Rein in the "Reptile" at Trial

Strategies for More Effective Motions In Limine

By Elaine M. Stoll and Brian J. Pokrywka

None of the building blocks of the "reptile" strategy are exclusive to its framework. Robust authorities limit or exclude many evidence and argument categories on which it relies.

"Reptile" has become shorthand for a trial strategy used by plaintiffs' counsel for framing issues, evidence, and arguments to focus jurors on the danger that a defendant's violation of a safety rule poses not merely to the random plaintiff, but also to the community at large and to jurors themselves. The goal of this "community-safety campaign" is to trigger an emotional, self-interested reaction whereby, even in a small-damages case, jurors reach a plaintiff's "verdict on a scale that protects the public." David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009).

The building blocks of a "reptile" strategy in a commercial vehicle case are consistent and familiar. At depositions of a defendant driver and a company's representative or safety director, plaintiff's counsel asks whether a driver or a company is ever allowed "needlessly to endanger the public," seeks agreement to a series of "safety rules," and tries to establish that a violation of any safety rule is intentional, endangers others, and carries a foreseeable risk of likely injury. Plaintiff's counsel also seeks to establish in the defendants' depositions that what happened to the plaintiff just as easily could have happened to any member of the community. By deposition questions to the defendants or by the opinion of a retained expert, plaintiff's counsel presents the driver as a "professional driver" with more training required than the average driver, who operates a "more dangerous" vehicle that can "cause more harm," and who therefore must be "more careful." A combination of questions to the defendants and opinions of the plaintiff's expert are designed to suggest a "safest possible" standard of care, emphasizing "safer" or "safest" alternatives to the defendant driver's actions. The plaintiff's expert identifies a long list of "violations" of actual and purported rules and opines that one or more defendants acted "negligently," "recklessly," or with "gross negligence" or "conscious indifference." At trial, plaintiff's counsel suggests that trial is nec-

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essary only because the defendants have failed to "take responsibility." Appealing to jurors as the "voice" of the community, plaintiff's counsel asks them to "speak" or "announce" with their verdict what is not acceptable or safe.

Tremendous opportunity exists in commercial vehicle cases to limit much of the evidence and argument that serve as a foundation for plaintiffs' "reptile" trial strategy. None of the building blocks of the strategy is exclusively "reptile," and robust authority outside that framework limits or excludes many categories of evidence and argument. Courts have also recently recognized "reptile" themes and arguments as improper appeals to jurors' passions and prejudices and as requests to render a verdict against the defendant on an improper basis of fear. *E.g., Brooks v. Caterpillar Global Mining Am.*, No. 4:14-cv-00022-JHM, 2017 U.S. Dist. Lexis 125095, at *24–25 (W.D. Ky. Aug. 8, 2017); *Biglow v. Eidenberg*, No. 112,701, 2016 Kan. App. Unpub. Lexis 285, at *39–40 (Kan. Ct. App. Apr. 15, 2016) (per curiam); *Hopper v. Ruta*, No. 12cv1767, 2013 Colo. Dist. Lexis 249, at *1 (Colo. Dist. Ct. Oct. 29, 2013); *see also Turner v. Salem*, No. 3:14-cv-00289-DCK, 2016 U.S. Dist. Lexis 1022389, at *7 (W.D.N.C. July 29, 2016) (discouraging "reptile theory" arguments but reserving ruling for specific objections at trial). Still, these opportunities often get overlooked. Our aim in this article is to equip defense counsel with strategies and exemplary authority for more effective motions *in limine*.

Tremendous opportunity exists in commercial vehicle cases to limit much of the evidence and argument that serve as a foundation for plaintiffs' "reptile" trial strategy.

Learn from Recent "Reptile" Guidance from the Courts

Recent decisions denying defense motions in limine to exclude "reptile" evidence and arguments provide some basic guidance for researching and writing more effective challenges.

One key takeaway is that failing to identify specific evidence, questions, or arguments for exclusion, or failing to articulate specific evidentiary grounds showing inadmissibility, will be fatal to any effort to obtain a pretrial order precluding it at trial. "Reptile" is not a category of evidence but a strategy by plaintiffs' counsel for eliciting, assembling, and arguing evidence. The mere fact that a type of evidence or argument can be used as part of a "reptile" theme supplies no evidentiary grounds for a court to exclude it. Courts consistently deny "stock" motions to exclude an umbrella "reptile" category—no matter how well defense counsel explain "reptile" strategy to the court. Such motions, focused on the strategy itself, fail for two reasons: they do not point to the case-specific evidence or arguments that the defendants wish to exclude, and they omit legal authority establishing inadmissibility. Instead, craft a case-specific, detailed motion that meets the standard for a pretrial evidentiary order.

Identify Specific Evidence or Argument for Exclusion

A federal district court in Tennessee recently recognized that the "'Reptile Theory'… appears to be in use by the plaintiffs' bar in some states as a way of showing the jury that the defendants' conduct represents a danger to the survival of the jurors and their families." *Hensley v. Methodist Healthcare Memphis Hosps.*, No. 2:13-cv-02436-STA-cgc, 2015 U.S. Dist. Lexis 113565, at *13–14 (W.D. Tenn. Aug. 27, 2015). The court further described it as an "appeal to the passion, prejudice, and sentiment of the jury." *Id.* But despite skepticism of "reptile" tactics, the court denied the defendants' motion in limine categorically requesting exclusion of techniques and "scare tactics" consistent with "Reptile Theory," because "Defendants have again not identified the specific evidence that is sought to be excluded." *Id.* at *14.

The *Hensley* decision highlights a problem endemic to defense motions targeting "reptile" evidence and argument: many "seek a broad prospective order untethered to any specific statements the other side will make." *Aidini v. Costco Wholesale Corp.*, No. 2:15-cv-00505-APG-GWF, 2017 U.S. Dist. Lexis 55863, at *3 (D. Nev. Apr. 12, 2017) (citing several cases denying broad and non-specific "reptile" motions for this reason). *See also Phillips v. Dull*, No. 2:13-cv-00384-PMW, 2017 U.S. Dist. Lexis 90020, at *6–8 (D. Utah June 12, 2017) (denying motion without prejudice because "Defendants have not shown with sufficient particularity what Plaintiff's counsel should be precluded from saying at trial"); *K.C. ex rel. Calaway v. Schucker*, No. 2:02-cv-02715-STA-cgc, 2013 U.S. Dist. Lexis 119161, at *16–17 (W.D. Tenn. Aug. 22, 2013) (same). As a Georgia district court explained, "[t]o the extent that Defendants seek to preclude Plaintiffs from engaging in the 'Reptile' tactics, this request is unnecessary and overly broad." *Bunch v. Pac. Cycle, Inc.*, No. 4:13-cv-0036-HLM, 2015 U.S. Dist. Lexis 183890, at *6 (N.D. Ga. Apr. 27, 2015).

Most jurisdictions have a high standard for an order excluding evidence before trial, requiring that the evidence be "inadmissible on all potential grounds." *E.g., Wright ex rel. Wright v. Watkins & Shepard Trucking, Inc.*, 2:11-cv-001575-LRH-GWF, 2016 U.S. Dist. Lexis 6530, at *2 (D. Nev. Jan 19, 2016) (granting defense motion to exclude "golden rule" arguments). Pinpointing particular questions, evidence, or argument as inadmissible is the first step necessary to satisfy this standard.

Identify Specific Legal Grounds for Exclusion

The next prerequisite is citation to specific legal authority supporting exclusion of the particular evidence or supporting preclusion of the particular line of questioning or argument identified. In a separate section below, we highlight authority for limiting or barring a number of the categories of evidence and argument that are common components of a "reptile" strategy. Undertaking evidence- or argument-specific research is essential in order to identify the best authority in a particular

jurisdiction to support the proposed evidentiary ruling.

If Possible, Show that the Plaintiff Intends to Offer the Improper Evidence or Argument

In some cases, courts have denied motions in limine when nothing before the court indicated that the plaintiff intended to offer the evidence or argument that a defendant sought to exclude. *E.g., Cameron v. Werner Enters., Inc.*, No. 2:13-cv-00243-KS-JCG, 2016 U.S. Dist. Lexis 68711, at *14 (S.D. Miss. May 25, 2016). This serves as a good reminder to provide the court with specific examples of questions, testimony, opinions, or argument from the discovery record that the plaintiff should be precluded from offering at trial.

It can be difficult to find something to cite to show a plaintiff's intent to offer a particular argument to the jury, because the discovery record will not include a preview of plaintiff's counsel's opening or closing arguments. In many cases, transcripts or video of plaintiff's counsel's opening and closing arguments in other cases may be available and would be proper and persuasive fodder for an argument that the same argument should be precluded in the present case. Sometimes, a plaintiff's opposition to a summary judgment or similar filing will be embellished to the point of hinting at a particular argument that the plaintiff intends to present to the jury, or certain portions of an expert report may contain statements that would be improper, whether from an expert or counsel.

Invoke Law Clearly Prohibiting Specific Evidence or Arguments

As in any other motion in limine, specific legal grounds for excluding particular evidence or precluding particular questions or arguments must support a motion to exclude or preclude a particular component of a "reptile" strategy. The following lines of authority support excluding or limiting particular evidence or arguments commonly offered as part of a "reptile" strategy. These are just examples of pretrial opportunities to limit the foundation for a plaintiff's "reptile" theme. Conduct jurisdiction-specific research to identify the best authority for the bar or limitation that you propose.

"Needless Endangerment" Questions and Questions Suggesting Danger to Hypothetical Non-Plaintiffs Are Improper on Multiple Grounds

Recent authority for precluding questions suggesting that certain conduct "needlessly endangers" the public includes *Pracht v. Saga Freight Logistics, LLC*, No. 3:13-cv-00529-RJC-DCK, 2015 U.S. Dist. Lexis 149775, at *4 (W.D.N.C. Oct. 30, 2015); *Biglow*, 2016 Kan. App. Unpub. Lexis 285, at *39; and *Hopper*, 2013 Colo. Dist. Lexis 249, at *1. In *Pracht*, the district court granted a motion by a motor carrier and its driver to bar the plaintiff's counsel from questioning defense witnesses in a way that suggested that jurors put themselves in the plaintiff's position or implied that the defendants were a danger to the public or a threat to the community. *Id.*; Defs.' Omnibus Mot. in Limine 3–4, *Pracht v. Saga Freight Logistics, LLC*, No. 3:13-cv-00529-RJC-DCK, ECF No. 102 (W.D.N.C. Oct. 8, 2015). Questions specified in the motion and barred by the court's order granting the motion included the following:

> Driving down the highway when you know you are fatigued and have not received proper rest needlessly endangers the lives of other people, doesn't it?
> Based on all of your experience, familiarity with trucks and truck accidents, do you believe that a driver who knowingly violates the hours of service regulations is needlessly endangering other people on the highway?

The defendants argued effectively that such questions are irrelevant, violate prohibitions against "golden rule" arguments asking jurors to put themselves in the position of the injured party, are improper under longstanding bars against speculative proof of liability and damages, and improperly invite decision based on emotion and prejudice rather than on the facts.

For the same legal reasons, a line of questioning designed to focus on harm that could have occurred to community members other than the plaintiff is improper. Defense counsel for a trucking company and driver effectively illustrated this tactic in a recent motion in limine by quoting the series of questions by plaintiff's counsel:

> Somebody could be hurt?
> Someone could be killed?
> A child could be run over?
> A mom could be run over?
> A grandparent could be run over?
> A wife could be run over?

Defs.' Mot. In Limine No. 1 3–4, *Haley v. Westfreight Sys., Inc.*, No. 3:15-cv-1161-JPG-SCW, E*CF.* No. 79 (S.D. Ill. Feb. 15, 2017). These questions "invoke the underpinnings of the golden rule arguments" that "seek to have jurors decide a case, not on the evidence presented at trial as instructed, but rather on the potential harms and losses that could have occurred within the community." *Id.* A federal district court agreed with a similar argument in a decision last year, explaining that "asking the jurors to put themselves in Plaintiffs' position and make a judgment based on that hypothetical reality" amounts to improper 'golden rule' arguments." *Sialoi v. City of San Diego*, No. 3:11-cv-02280-JLS-KSC, 2016 U.S. Dist. Lexis 145013, at *4 (S.D. Cal. Oct. 18, 2016). Such arguments are "irrelevant to the actual damages alleged" and "have a substantial likelihood of unfairly prejudicing the jury" because they "may encourage the jury to render a verdict based on personal interest and bias rather than on the evidence." *Id.* (granting in part Defs.' Mot. in Limine No. 1 to Preclude "Golden Rule" Arguments Framed as References to or Arguments About "Public Safety or "Community Safety," *Sialoi v. City of San Diego*, No. 3:11-cv-02280-JLS-KSC, ECF No. 83 (Sept. 23, 2016)).

References to "Safety Rules" May Be Excluded or the List of Purported Rules Pared

Some authority supports banning references to "safety rules." *E.g., Hopper,* Colo. Dist. Lexis 249, at *1. Availability of such a ruling is likely jurisdiction- and case-specific.

Two decisions last year by the Court of Appeals of Kansas are especially on point, and both provide a persuasive rationale for excluding "safety rule" references that could be argued in a jurisdiction without such direct authority. In *Lanam v. Promise Reg'l Med. Ctr.–Hutchinson, Inc.*, the district court issued a pretrial order barring a medical-malpractice plaintiff from referring to the defendant's policies and procedures as "safety rules." No. 113,430, 2016 App. Unpub. Lexis 18, at *5–7, 19–24 (Kan. Ct. App. Jan. 8, 2016) (per curiam). While the plaintiff

would be allowed to indicate that the purpose of the policies and procedures is patient safety, the court required that they be referred to as "policies and procedures." References to "safety rules" risked that "the jury would conflate the standard of care with an alleged safety rule," the trial court reasoned, and the appellate court agreed. The plaintiff's counsel violated the order by referring to "the safety requirements that protect patients" during the opening statement. Finding this language synonymous and equally likely to prejudice the jury, the appellate court affirmed the district court's decision granting a mistrial. Similarly, in *Biglow v. Eidenberg*, the Court of Appeals of Kansas affirmed a trial court's pretrial ruling requiring plaintiff's counsel to instruct witnesses not to respond to questioning "with any derivative of the word 'safe' or the phrase 'needlessly endangering a patient'" and to refrain from using such language in closing argument. 2016 Kan. App. Unpub. Lexis 285, at *39–42, 45–47. The terms were inconsistent with a doctor's "legally defined duty of care," the trial and appellate courts found. Moreover, it would be easy for the jury to interpret such language from counsel in closing as a golden rule argument.

Every jurisdiction has negligence per se case law describing the only sources of legal duty—generally, a statute, an ordinance, or a regulation. A plaintiff's counsel may attempt to multiply the list of suggested "rules" by other means.

In some cases, however, the type of case or the jurisdiction's prior authority allowing "safety" language will make some references to "safety rules" at trial inevitable. Some decisions permit references to "safety" and "safety rules" as relevant to evaluation of a defendant's compliance with the standard of care. *See Randolph v. Quiktrip Corp.*, No. 6:16-cv-01063-JPO, 2017 U.S. Dist. Lexis 76103, at *12–14 (D. Kan. May 18, 2017). In a product liability case, a federal district court recently declined to enter a broad order requested that would have barred safety-prevention references. "Certainly, it will be hard for plaintiffs to prove the product is defective if they cannot say it was unsafe or dangerous," the court wrote. *Bunch*, 2015 U.S. Dist. Lexis 187687, at *6–7. The court barred a narrower category of safety-related arguments, ordering that plaintiffs' counsel could not "argue that this lawsuit was brought to ensure or promote community safety." *Id.* at *7.

"Rule" terminology necessarily implies a "duty." Language defining a defendant's actual duty of care is an essential starting point for any argument to exclude or to limit "safety rule" references. Other duty-related case law may provide grounds for paring back the list of purported "rules" that may be raised at trial:

- Legal conclusions—including a party's "duty"—are inadmissible through lay and expert testimony. It is a court's role to determine whether a duty exists and to instruct jurors on the law. This limitation, and the limitation on judicial admissions to matters of fact, mean that a defendant's agreement with a "safety rule" proposed by plaintiff's counsel during deposition does not define the defendant's duty of care, and the question itself, depending on the wording, may be improper.
- Every jurisdiction has negligence per se case law describing the only sources of legal duty—generally, a statute, an ordinance, or a regulation. A plaintiff's counsel may attempt to multiply the list of suggested "rules" by other means, such as answers to deposition questions, opinions of a retained expert, or a driver-training manual or internal policy. Authority defining the limited sources of legal duty may be invoked in support of a request either to exclude specific proposed "rules" that are not based on any recognized source of legal duty, or to require substitution of language such as "industry standard" or "policy" for "rule" references.
- Jurisdictions vary in their treatment of the admissibility and legal consequence of a driver's manual, a training handbook, or an internal company policy. It is essential to compare a plaintiff's intended use of such a source with decisions from that jurisdiction on the admissibility and legal consequence of that category of material. For example, in some states, a manual or a policy is inadmissible because it lacks the force of law, whereas in others, it may be admissible as evidence of the standard of care or whether a defendant met the standard but cannot operate to create a duty where the law imposes none.

Commercial Drivers Are Not Held to a Higher, "Professional" Standard of Care

No proposed heightened standard of care for commercial drivers should reach a jury in most jurisdictions. Almost universally, courts across the country have rejected plaintiffs' suggestion that a commercial driver is a "professional" driver held to a higher standard of care. *E.g., Fredericks v. Castora*, 360 A.2d 696, 697–98 (Pa. Super. Ct. 1976) (per curiam); *Dahlgren v. Muldrow*, No. 1:06-cv-00065-MP-AK, 2008 U.S. Lexis 4103, at *18–19 (N.D. Fla. Jan. 18, 2008); *Townsel v. Dadash, Inc.*, No. 05-10-01482-CV, 2012 Tex. App. Lexis 3185, at *9–10 (Tex. App. Apr. 24, 2012); *Calahan v. May Trucking Co.*, No. 1:11-cv-00214-NDF, 2012 U.S. Dist. Lexis 189853, at *13–15 (D. Wyo. Aug. 28, 2012); *Angulo v. Santillanes*, No. 1-12-2685, 2013 Ill. App. Unpub. Lexis 617, at *9 n.1 (Ill. App. Ct. Mar. 27, 2013); *Botey v. Green*, No. 3:12-cv-01520-RDM, at *6–8 (M.D. Pa. June 8, 2017). Louisiana is a rare exception. *See Davis v. Witt*, 851 So.2d 1119, 1128–29 (La. 2003).

Likewise, the "size, type, and kind of truck being driven" does not impose on the driver "a duty to exercise more than ordinary care." *Assoc. Petroleum Carriers, Inc. v. Beall*, 217 F.2d 607, 608 (5th Cir. 1954). *Accord Lemons v. Maryland Chicken Processors*, 164 A.2d 703, 706 (Md. 1960) (no different test of negligence applies to the operation of "large, heavy and unwieldy vehicles").

One common plaintiffs' tactic to raise a defendant driver's standard of care is to elicit testimony or introduce training materials stating that a commercial driver has a duty to be constantly aware or to

maintain a constant vigil and that a driver must anticipate and see any potential hazard. This is prejudicial—and inadmissible—because it suggests that the mere occurrence of an accident is proof of a commercial driver's negligence and adjusts the standard of care closer to a strict-liability standard. Because the relevant standard of care is the duty to exercise ordinary care under the circumstances, and a driver "cannot be found negligent merely because he could have prevented the collision if he had exercised a heightened degree of care," expert opinions or other evidence suggesting a constant-awareness requirement should be excluded. *Rios v. Norsworthy*, 597 S.E.2d 421, 426–27 (Ga. Ct. App. 2004).

Suggestion of a "Safest Possible" Standard of Care Is Inadmissible

Decisions expressly rejecting the "safest" conduct as the measure of a negligence defendant's standard of care abound. *E.g., Johnson v. Nat'l Sea Prods., Ltd.*, 35 F.3d 626, 632 (1st Cir. 1994) (defendant alleged to have loaded pallets into trailer negligently was not required to package and palletize its cartons "in the safest possible way"); *Biglow*, 2016 Kan. App. Unpub. Lexis 285, at *47 ("exercise of ordinary care and diligence does not necessarily require the safest option"). Not even a common carrier owes its passengers the "safest" conduct, nor does a manufacturer subject to strict liability have a duty to provide the "safest" product possible. Under the case law so holding, and under authorities simply setting forth a defendant's "reasonable" or "ordinary" standard of care, questions or argument by plaintiff's counsel or testimony by a plaintiff's expert suggesting a defendant's responsibility or failure to do what was "safest" are inadmissible.

Legal Conclusions Are Inadmissible

Because legal questions are for the court to resolve, and the court instructs jurors on the law, testimony on matters of law is always inadmissible. Such testimony is improper whether elicited from a plaintiff's expert or from a defendant. Examples of prohibited testimony on legal questions include testimony about a defendant's duty under the law and whether the defendant's conduct violated the law. *E.g., Summers v. A. L. Gilbert Co.*, 82 Cal. Rptr. 2d 162, 164, 175–77, 179 (Cal. Ct. App. 1999); *Thomas ex rel. Thomas v. Nat'l Carriers, Inc.*, No. 2:05-cv-02669-HGB-ALC, 2007 U.S. Dist. Lexis 95103, at *11 (E.D. La. Mar. 22, 2007). Opinions characterizing conduct as negligent, reckless, grossly negligent, or consciously indifferent to risks or to others' safety are also inadmissible. *E.g., Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 231–32 (Tex. 2004).

Appeals to Community "Values" and Arguments that Jurors Are the Community's "Conscience" Are Often Impermissible

Closing-argument appeals to jurors to "bring justice" by applying "the values of the community" or acting as the community's "conscience" have become common. Proponents of the "reptile" strategy encourage plaintiffs' counsel to so argue as "one way you make it a Reptile case." David Ball & Don Keenan, *Reptile in the MIST and Beyond* 10 (2013). Some jurisdictions permit such arguments, at least without a direct link to the amount of compensation that a jury should award. But substantial and persuasive authority also exists to exclude such appeals. For example, earlier this year, the Supreme Court of Kansas categorically condemned such arguments as improper invitations to the jury to decide the case based on subjective feelings or based on community values rather than on the law that was contained in the court's instructions. *Bullock v. BNSF Ry. Co.*, 399 P.3d 148, 2017 Kan. Lexis 399, at *43–45, 49–54 (Kan. 2017). And a federal district court recently reiterated that "'[s]end a message' or conscience of the community arguments are disfavored in the Sixth Circuit" because they "can have no appeal other than to prejudice" and amount to "improper distraction from the jury's sworn duty to reach a fair, honest and just verdict." *Brooks*, 2017 U.S. Dist. Lexis 125095, at *22–23 (quoting *Strickland v. Owens Corning*, 142 F.3d 353, 358–59 (6th Cir. 1998)). *Accord Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238–39 (5th Cir. 1985).

Illustrative of the typical "conscience" argument is the following, which a California appellate court recently deemed "improper":

> You are the voice. You are the conscience of this community. You are going to speak on behalf of all the citizens in Riverside County, and, in particular, Coachella Valley. You are going to make a decision what is right and what is wrong; what is acceptable, what is not acceptable; what is safe, and what is not safe. You are going to announce it in a loud, clear, public voice.

Later in the same closing, plaintiff's counsel continued, "These courtrooms, these courthouses, exist for one reason: It's to keep the community safe. Period." *Regalado v. Callaghan*, 207 Cal. Rptr. 3d 712, 725–26 (Cal. Ct. App. 2016).

One common plaintiffs' tactic to raise a defendant driver's standard of care is to elicit testimony or introduce training materials stating that a commercial driver has a duty to be constantly aware or to maintain a constant vigil and that a driver must anticipate and see any potential hazard.

Because it panders to jurors' prejudice, passion, or sympathy, such argument is forbidden, the California appellate court explained, calling closing-argument appeals to jurors' self-interest "improper" and "misconduct." *Id.* (quoting *Cassim v. Allstate Ins. Co.*, 16 Cal. Rptr. 3d 374 (Cal. Ct. App. 2004)). *Accord Landrum v. Conseco Life Ins.*, No. 1:12-cv-00005-HSO-RHW, 2014 U.S. Dist. Lexis 188, at *17–18 (S.D. Miss. Jan. 2, 2014); *Norton v. Nguyen*, 853 N.Y.S.2d 671, 674 (N.Y. App. Div. 2008) ("it is inappropriate to refer to the jury as the 'conscience of the community'").

Asking Jurors to "Send a Message" Is Improper Without—and Sometimes With—a Punitive Damages Request

When only compensatory damages are available, statements asking the jury to "send a message" with the verdict are "intended to inflame and prejudice the jury," improperly invite punitive use of compensatory damages, and "should never be allowed." *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004). *Accord Bunch*, 2015 U.S. Dist. Lexis 187867, at *6. Often courts treat "send a message" arguments together with "conscience of the community" references and exclude both for the same reason: that both "urge the jury to render its verdict based upon passion and prejudice and not the facts and evidence presented at trial." *Landrum*, 2014 U.S. Dist. Lexis 188, at *17–18. *See also Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, No. 2:10-cv-01494-JCM-GWF, 2017 U.S. Dist. Lexis 148520, at *9–11 (D. Nev. Sept. 13, 2017) (granting defendants' motion in limine and excluding "inappropriate argumentation," including arguments that the client's cause is just, that jurors should place themselves in the plaintiff's shoes, and that jurors should "send a message" with a high verdict). The authorities and rationale for exclusion apply equally to statements telling jurors to "speak" or "announce" with their verdict.

"Send a message" arguments should be challenged as improper when punitive damages are unavailable, but that doesn't mean that they are always admissible in cases with a viable prayer for punitive damages. In Florida, even when punitive damages are at issue, "a plaintiff may not utilize 'send a message' and conscience of the community arguments when discussing whether the plaintiff should be compensated, due to the potential for the jury to punish through the compensatory award." *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So. 3d 53, 58 (Fla. Ct. App. 2016).

Some Jurisdictions Expressly Prohibit "Take Responsibility" Arguments, Which Improperly Shift a Plaintiff's Burden of Proof

Counsel for a plaintiff may argue that the defendant should have taken responsibility and suggest that trial is necessary only because the defendant failed to do so. Ball and Keenan encourage this strategy even when the defendant has stipulated to liability. Ball & Keenan, *Reptile* (2009), *supra*, at 233.

Courts in some jurisdictions have expressly concluded that such arguments are improper. Arguments by plaintiff's counsel in closing that product liability defendants never admitted guilt or apologized and that they failed to do either during trial "crossed the line into forbidden 'take responsibility' and 'apologize' territory," a Florida appellate court recently held. *Cohen v. Philip Morris USA, Inc.*, 203 So.3d 942, 946–48 (Fla. Ct. App. 2016). These arguments were "egregious and unacceptable," even in a punitive damages case, and were sufficient grounds for a new trial. *Id.* In a recent vehicle-accident case, a Connecticut trial court granted the defendant driver's motion in limine to prohibit any commentary on the defendant's refusal to take responsibility for the accident or failure to stipulate or admit to liability, then admonished the plaintiff's counsel for violating the court's order during the trial. *Johnson v. Proto*, No. CV136037713S, 2016 Conn. Super. Lexis 11, at *26–29 (Conn. Super. Ct. Jan. 4, 2016). The court called such argument "improper and prejudicial." *Id.* at *29. A California appellate court likewise deemed "improper" and "objectionable" comments by the plaintiff's counsel during opening statement that "had the defendants taken responsibility for [the defendant driver's] actions, we wouldn't have to be here. We didn't ask for a jury trial. We could have resolved this matter." *Devereaux v. Brummett*, No. C048950, 2006 Cal. App. Unpub. Lexis 10594, at *8–11 (Cal. Ct. App. Nov. 21, 2006). *See also Johnson v. Young*, No. 3:14-cv-00718-RCJ-VPC, 2016 U.S. Dist. Lexis 167549, at *14–15 (D. Nev. Dec. 5, 2016) (precluding statements that "Defendants must take responsibility for their conduct" and invitations to the jury to "send a message" and "teach Defendants a lesson").

If case law in a particular jurisdiction does not address this issue directly, consider citing well-settled authority describing a plaintiff's burden of proof. Because a plaintiff bears the burden of proving the defendant's liability and of proving damages, any suggestion that trial is necessary because the defendant failed to take responsibility, or any commentary faulting the defendant for failing to admit liability, would improperly shift that burden to the defendant.

Present "Reptile" Arguments as Forbidden "Golden Rule" and "Conscience of the Community" Appeals

Before undertaking to explain the entire "reptile" strategy to a busy court on the eve of trial, consider whether doing so will aid your effort to exclude particular evidence or arguments. A motion in limine built on authority directly barring or limiting an objectionable category of evidence or argument is often the most efficient and effective route to the desired pretrial ruling. The fact that the particular evidence or argument is also a mainstay of a "reptile" theme may not be important to a motion to limit or to exclude it.

In some cases, it makes sense to present evidence or argument as part and parcel of the "reptile" strategy routinely employed by plaintiffs. This may be the case when the focus is on the bounds of proper argument to a jury, or when deposition questions so precisely track a recommended "reptile" tactic that an excerpt of a published piece of "reptile" advocacy actually helps illustrate its improper purpose of appealing to jurors' passions and prejudices.

Explanations of the "reptile" strategy within motions in limine are most effective when the strategy is presented as the latest iteration or evolution of long-barred "golden rule" arguments and appeals to jurors as the "conscience of the community." *See, e.g.*, *Sialoi*, 2016 U.S. Dist. Lexis 145013, at *4–5 (granting Defs.' Mot. In Limine No. 1 to Preclude "Golden Rule" Arguments Framed as References to or Arguments About "Public Safety or "Community Safety," ECF No. 83, where defendants' motion presented "reptile" argument as a "nuanced method of accomplishing the purpose of the golden rule argument"). In this context, an argument for exclusion asks a judge not to become the first in the jurisdiction to recognize and exclude a new-sounding category of argument, but merely to follow a line of existing authority consistently excluding arguments of the same ilk.

Conclusion

The ineffectiveness of a vague motion asking the court to preclude any and all uses

of the "reptile" strategy at trial is illustrated by an October decision in a personal injury case arising from the collision of the plaintiff's car with the defendants' tractor-trailer. The district court judge devoted a multi-page decision to lambasting a motion in limine that failed to specify specific evidence or arguments for exclusion, failed to show that the plaintiff would offer anything objectionable, and ignored the jurisdiction's legal authority defining the bounds of specific categories of evidence and argument. *Baxter v. Anderson*, No. 3:16-cv-00142-JWD-RLB, 2017 U.S. Dist. Lexis 165004 (M.D. La. Oct. 4, 2017). The defendants moved to preclude the plaintiff and her witnesses and attorneys from introducing any testimony, arguments, or exhibits "that attempt to utilize the 'Reptile Theory' of juror persuasion." Mot. In Limine to Exclude "Reptile Theory" Testimony, Argument, Exhibits or Other Evidence 1, *Baxter*, No. 3:16-cv-00142-JWD-RLB (M.D. La. June 2, 2017) ECF No. 49. The judge's reasons for denying the motion are reasons that would lead *any* court to deny *any* motion in limine—and that should motivate defense counsel to draft motions in limine to target specific evidence and argument:

> The Court agrees with Plaintiff that Defendants give the Court nothing objective to consider in deciding what language, phrases or evidence the Court should deem improper. Defendants complain about amorphous and ill-defined concepts rather than specific evidence which they believe Plaintiff will introduce or arguments which they believe Plaintiff might make. The Court is being asked to rule on abstract and generalized hypotheticals. In the absence of something more specific, the Court is unable and unwilling to grant their motion.

Baxter, 2017 U.S. Dist. Lexis 165004, at *6–7. For the very same reasons, a vague "reptile" objection during testimony is ineffective to identify specific objectionable testimony and grounds for its inadmissibility. *See Malone v. Eden*, No. 1:15-cv-01009-MV-KBM, 2017 U.S. Dist. Lexis 168061, at *13 (D.N.M. Oct. 10, 2017).

Discard the notion that the label "reptile" describes a category of evidence or that an explanation of the "reptile" strategy serves as a substitute for identifying legal grounds for excluding particular evidence and arguments. By recognizing key "reptile" components in your case, researching their admissibility in your jurisdiction apart from the "reptile" framework, and drafting a motion *in limine* that identifies the objectionable evidence or argument and articulates legal grounds for exclusion, you will weaken the foundation on which the plaintiff's counsel can build a community-safety trial theme.