Slash Back and Speak the Defense Narrative

Do Not Let Your 30(b)(6) Deponent Get Snaked

By Laura D. Eschleman and Michael A. Gross

Defense attorneys need new rules to counteract reptile plaintiff attorneys' approach to 30(b)(6) depositions.

Plaintiffs' attorney Don C. Keenan, Esq., and David Ball, Ph.D., authored a book published in 2009, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, in which they formulate their reptile theory for plaintiffs' lawyers. The reptile theory is loosely based on the work of physician and neuroscientist Paul D. MacLean, who worked at Yale Medical School and the National Institute of Mental Health and posited a triune brain theory, which proposed that the human brain was in reality three brains in one: the reptilian complex, the limbic system, and the neocortex. *Id.* Keenan and Ball focus on the reptilian complex, the oldest portion, which governs humans' most basic instincts, which, according to their theory, governs the fight or flight reactions to stimuli.

Keenan and Ball also use the work of "marketing guru" Clotaire Rapaille, who developed testing to determine how decision making may be driven by the reptilian brain and whether it would include jury decisions. *Id.* The theory is that humans have a shared primitive instinct to avoid danger, and at the subconscious level, the primitive portion of the brain will choose safety and survival in making decisions. Keenan and Ball also focus on triggering the brain's most basic instincts to motivate jurors to return not only plaintiffs' verdicts but also higher plaintiffs' verdicts. The key to the reptile theory is to draw from the human desire to achieve safety from danger. Keenan and Ball submit that if an attorney can reach the jurors' reptilian part of their brains, the attorney can show that a defendant is a danger not only to the current plaintiff, but also to the community at large. They postulate that once jurors perceive that a defendant broke a safety rule, jurors' survival instincts awaken, and the jurors will then render a large verdict to protect the community from the dangerous defendant. They further postulate that defendants who break safety rules anger the reptile, who no longer feels helpless in protecting its community but can do

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something about it, namely awarding large plaintiffs' verdicts.

Boiled down, the reptile theory includes:

- "Reptile" or "reptile brain" is a primitive, subcortical region of brain that houses survival instincts.
- When the reptile brain senses danger it goes into survival mode to protect itself and the community.

As most attorneys who defend medical negligence cases are aware, jurors can forgive physician judgment if the judgment turns out to be thoughtful but wrong.

- Courtroom is a safety area.
- Damages enhance safety and decrease danger.
- Jurors are the guardians of community safety.

See Bill Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, For The Defense, Apr. 2014, at 14–20, 76.

The science underlying the reptile theory has been wholeheartedly debunked; however, it remains an effective strategy by which plaintiffs' lawyers secure damaging admissions from deponents, particularly ill-prepared 30(b)(6) witnesses. As for the debunking, first, a plaintiff attorney can only imply danger to jurors, rather than actually expose jurors to a truly life-threatening stimulus that would trigger the reptilian portion of their brains' survival instincts. *Id.* When the jurors are not exposed to direct danger, it has been said to be physiologically impossible to awaken the reptilian portion of the brain in the manner in which Keenan and Ball describe. *Id.* Secondly, while the reptilian portion of the brain plays "a key role in detecting danger, the [more advanced] limbic system actually processes the dangerous information and can activate the sympathetic nervous system to trigger the fight or flight survival response." *Id.*

Despite the "debunking," the reptile theory can, and has, influenced juror decision making, for reasons other than the reptilian fight or flight survival response. This will be discussed in the next section. Make no mistake: Keenan and Ball are not seekers of truth or justice. They are seekers of money. Keenan and Ball's website boasted *$8 billion* in reptile verdicts and settlements as of May 2018, with $38 million reported in one week that month. The Edge Verdicts & Settlements, http://www.reptileverdicts.com. Prudent defense attorneys must understand the reptile theory and change the way that they prepare their 30(b)(6) deponent witnesses.

How Is the Reptile Theory Used?

Lawsuits involving medical malpractice, long-term care, and assisted living facilities are rife for the use of the reptile theory. As Keenan and Ball state with respect to medical negligence cases, "*[r]emember that errors and mistakes don't motivate verdicts (especially med mal verdicts); patient-safety-rule violations do.*" Keenan and Ball, *Reptile: The 2009 Manual of the Plaintiff's Revolution* 243 (2009) (emphasis supplied). As most attorneys who defend medical negligence cases are aware, jurors can forgive physician judgment if the judgment turns out to be thoughtful but wrong. The reptile theory seeks to erode physician judgment and the standard of care and instead insert rigid absolute safety rules.

With respect to the 30(b)(6) designee for a hospital or nursing home defendant, reptile plaintiff attorneys attempt in depositions to (1) establish that a safety rule exists that protects not only the plaintiff but also the jurors; (2) prompt the designee to admit that an employee, agent, or the entity itself violated the rule, putting both a plaintiff and the jurors in danger; and (3) admit that people and companies should be responsible for their actions, allowing the jury to keep its community safe by punishing the dangerous defendant.

The reptile plaintiffs' attorney will begin with seemingly simple safety rules, then will narrow the questions, and finally will apply the questions to the facts of the particular case. With respect to 30(b)(6) depositions in medical negligence actions, Keenan and Ball provide a guideline for the safety rules:

> For hospital cases, an important rule source is the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). They do not merely provide rules; they provide rules about how the rules (policies and procedures) must be written. JCAHO requires that every hospital policy and procedure be described specifically and clearly, that examples be provided, and that there is repetitive in-service training to ensure that hospital personnel know them.
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> There are also medical staff bylaws, policies, and procedures; general hospital policies and procedures; and policies and procedures governing every medical treatment and procedure in the hospital. Every one constitutes a patient-safety rule.

Keenan & Ball, *supra*, at 243–44.

The way that plaintiffs' lawyers make the reptile theory effective is first to ask a 30(b)(6) deponent very broad and seemingly common sense-type questions about patient safety. Then once the deponent agrees, for example, that "hospitals should not needlessly endanger patients," and "hospitals have rules in place for patient safety," and "if an employee violates a patient safety rule, that can cause harm to patients," they have the 30(b)(6) deponent cornered when he or she later is trapped by the violation of the patient safety rule in the actual case. The reptile theory seeks to avoid the application of specific facts to specific cases and the applicable standard of care. It seeks to apply absolutes in the form of safety rules. Once a deponent is trapped by the absolutes, it is actually the deponent who goes into survival mode, not the jury. Kanasky, *supra*. Once the deponent goes into fight or flight mode, he or she either fights and becomes argumentative, or defensive, which we know is ineffective, or "flees" and becomes submissive and agrees to everything that the reptile plaintiffs' attorney needs from the deponent. Worse yet the deponent may try to go back and clarify previous answers or explain why the broad safety rule to which he or she just agreed does not apply in the present case. The contradictory and hypocritical testimony will quickly lead to an often incurable dislike and distrust of the defense deponent by the jury. *Id.* These strategies work because reptile plaintiff attorneys have stopped focusing on ju-

ror sympathy for the severity of a plaintiff's injuries and have begun focusing on "bad" defendant conduct.

A reptile plaintiff attorney will begin with easy-to-understand safety rules that will make the unprepared 30(b)(6) deponent agree with ease. "Of course, a hospital should not needlessly endanger its patients!" the deponent will think. "A jury would think badly of me as the representative of the hospital if I did not agree with that!" A reptile plaintiffs' attorney wants the rule to be an absolute, with no room for an answer such as "it depends." There are, of course, real safety rules that meet this standard: "It is never okay for a surgeon to operate while under the influence of alcohol or drugs when he or she is so inebriated that he or she cannot cut in a straight line." But cases with these extremes usually do not get to corporate depositions because good defense lawyers know that there will be an early admission of liability or settlement. When a 30(b)(6) deposition is taken in a medical liability or long-term care case, reptile plaintiffs' attorneys will have to work to establish the absolute safety rules.

The reptile theory works not because it awakens the reptilian brain of the jurors but because a defense witness becomes trapped by agreeing to a safety rule, which then creates a clear contradiction between the rule and the defendant's conduct in the actual case. *Id.* This can be a devastating contradiction because, as all seasoned trial attorneys know, trials are entirely about perception. Once a defendant's witness is on the stand and it appears that the defendant broke a safety rule with respect to the plaintiff, that behavioral inconsistency has a powerful effect on jurors' decision making. On the other hand, behavior consistency is highly correlated with honesty and truthfulness. *Id.* A reptile plaintiffs' attorney therefore seeks to create and fuel the inconsistency perception. *Id.*

The inconsistency looks like this:

- The deponent instinctually agrees to the safety or danger rule questions because they support a general belief that has been highly reinforced in the health care arena: that patient safety is always paramount and danger to patients should always be avoided.
- The deponent continues to agree to additional safety or danger rule questions that eventually link the safety or danger to specific conduct.
- The deponent unknowingly digs a hole by dealing with absolutes and safety rules rather than answering with specific circumstances or physician, hospital, or nursing home judgment and the application of the standard of care.
- The reptile plaintiffs' attorney then presents the facts of the actual case to the defendant 30(b)(6) witness, causing the deponent to become uncomfortable by realizing the facts of the actual case do not meet the previous agreed-upon absolute safety or danger rules.
- The reptile plaintiffs' attorney then repeats to the deponent the previous absolute safety /or danger rules to which the deponent just repeatedly agreed under oath and shows that they have been violated and harm was done as a result.
- The deponent either regrettably admits to negligence or causing harm (flight) or becomes argumentative (fight) or tries to explain previous answers (inconsistency, hypocrisy).
- None of these situations are positive for the defense!

Reptile Plaintiff Attorneys' Absolute Safety and Danger Rules

As mentioned, the first question set will establish some general, absolute safety and danger rules and achieve a deponent's agreement to them.

- As a hospital [or nursing home or assisted living facility], safety is your top priority, correct?
- You have an obligation to ensure safety, correct?
- You have a duty to put a patient's [or resident's] safety first, correct?
- It would be wrong to endanger someone needlessly, right?
- You would agree that exposing a patient [or a resident] to unnecessary risk is dangerous, right?
- A nursing home should not needlessly endanger its residents, true?
- A nursing home is never permitted to remove a safety measure, correct?

These questions reinforce the inherent patient safety rules that a deponent has heard over the years in the industry and forces the deponent to continue to answer "yes," which then sets him or her up to answer a reptile plaintiffs' attorney's specific "linking" questions with a "yes."

Reptile Plaintiffs' Attorneys' Linking Questions

The second stage, as mentioned, involves linking safety or danger to the conduct at issue in the particular case through questioning. A reptile plaintiffs' attorney uses the previously agreed to answers to link to subsequent questions involving specific conduct, with questions such as the following:

- To ensure patient safety, as a hospital, you must follow the Joint Commission's standards for patient safety?
- Another safety rule requires inspection of diagnostic equipment?
- Another safety rule requires inspection of the resident's living areas?
- A nursing home must have enough staff to keep residents safe and to prevent unnecessary harm?
- A nursing home must have enough trained staff to transfer residents safely to prevent unnecessary harm?
- To ensure patient safety, you are required to put physicians through a credentialing process to ensure that they meet the standard of your hospital to have privileges to treat patients at your hospital?
- You would agree that if someone violated those safety rules and caused an injury to the patient [or resident], then they should be held responsible for their actions, correct?
- Hospitals keep records on patients to ensure that the patients are not put in danger, right?
- You would agree that if a physician does not include that a patient is on a specific medication, that patient is put in danger, correct?
- You would agree that if a physician did not meet the credentialing requirements to obtain privileges to practice medicine at your hospital, that would put patients in danger, would it not?
- Credentialing should be thorough. Otherwise patients could be in danger, right?
- A hospital that puts patients in danger should be held responsible for the harms and injuries it caused, right?

Reptile Plaintiffs' Lawyers Show Inconsistency and Force Admission

Finally, as mentioned, a reptile plaintiffs' attorney elicits answers from a deponent that demonstrate behavioral inconsistency, with questions such as these:

- Your hospital did not follow that Joint Commission rule, did it?
- That was a safety rule violation, wasn't it?
- And that violation exposed my client to unnecessary risk and harm, correct?
- And had your hospital followed that rule, it would have prevented injury to my client, correct?
- By failing to follow that rule, there was a deviation from the standard of care, wasn't there?
- Your assisted living facility did not follow its policies and procedures with respect to my client, did it?
- That was a safety rule violation, wasn't it?
- And that violation exposed my client to unnecessary risk and harm, correct?
- And had your facility followed that rule, it would have prevented injury to my client, correct?
- Your company should be held responsible for violating its own policies and procedures and injuring my client, agree?

At this point, the reptile plaintiffs' attorney has repeatedly obtained admissions from the deponent regarding rules that he or she supports but to which he or she does not always adhere, causing shame, embarrassment, and the fight or flight reaction.

How Can a 30(b)(6) Deponent Slash Back and Speak the Defense Narrative?

It is no longer acceptable in a post-reptile world to advise defense deponents to keep answers as short as possible, answering "yes," "no," "I don't know," or "I don't recall." It is also ill advised to counsel your deponent not to volunteer information beyond the question that has been asked. Instead we now need to include all information that speaks the entire truth and pushes the defense narrative forward. We must provide specialized deposition preparation to educate our clients how to pivot to speak the defense narrative. They must speak the whole truth. And we must help clients understand how to spot the broad and absolute reptile theory theme.

We need new rules. The most basic rule to slash back at the reptile theory is to never say "yes" alone as the entire answer. The deponent must answer the question directly first but then must pivot with a response that put the answer in context. The pivot is not a diversion but rather a truthful and complete way to show the reasoning behind the direct answer. Reptile theory questions are designed to allow the reptile plaintiffs' attorney to testify, with a 30(b)(6) deponent answering "yes" to all of the questions that push the case forward for the plaintiff. The deponent must always complete the response with a pivot that puts the "Yes" or "It depends" or "Not Necessarily" in context. After all, the oath required in every deposition requires the deponent to swear to tell the whole truth and a single "Yes" answer is not the whole truth.

Consider what the safety rule questions really mean. A witness unprepared for the reptile theory will always answer "yes" to the question "safety is a top priority, correct?" It is hard for anyone to say "no" to that question. But think about what the question really means. When you allow your children to go swimming, you put them at risk of drowning. If absolute safety was always the top priority, you would never let them swim, ride water rides, or be around water. In short, the answer to whether you would allow your child to be in a potentially dangerous situation is "yes but," "it depends because," or "not always because" or "not necessarily because." Then you would explain, "I watch my child constantly at the pool, and he [or she] has been in swimming lessons since age two," or whatever the actual truth is. You would never respond that you failed the absolute safety priority by letting your child go swimming and leave it at that.

In medical negligence cases, the jury must determine if a defendant acted within the standard of care, or as a reasonably prudent physician considering surrounding facts and circumstances would have acted. A reptile plaintiffs' attorney seeks to replace the sometimes-undefined reasonableness standard for a clear-cut absolute safety rule. Any time a safety rule can be undercut, it should be. The key information for a 30(b)(6) deponent to know is the defense narrative so that he or she can push it forward by speaking the complete truth in that narrative at all times.

Finally, advise your deponent to refrain from answering damages questions. A reptile plaintiffs' attorney will ask whether a person who causes damage by refusing to obey a safety rule should "pay" for that damage. It is hard for a 30(b)(6) deponent to say no to that question, so he or she should refrain from saying it. Instead, a deponent should let a reptile plaintiffs' lawyer know that the question sounds like one that should be answered by lawyers.

Sample Questions and Answers for the Fully Prepared 30(b)(6) Deponent

Below are some the answers to questions that a fully prepared 30(b)(6) deponent could give to throw a reptile plaintiffs' lawyer's game plan off balance.

Q: Safety is always a top priority, correct?

A: It depends because there is risk in all activities and every risk is balanced against the potential benefit and in this case, we did what was reasonable in light of the inherent risk.

Q: A prudent physician does not needlessly endanger anyone, correct?

A: No, but there is always a risk with surgery even with reasonable medical care and unfortunately this patient experienced one of the known complications of this type of surgery.

Q: Your company must always protect its customers from harm, true?

A: Yes, but we did what was reasonable under the circumstances in this case by providing routine security in our parking lots based on what we knew at the time.

Q: Your hospital has adopted policies to limit medical residents and other hospital staff to avoid mistakes that can be made by acute and chronically fatigued medical residents.

A: Yes, but in this case patient care outweighed the benefit of the resident leaving the patient alone.

Q: You have a responsibility to protect customers form unsafe products, true?

A: Yes, and in this case we submitted the product for testing annually and it passed all the independent lab tests that were established at the time.

Q: You should never needlessly endanger the well-being of customers, right?

A: No, and in this case, we did what was reasonable under the circumstances by putting out warning signs that were plainly visible.

Conclusion

The defense deposition has become more and more important because fewer cases go to trial. And even if a case does go to trial, the videotaped deposition becomes the focus of the plaintiff's case. It no longer makes sense to "save [whatever juicy defense information] for trial." Full, complete and truthful answers during the deposition is the only time to present the defense of the case.

In the post-reptilian world, we can no longer instruct our witnesses to answer "yes," "no," "I don't know," or "I don't recall" without pivoting to put the answer in context with the whole truth. We also must not counsel our clients to refrain from volunteering information. Through specialized deposition preparation, our clients will learn to reject the isolated safety rule and pivot to the actual standard, which is doing what is reasonable under the circumstances. By understanding the reptile theory and what safety rule questions actually mean, our 30(b)(6) witnesses can slash back against the reptile plaintiffs' attorney and speak the defense narrative, which is the whole truth and not a fabricated "safety" rule. FD