissions. We do not discuss requests for production of documents because that form of discovery is not applicable to the Reptile strategy.

II. General safety rules are the equivalent of vague legal conclusions and the United States Supreme Court has instructed district court judges to ignore legal conclusions in pleadings.

In federal court, pleadings are governed by Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009). In Twombly, the Court held that a plaintiff must plead “only enough facts to state a claim to relief that is plausible on its face.” Twombly, 550 U.S. at 570. In Iqbal, the Court made clear that the “plausibility” standard of Twombly applies to all cases. The majority opinion also clarified the methodology set forth in Twombly. First, the court ruling on a motion to dismiss under Rule 12(b)(6) ignores “legal conclusions” alleged in the complaint. Second, the court looks to the

³ In his article, Dr. Kanasky recommended this strategy in the context of voir dire, but the same strategy can be employed in your discovery responses. The point is to tell your own story. Never adopt the plaintiff’s story.

factual allegations to see if the claim is plausible. Defense practitioners should follow a similar procedure when answering Reptile complaints.⁴

First, look for legal conclusions. This means looking for alleged acts of negligence and vague safety rules, which are often simple legal conclusions. If the plaintiff asserts legal conclusions or vague safety rules, then draw attention to it. As an example, we had a case where the plaintiff alleged the following in her complaint:

- “[Defendant] breached its duty of ordinary care in the retention and supervision of [Employee], because [Defendant] knew or should have known about [Employee’s] propensities to secretly photograph or video up skirts.”
- We answered, “[Defendant] denies said averments and further shows that Plaintiff sets forth a conclusion without pleading any supporting facts nor producing any supporting evidence. If Plaintiff has any such supporting evidence, [Defendant] requests that it be produced immediately so that it can be analyzed.”

Notice how the plaintiff’s allegation is a bare legal conclusion. There is no factual support for the plaintiff’s claim that the employee had such a propensity or that Defendant should have known about said propensity. This case was not pending in federal court, so we did not have the option to file a motion to dismiss pursuant to the more defense-friendly standards of Iqbal and Twombly.

Second, look for Reptile plaintiff attorneys to allege salacious facts. Although this tactic does not rely on the use of safety rules, it is a common practice among Reptile plaintiff attorneys

⁴ See Drake v. Old Dominion Freight Line, Inc., 2016 WL 1328941 for an example of a federal court striking plaintiff’s claims for negligent hiring, retention, qualification, supervision, and training due to a lack of factual support.

to assert slanted facts that are devoid of context. The motivation in doing this is clear: Reptile plaintiff attorneys intentionally draft all pleadings and discovery with one audience in mind: the jury. They want to defame your client with scandalous assertions in order to awaken the collective reptilian brain of the jury. For example, in the same photograph case, the plaintiff made the following allegation:

- “[Defendant], an employee of [Defendant], used his cell phone to photograph or video up the skirt of [Plaintiff].”
- We responded with the following facts: “The incident occurred on [Date] inside [Defendant’s Store] located at [Address]. The plaintiff shopper reported that [Defendant Employee] was taking pictures up her dress and she began yelling, then punching, kicking and pushing this person to the floor. The incident occurred during a day and time wherein this [Defendant Employee] was to be working at the pharmacy inside the [Defendant Store]. The employee was arrested, charged and pled guilty to felony eavesdropping/surveillance, and the employee resigned his position at [Defendant Store].”

Here, our strategy was to show that the employee was not acting within the course and scope of his employment and that the criminal justice system, as well as the plaintiff, punished the employee. We also wanted to show that this employee no longer works for our client and that our client would not retain such an employee.

III. Answer reptile interrogatories with the facts and context that support your client's case.

With interrogatories, we employ the same strategy as we do when answering complaints. We answer truthfully with facts and context that support our case. Reptile plaintiff attorneys will never mention facts that are unfavorable to their case, so it is important that you do this. For example, in a premises liability shooting case, we received the following interrogatory:

- “Please describe each and every warning that you claim was provided to [Plaintiff] regarding any danger associated with the premises or vicinity of the premises, either [Premises 1] or [Premises 2].”
- In response, and after making objections, we stuck to the facts: “Defendant . . . objects to this Interrogatory on the grounds and to the extent that it is worded to suggest that Defendant knew or should have known that Plaintiff would engage in a verbal altercation with [Non-Party], or that Plaintiff provoking an altercation with [Non-Party] would result in [Non-Party] shooting Plaintiff.” We also instructed plaintiff’s counsel to review the incident report and video of the incident. Both pieces of evidence supported our story that the plaintiff started a fight with the wrong person and was shot as a result.

The plaintiff attorney’s strategy in drafting that particular interrogatory was clear. He wanted to imply that Defendant knew about crime on its property. Our strategy was to distinguish this particular crime. This was easy to do. When the plaintiff’s interrogatories asked about other crimes on Defendant’s property, we responded as follows:⁵

⁵ Appropriate legal objections preceded our response.

- After making objections, we responded as follows: “Defendant states that there have been no prior, substantially similar crimes where a [Patron] was shot aboard [Defendant’s train] for the five (5) years preceding the subject incident.”⁶

As another example, in the photograph case, the plaintiff asked the following interrogatory:

- “Please state whether, within the past seven years, you have ever discarded or destroyed any documents or things that have information about incidents of sexual perversion at [Defendant Store], and if the answer is ‘yes,’ please identify all such documents, state the dates on which said documents were discarded or destroyed, and ‘identify’ who has knowledge of the documents or things.”
- We responded as follows: “[Defendant] objects to this Interrogatory on the grounds that it is overly broad, vague, ambiguous, and unspecific as ‘sexual perversion’ is not defined. Without waiving said objection, [Defendant] is not aware of the destruction of documents related to any alleged sexual perversion at [Defendant Store].”

Notice how the use of the phrase, “sexual perversion,” is both vague and defamatory. This is a favored tactic of the reptile attorney. In responding to interrogatories that use vague words or safety rules, remember that federal case law is clear that a “respondent need not be a mind reader, and bears no obligation under the federal rules to fill in the missing blanks or construe an incoherent question in a coherent manner.” Paul W. Grimm et al., *Discovery Problems and Their Solutions*, 10 (3d. ed. 2014) (citing Rucker v. Wabash R. Co., 418 F.2d 146 (7th Cir. 1969); Tsangarakis v. Panama S.S. Co., 41 F.R.D. 219 (E.D. Pa. 1966)).

⁶ In Georgia, only substantially similar crimes are relevant in assessing a whether a landowner should have foreseen criminal activity.

IV. Answer requests for admissions with facts and context that support your client's case.

Like answers to complaints and interrogatories, we answer requests for admissions with facts and context that support our client's case. For example, in the shooting case, we received the following request for admission:

- “Defendant did not take any action to warn [Plaintiff] of prior criminal activity at [Defendant's premises prior to date of incident].”
- We responded with the following: “Denied. Defendant shows that it did not warn Plaintiff that should he choose to enter into a verbal altercation with another [Patron] that such might result in the escalation of said altercation to the point where a shooting may occur.”

As another example, from the same shooting case, opposing counsel requested admission of the following:

- “Defendants, its agents, and/or its employees had knowledge that other individuals had been physically assaulted prior to [Date at Defendant's Premises].”
- Again, we stuck to the facts: “Denied as stated. Defendant did not have actual knowledge of any prior substantially similar crime occurring aboard a train [at Defendant's premises]. Although Defendant was aware of prior crime occurring at [Defendant's premises], there had never been an incident involving one patron confronting another patron on a train, with the latter patron shooting the former upon escalation of that confrontation, as the train arrived at [Defendant's Premises].”

In a wrongful death case, involving claims of excessive force by Defendant's employee, we received the following request for admission:

- “[Defendant Employee] used excessive force against [Plaintiff's Decedent].”
- In response, and after making objections, we admitted the facts: “[Plaintiff's decedent] was under the influence of [drugs] when he stole merchandise from [Defendant] and thereafter assaulted [Defendant employees]. Further, according to the documents contained in the files of the medical examiner, the effects of [drugs] include risk taking and aggression. Based on the foregoing, [Defendant] denies this request as pled.”

The plaintiff attorney asked multiple times for similar admissions and we stuck to the facts that were favorable to our case. However, keep in mind that an “improper response may cause the request to be deemed admitted or the imposition of other sanctions.” Paul W. Grimm et al., *Discovery Problems and Their Solutions*, 34 (3d. ed. 2014). In addition, be sure that your client did not make a “binding admission in another place,” such as a document or a policy and procedure. *Id.* Reptile plaintiff attorneys will seize on inconsistencies to show that your client is a liar.

V. Assert timely objections to Reptile 30(b)(6) deposition topics.

The Reptile plaintiff attorney desires little more than to place your client's corporate representative in the cross-hairs during her deposition. Every opportunity to advocate facts and context that supports your client's narrative of the case should be taken, and this includes asserting written objections to opposing counsel's topics for deposing the corporate representative. In this setting, the Reptile attorney is likely to show his hand through the topics he presents in seeking the deposition. For instance, the Reptile attorney may seek to turn the

focus in the most basic of slip/fall cases away from the question of equal or superior knowledge of an alleged hazard, and toward extraneous and irrelevant issues relating to document retention and other internal policies, to distract, confuse, and mislead the court and jury, and to create questions and doubts on irrelevant matters in the minds of the jurors. Alternatively, the Reptile attorney may even overtly seek opinions on legal issues reserved for the fact-finder such as liability, or try to delve into defenses beyond facts and into legal strategy. If any such topics arise in the list presented by counsel for the 30(b)(6), we object on legal grounds with reference to factual context and advocate the reasonable position that irrelevant and improper topics of deposition discovery amount to knowing efforts to exceed the proper scope of discovery.⁷

For instance, where a Plaintiff attorney sought to depose the corporate designee on the corporate defendant's "knowledge, position, and opinions of liability regarding the subject fall and Plaintiff's injuries," we objected on multiple grounds, such as:

⁷ Limitations on 30(b)(6) depositions and topic construction from outside the "pure" Reptile Theory arena inform the defense to the Reptile: "Where...the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible." Reed v. Bennett, 193 F.R.D. 689, 692 (D.Kan. 2000). Accordingly, a notice must avoid phrases such as "including but not limited to." Such a topic would put the corporation to the impossible task of preparing for an open-ended, and theoretically infinite subject. *Id.* Where possible, the 30(b)(6) notice should "be limited to a relevant time period, geographic scope, and related to claims" that are at issue in the case. Young v. United Parcel Serv. of Am., Inc., 2010 WL 1346423, *9 (D.Md. Mar. 30, 2010).

- The improper invasion of the province reserved to the fact-finder as to ultimate issues in the case.
- Legal positions of a party defendant are appropriately limited to the initial responsive pleading filed in answer to the complaint.
- Seeking of “opinions of liability” is a clear violation of the scope of Rule 26 discovery because it can only be “seeking disclosure of the mental impressions, conclusions, opinions, or legal theories of defense counsel or other representative of the party.”
- Attempting to compel a party to proffer positions and opinions in response to hypothetical questions lacking relevance to the legal issues in the case or in response to other irrelevant questions is wholly improper, as such efforts run counter to the 30(b)(6) framework itself, where the trade-off is the party seeking the testimony must provide tailored, intelligible topics, and in exchange, the party giving the testimony is obligated to appropriately prepare its corporate designee to address those topics under oath.
- The use of the topics to advance the disingenuous Reptile strategy is merely part of an effort by the Reptile attorney to confuse and mislead jurors in violation of applicable law.

Under Georgia’s version of Rule 26, the party defendant’s mental impressions, etc., are protected from discovery just as those of the party’s attorneys are. The corporate defendant is under no obligation to develop non-existent “opinions” regarding the ultimate legal issues for the purpose of answering Reptile questions in a 30(b)(6) deposition. Asserting your objections in a timely written response to the 30(b)(6) notice allows you to assert control over the scope of discovery, helps to prevent the Reptile approach from being employed against your corporate representative, and allows the defense to push back against the Reptile’s wiles.

VI. Lay groundwork from the outset of the litigation to prepare for trial, and to make the most of opportunities to inform the trial court that the Reptile is lurking.

In the setting of commercial drivers and trucking cases, Reptile attorneys often attempt to argue for an increased or heightened standard of care upon the corporate defendant and its employee driver. During the last few years, a number of rulings have issued in the context of motions in limine, addressing the Reptile theory, “scare tactics,” the “conscience of the community”⁸ theory, and the “safety rules” approach. Sometimes the courts grant the motion in limine on these theories,⁹ and sometimes they do not,¹⁰ but there are at least two important lessons to be drawn regardless of how a court may have ruled in a specific case. First,

⁸ Notably, “conscience of the community” arguments “would not necessarily be improper in Georgia. See United States v. Marin-Vega, 403 Fed.Appx. 358, 362 (11th Cir. 2010) (“Prosecutorial appeals for the jury to act as the conscience of the community are not impermissible, unless calculated to inflame.”) (per curiam). What Plaintiffs may not do, however, is argue that they brought this lawsuit to preserve community safety.” Bunch v. Pacific Cycle, Inc., 2015 WL 11622952 (N.D. Ga., April 27, 2015). But “conscience of the community” arguments are “disfavored in the Sixth Circuit,” as noted in the Brooks case cited below.

⁹ For instance, in Brooks v. Caterpillar Global Mining America, LLC, 2017 WL 3401476 (W.D. Ky., August 8, 2017), the trial court granted defense motions in limine on both “send a message” arguments and Reptile Theory arguments, observing that Reptile Theory mirrors the “send a message or conscience of the community arguments which are “disfavored in the Sixth Circuit.”

¹⁰ In Turner v. Salem, 2015 WL 4083225 (W.D. N.C., July 29, 2016), the trial court took the middle road, deferring ruling on Reptile Theory arguments to trial, subject to objections made “as the need arises.”

timeliness¹¹ and specificity¹² are key. Second, even in many instances where the court defers ruling on such a motion in limine, defense counsel has taken the opportunity to inform and educate the trial judge about the Reptile attorney's business plan of intentionally attempting to provoke jury prejudice, fear, and sympathy.^{13,14}

¹¹ E.g., Regalado v. Callaghan, 3 Cal.App.5th 582 (September 16, 2016) (while the appellate court agreed with the defense's position that plaintiff's counsel inappropriately urged the jury to base its verdict on protecting the community, the untimeliness of the eventual objection to the improper closing arguments proved fatal to the issue on appeal).

¹² See, e.g., Hensley v. Methodist Healthcare Hospitals, 2015 WL 5076982 (W.D. Tenn., August 27, 2015) (while Reptile and "scare tactics" recognized as encouraging "plaintiffs to appeal to the passion, prejudice, and sentiment of the jury," the court denied the motion in limine due to lack of identification of specific evidence sought to be excluded; ruling includes admonishment that "any attempt by either party to appeal to the prejudice or sympathy of the jury will not be condoned.") See also Botey v. Green, 2017 WL 2485231 (M.D. Pa., June 8, 2017) (ruling deferred apparently due to lack of citation to specific objectionable testimony or evidence at motion in limine stage). And see Cameron v. Werner Enterprises, Inc., 2016 WL 3030181 (S.D. Mississippi, May 25, 2016) (in the single footnote to this decision, "The Court would note that many of Defendants' arguments are extremely abstract and vague and do not specify the exact piece of evidence to be excluded. The Court does its best to address these vague arguments.")

¹³ Of particular relevance to this point, see Wahlstrom v. LAZ Parking Ltd., LLC, Not Reported in N.E.3d, 2016 WL 3919503 (May 19, 2016) (order granting defense motion for new trial). The groundwork for opposing the Reptile was laid pretrial and all through the course of the trial; ultimately the defense was granted a new trial. Arguably the laying of the foundation by defense

Conclusion

The Reptile plaintiff attorney wants to convince the jury that your client is endangering the community. They will do this by getting your client to agree to an umbrella safety rule; next, they will have your client agree that they violated a specific safety rule; and, finally, they will spread the “tentacles of danger” to show that your client violates safety rules in other contexts. When responding to pleadings and discovery, look for legal conclusions and vague safety rules. Remember that the Reptile plaintiff attorney wants to make sweeping generalizations. You want to “re-prime” and tell your client’s story. You tell your client’s story by focusing on the facts and context of the underlying incident.

counsel led to the granting of their motion for new trial in this case in which the lead Reptile Don Keenan himself was the plaintiff’s lead counsel.

¹⁴ See Jackson v. Asplundh Constr. Corp., 2016 WL 5941937 (E.D. Missouri, October 13, 2016) (court deferred ruling on defense motion in limine to preclude Reptile arguments, preferring to address objections as evidence introduced during trial).