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CLM 2016 National Construction Claims Conference
September 28-30, 2016
San Diego, CA

From the Reptile to the Primate: Beating the Reptile in Litigation Management

I. What is the Reptile?

The reptile is a manner of litigating cases that focus on the Defendant's conduct.

The reptile is based on a book written by David Ball and Don Keenan. The book is based upon jury research that showed that jurors are not necessarily driven by logic and emotion but rather driven by self-preservation. That is where the term reptile comes from, the reptilian brain is driven by a survival function and if a Plaintiff's attorney can appeal to the reptile brain rather than logic they can achieve higher verdicts.

A. **The Reptile protects herself and her community:** Reptile counsel does not focus on damages but rather on Defendant's conduct. As stated in the book: ". . . our primary goal in trial: To show the immediate danger of the kind of thing the Defendant did – and how fair compensation can diminish the danger within the community." A reptile convinces a jury that if they award large damages, they are in essence protecting their own families and communities.

B. **Hijacking of the standard of care**: The reptile achieves this goal by ignoring the standard of care and throughout the case setting a higher standard of care than that which exists under the law. The Reptile argues that counsel should use the umbrella rule to trump the standard of care that would ordinarily govern Defendant's conduct. "The professional must select the safest way. If she selects the second safest then she is not prudent because she is allowing unnecessary danger. Regardless of the legal standard of choosing among acceptable alternatives the reptile must adopt the "safest choice available." Pg. 63 of Reptile.

II. How do they do it?

A. **The reptile asks three questions:** 1) How likely is it that the act or omission would hurt someone? 2) How much harm could it have caused? 3) How much harm could

it cause in other types of situations? "The valid measure is the maximum harm the act could have caused. How much harm could it have caused in other situations?"

B. They set a different standard of care: "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 the same result the reptile allows – demands – only one level of care: the safest. Justice is an excuse. A feel good rationale. For people to protect themselves and their families." Pg. 44

C. Safety Rule Plus Danger = Reptile

The reptile focuses on a number of rules in setting up their case. Those rules are the following: 1) Safety is always a top priority 2) Danger is never appropriate. 3) Protection is always a top priority. 4) Reducing risk is always a top priority. 5) Sooner is always better. 6) More is always better.

All risk can result in catastrophic results. Defendants must eliminate all risk – and follow safety rules. The community suffers, because the danger is imminent. If the community is at risk – the juror and family are at risk. Damages are irrelevant.

1. Example:

Reptiles Use the Deposition Process to set the Safety Rules. The following was taken from the deposition of an actual case. The facts were that a gang member shot a girl at an apartment complex in retaliation for beating up his girlfriend. Liability was tenuous.

2. Structure of the questions:

Question 1:	Factual/Easy = Agree (general safety rule question)
Question 2:	Factual/Easy = Agree (general safety rule question)
Question 3:	Factual/Easy = Agree (general danger rule question)
Question 4:	Factual/Easy = Agree (general danger rule question)
Question 5:	Factual/Easy = Agree (specific safety rule question)
Question 6:	Factual/Easy = Agree (specific danger rule question)
Question 7:	**"Reptile" Question (Safety Rule/Hypothetical)**
Question 8:	Case Specific Fact
Question 9:	Case Specific Fact
Question 10:	**Case Specific Negligence/Causation ($$$)**

3. Specific question applied to question structure:

Question 1:	You would agree with me that as a property manager, safety of your tenants is always a top priority? (SAFETY IS ALWAYS TOP PRIORITY)
Question 2:	You would agree that a property manager should never needlessly endanger their tenants? (DANGER IS NEVER APPROPRIATE)

Question 3: You would agree that you always do everything you can to ensure the safety of your tenants and your community? (MORE IS BETTER)

Question 4: You would agree that as part of your effort to protect your community you try to ensure that you do everything you can to provide security?

Question 5: You would agree that the provision of onsite security officers is one way to ensure your community is safe?

Question 6: You would agree that as a property manager you have a responsibility to keep gangs out of your community?

Question 7: You would agree that provision of security in your community would have helped keep gang violence out of your community?

Question 8: Case Specific Fact. But you did not provide security, did you?

Question 9: Case Specific Fact. You did in fact know of gang activity in your community?

Question 10: Case Specific Negligence/Causation ($$$) You would agree that had you provided security your community would have been protected against gang violence?

III. **What kind of construction claims lend themselves to use of the reptile?**

Any type of claims that involve rules. Those rules can be most anything such as building code standards, and jobsite safety standards. In 2012, 403 of the top 100 verdict nationwide were from workplace safety violations and many of them construction related.

A. Building Code Violations cases resulting in bodily injury: *Von Normann vs Newport Channel Inn:*

On November 16, 2008, Plaintiff James Von Normann, a 25-year-old salesman, was found unconscious in the parking lot of the Newport Channel Inn in Newport Beach, California. Plaintiff was transported to Western Medical Center in Santa Ana with a skull fracture and severe traumatic brain injuries. There, hospital physicians ordered a blood draw which revealed Plaintiff's blood alcohol content to be .267, more than three times the legal limit for driving while intoxicated.

Although Plaintiff had checked out of the Newport Channel Inn before the fall, he remained on the premises for reasons unknown. When Plaintiff woke up from the coma three weeks later, he had no memory of what had happened. There were no witnesses to how Plaintiff ended up in the parking lot. Plaintiff's counsel had to rely on circumstantial evidence to prove his case against Defendant, Newport Channel Inn.

Verdict: ***$38,628,127*** *in total damages, which was reduced to $32,833,908 to account for Plaintiff's 15% comparative fault.*

B. Jobsite Safety: *Bayer v. Garbe Iron Works Inc., Cook Co., Ill., Cir. Ct.*,

On June 20, 2007, Plaintiff Ronald Bayer, 36, an ironworker, was working at a warehouse in DeKalb. His employer, Area Erectors, Inc., had been hired by general

contractor Panduit Corp. to erect the structural steel as part of an addition to the warehouse. Bayer was on top of a beam when he tripped on a stud. Bayer, who wasn't using his safety harness, fell head first approximately 15 feet into a concrete wall below. Bayer's neck snapped upon impact, leaving him paralyzed from the chest down.

Bayer sued Panduit Corp.; Tylk Gustafson Reckers, the architectural engineer; and Garbe Iron Works, Inc., the fabricator that installed the studs on the beam. The Defendants then sued Area Erectors, Bayer's employer, as a third-party Defendant.

Plaintiff's counsel alleged that the presence of studs in the beams was negligent, as they constituted a tripping hazard and were in violation of Occupational Safety and Health Administration standards. Plaintiff's counsel also maintained that the Defendant failed to provide stanchions and cables, which were required for the job site according to the Defendant's site-specific safety plan for the project.

The Defendants claimed to have provided Bayer and the rest of the workers that day a basket to hook their safety harnesses, as opposed to safety cables. The defense contended that Bayer was solely at fault, as he untied himself from the basket and then climbed on the beam, violating the rules that required workers to hook their safety harness to the elevated basket, and to be tied off at all times at any height above 6 feet. According to the defense, Bayer had regularly complied with the rules, allegedly over 100 times, but on this occasion decided not to.

Jury verdict: $80,000,000

C. Jobsite Safety: *Roberts v. Bick's Construction Inc., Duval Co., Texas, Dist.*

Warning signs for construction zone not in place: On June 1, 2011, Plaintiff James Roberts, 68, was driving on a section of road being repaved by Fort Worth general contractor Bick's Construction Inc. when a westbound car driven by Joseph Drennan crossed into his lane and struck him. Roberts sustained spinal cord injury.

Roberts claimed that Drennan lost control and left his lane attempting to avoid a collision with a vehicle that had suddenly come to a stop ahead of him due to traffic buildup in the construction zone. He claimed that the warning signs mandated by Bick's state contract were not in place around the construction zone, and this lack of warning contributed to the collision.

Verdict: The jury found for the Plaintiff and found Bick's 70 percent liable and Drennan 30 percent liable. The Plaintiffs was awarded $33,313,573.96.

D. Mold cases:

Mold cases seem to fit the bill because they usually involved claims of defective construction resulting in water intrusion. If the mold makes a claimant ill, it is easy to spread the tentacles of danger.

IV. How do you Recognize and Manage a Reptile Claim?

File handlers and defense counsel need to learn to recognize a reptile claim early in the litigation or claim process to ensure that the case is set up properly. If you wait until trial to deal with the issues, that is generally too late.

A. Claim Stage: Often file handlers can recognize a reptile case in the claim stages before litigation is filed. Some of the red flags is terminology of demand letters, and terminology of the allegations of the complaint. For example, reptile counsel use the same terms over and over again such as: "needlessly endanger, always, never, Safety, Community, Public, Unnecessary Risk etc."

1. **Research Reptilian Counsel:** There are ways to recognize reptile counsel because they market themselves in a very specific manner. For example this can be seen on the front page of a website for well-known reptile counsel in California: "Our law firm's goal is to make communities safer. We do this by holding those responsible who violate community safety standards causing needless harm."

2. **Evaluate whether or not it is the type of claim that lends itself to the Reptile:** Is there a safety rule that was violated? And was there a dangerous condition they claim as a result that caused harm or was capable of causing harm?

3. **Educate file handlers on the reptile and make sure you hire defense counsel who understands and knows how to respond to reptile type claims.**

B. Litigation Stage:

1. **Deposition Preparation:** You cannot prepare your witnesses in the same way you train your witnesses typically. You must teach them to be prepared for the general safety questions and danger questions. Most lawyers work with witnesses to be prepared to answer the liability questions but if you wait until then your witnesses is already trapped.

   For example: In response to general safety rule questions, do not admit open ended safety questions – force counsel to be specific about facts of this accident. Force counsel to define "safety." Do not permit absolute agreement. Typically answers would include: 1) It depends on the circumstances 2) Every situation is different 3) No, that is not always true. 4) I don't understand what you mean by needlessly endanger, can you be more specific? 5) That is a broad question, can you please be more specific?

2. **General Safety Rule Questions:** As a general contractor, subcontractor, etc. (insert any party) safety of your (insert person: i.e., employees, other contractor's employees, and anyone who might come on site) during construction is always a top priority?

3. **Answers:**

    a. Option 1: No absolute agreement. Safety is an important factor, yes.

    b. Option 2: Request More Specificity: Could you be more specific? Safety in what regard?

4. **General Danger Rule Questions:**

    a. It would be wrong to needlessly endanger a (tenant, guest, subcontractor, visitor, etc.), right?

    b. You would agree that exposing a (tenant, guest, homeowner, subcontractor etc.) to an unnecessary risk is dangerous, correct?

    c. You always have a duty to decrease risk/danger to your (insert term subcontractor, guest, visitor, etc.) right?

5. **Answers:**

    a. I don't understand **what you mean** by "needlessly endanger."

    b. That is a **confusing** question; **can you define** "needlessly endanger?"

    c. I don't understand what you mean by "unnecessary risk;" can you please be **more specific**?

    d. That is a very **broad** question, what **specific circumstances** are you referring to?

6. **Voir Dire, Opening, and Closing:**

    PLAINTIFFS APPROACH

    1. *Priming:* Plaintiffs are adept at using priming and the primacy effect. They use the same terms over and over again making those concepts easier to accept by the end of the trial. They reinforce those themes starting in voir dire, going through opening, in testimony and in closing. The primacy effect means that studies show that jurors value early information more than later information.

E.g. Describe a person:

"Intelligent, industrious, impulsive, critical, stubborn, envious"

OR

"Envious, stubborn, critical, impulsive, industrious, intelligent".

Same person but your opinion is different. You like the first but not the second, because of the ordering of words.

2. *Mini Opening prior to Voir Dire:* In some states Plaintiffs also effectively use what is called a mini opening which is a short 3-5 minute description of the case given prior to voir dire. It is favored by the judiciary in California. In that mini opening the Plaintiff says he/she is going to ask for a verdict of (insert outrageous number). S/he then voir dires the panel to see if they can accept that number. They couch their inquiry with questions like, if the evidence supports a verdict of $40 million could you give that number? If a juror answers no they try to eliminate that juror for cause, and if that does not work, they exercise a peremptory, thereby assuring that the jury empaneled is a jury that does not think it is outrageous to award $40 million dollars in a case wherein you know it is not supported by the law or the evidence.

DEFEDANT'S APPROACH:

In response, Defendants need to either object to a mini opening or ask that the court not permit Plaintiff to mention a number during their mini opening.

Vis-a-vis priming, Defendants must also do their own priming. Refer to a juror's commitment to fairness, relevant evidence. Make jurors commit to not being frightened or reacting to danger. In opening, continue those voir dire themes using the primacy effect and prime the jury with your own key terms.

In closing arguments, refer to fairness and emotion jury instructions – this is the law. Challenge jury to use their reason, fairness, logic, not their base instincts. Don't fall for the cynical attempt to get you to ignore the law and your duty.

3. **Motions in Limine in Contested Liability Cases:**

a. Motion in Limine to Preclude a Mini Opening Statement: Explain to the court what is expected so you prevent this type of priming and choice of a jury that is immune to the idea of outrageous numbers.

b. **Reptile Motion in Limine: (both contested and stipulated liability cases).** File Motion in Limine to Preclude any Reference to Community or Public Safety Rules. There are plenty of good samples Floating around.

4. **Consider to stipulating to Liability:** If there is a case where all the elements are there for a possible big award, i.e. skilled reptile counsel, bad facts, bad damages, etc. then defense counsel and insurers need to evaluate the possibility of stipulating to liability. Stipulating to liability coupled with a motion in limine to keep out any evidence of liability cuts off counsel's ability to most effectively use the reptile tactics.

But beware because counsel will continue to try to get liability issues into evidence. "Argue to jury that liability still comes in because of prejudicial inferences. That information is always linked to Reptilian safety concerns." Reptile. Pg. 236

However, if there is a stipulation to liability there are different reptile tactics that come into play. "The Reptile does not relax just because someone says "I did it!" The Reptile has several other non-negotiable requirements before she goes back to sleep." Reptile. pg. 233

5. **MIL to preclude any argument or evidence on Defendant's delay in stipulating to liability:** Expect a reptile to argue to a jury that Defendant did not accept liability until the very last minute. The late stipulation is a legal maneuver because defense claims they are accepting responsibility. That hypocrisy and the reptile hates hypocrisy. Also expect them to argue that Litigation stress increases damages. "I admit I did it but you will have to haul me into court to get me to do anything about it." Reptile. pg 235.

Depending upon the facts of your case, there are a multitude of other potential motions in limine that can be brought based on reptile type tactics which is why it is crucial to learn these tricks and to be prepared to address them.