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REPTILE

THE 2009 MANUAL OF
THE PLAINTIFF'S REVOLUTION

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REPTILE

The 2009 Manual of the Plaintiff's Revolution

By David Ball and Don C. Keenan

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DEDICATION

This first edition of *Reptile* is dedicated to the pioneers: the national array of trial attorneys who, instead of caving in to mean times, have allied themselves with the Reptile by successfully field-testing her in negotiations and in trial after trial.

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We are grateful to Duke University School of Law, and to Duke's medical research library. Duke Law Professor Doriane Lambelet Coleman has been of enormous help. So has Duke's Professor Norman L. Christensen, whose lucid explanations of evolution stand as a lesson to lawyers that even the most complex of concepts can be made simple enough for everyone to understand.

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Finally but most of all, thanks to our amazing research partners, James E. Fitzgerald (Cheyenne) and Gary C. Johnson (Pikeville, Kentucky), towering examples of great lawyers who spare nothing to become even greater.

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Durham, NC

Don Keenan
Atlanta, GA

CONTEXT: This book is the companion volume to *David Ball on Damages*, which explains many techniques you'll need to help you work with the Reptile.

Two other books should be your close companions as you master the Reptile: *Rules of the Road* (Rick Friedman and Pat Malone), and both volumes of *Closing Arguments* (Ed. Don C. Keenan). *Rules of the Road* is essential for working with the Reptile. *Closing Arguments* is a treasure trove of Reptiliana to pore through after reading *Reptile*.

CAVEAT: The language of this book – “Reptile,” “Code,” “Tentacles of Danger,” etc., are used to teach you how this approach works. Such words are not for the jury.

MAJOR AXIOM: When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.

Trial Advocacy Books by Don C. Keenan

Out-of-State Practice of Law; Pro Hac Vice, 1981, Harrison Publishing Company.

Social Security Law; Procedure, 1986, Harrison Publishing Company.

Obstetrical Medical Negligence, 1991, Law Press, Inc.

Closing Arguments; Child Injury Wrongful Death, Volume I, 2004, Balloon Press.

365 Ways to Keep Kids Safe, 2005, Balloon Press.

-First place, Benjamin Franklin Book Award by Publishers Marketing Association, Best Parenting Book of 2008.

-Outstanding Book by National Organization Exceptional Parent.

Closing Arguments; Child Injury, Wrongful Death, Volume II, 2008, Balloon Press.

Audio Tape Collection by Don C. Keenan

Faces of the Future: How To Be A Better Lawyer For Children. 10 lectures remastered by TrialGuides

Don Keenan

During his 34-year national career, Don has obtained 145 verdicts/settlements over a \$1,000,000.00, eight over \$10,000,000.00 and one verdict over \$100,000,000.00. He has twice been chosen "Trial Lawyer of the Year" and was given by Oprah Winfrey the distinction as a "person of courage". Don has handled associated cases in over 43 states and 5 foreign countries. NBC News 27 years ago featured Don as a pioneer in the evolution of focus groups. He's recognized as an innovator and out of the box leader of the trial bar twice serving as national President, first of

ABOTA (1992) and the youngest member (1987) and youngest President of the Inner Circle of Advocates (1997). In 1993, Don founded the non-profit Keenan's Kids Foundation. (Contact dkeenan@keenanlawfirm.com, www.keenanlawfirm.com)

Trial Advocacy Books by David Ball

Theater Tips and Strategies for Jury Trials

How to Do Your Own Focus Groups

David Ball on Damages

David Ball

America's most influential trial consultant, Dr. Ball has changed the face of modern trial advocacy. He wrote best-sellers *David Ball on Damages* and *Theater Tips & Strategies for Jury Trials*, and advised on more than a thousand civil and criminal cases. He teaches CLEs and at law schools across the country. Along with partners Debra Miller and Artemis Malekpour, he consults on cases from coast to coast. Trained in engineering and a professional theater director and writer, his hobby is physics, his favorite job was taxi driver in 1960, and his daddy was a Catskill Mountains bootlegger. (Contact: ball@nc.rr.com)

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Foreword

In 2006, attorneys Don Keenan (Atlanta), Jim Fitzgerald (Wyoming), and Gary Johnson (Kentucky), along with jury research specialist and trial consultant David Ball (North Carolina), began a series of unique jury-research sessions. Our research took us well beyond juror attitudes, biases, and life experiences. Important as they all are, something immeasurably more powerful was obviously in the driver's seat. But what?

We found a clue in the work of Yale Medical School and National Institute of Mental Health physician and neuroscientist Paul D. MacLean. His groundbreaking work first posited the three-part ("triune") brain. Our particular focus was on the part he colorfully and accurately called the "Reptilian brain." More sedately known as the "R-Complex," it's the oldest part of the brain. Over millions of years of evolution, the R-Complex gave rise to the rest of the brain: the parts that think and feel.

As with most of what we know about the brain and human behavior, the concept of the triune brain derives from Freud's postulate – accepted even by those who reject much of Freud's work – that most of what we do is driven by parts of the mind that are not conscious. Neuroscientist Joseph E. LeDoux, Principal Investigator for the Center for the Neuroscience of Fear and Anxiety based at New York University, puts it in perspective: "The conscious brain may get all the attention, but consciousness is a small part of what the brain does, and it's a slave to everything that works beneath it."¹

Dr. MacLean called the R-Complex the "Reptilian" brain because it is identical in function to the brain of reptiles. Perhaps ironically, human beings are most similar to each other – all but identical – at the Reptilian-brain level.

¹ Cited in *How We Decide*, John Khehrer, New York; p.23.

MacLean's work has been refined and expanded by recent imaging studies that show, among other things, how the brain's functions actually interact. Observable fact is trumping psychological speculation.

Dr. MacLean died in 2007, shortly after we began our research. But his influence on trial advocacy has come alive. This book is its birth announcement.

We also had access to the work of marketing guru Clotaire Rapaille. He developed a testing approach to investigate how the Reptilian brain drives some kinds of decision-making. We hypothesized – correctly, as it turned out – that this might include jury decision-making.

We quickly learned that the Reptile had long been working diligently and nearly invincibly for the defense in civil trials. As you will see, once we get her to switch sides, she works better for us than for the defense. She is reversing – with a satisfying vengeance – tort-“reform’s” poisoning of the jury pool.

To adopt the Reptile, you need not throw out all you have been doing. The new methods, though fundamental in concept, are used as an overlay to your current armament. It's like adding a telescopic sight to a rifle.

CAVEAT: This book is no bag of tricks. You need a rudimentary understanding of the science behind the methods, so that's where we begin. This will enable you to use the methods properly, contribute to refining them, and create new ones.

And reading about how to do something is never enough. As with any new methods, before going to trial you must practice. And practice. And practice – as do all good actors, dancers, singers, athletes, and ministers. After all, your job is no easier and no less important than theirs.

The Judge: Before using any new methods, including those in this book, be sure they will pass muster. Be prepared to argue that what you are doing is proper. Have back-up plans to get around sustained objections. Defense attorneys will be doing everything in their power to keep you from using these methods. (See Appendix B for venue-to-venue Golden-Rule decisions, and guidance on researching community safety arguments.)

So welcome to the revolution and to the world of the Reptile. She will re-energize you. And she gives new meaning to the term “Scales of Justice.”

ONE

THE SCIENCE

(Major axiom: When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.)

The Reptilian brain houses basic life functions, such as breathing, balance, hunger, the sex drive, and the fundamental life force: survival. The Reptile does not tend to these functions solely to keep you alive. Her larger purpose is to keep your genes alive and spread as many of them as possible into future generations. This impulse drives all life. Even people who want no children cannot normally get rid of the Reptilian imperative of personal survival. Nor can they get rid of the Reptilian drives that the Reptile has developed for the creation and nurturing of children (such as the sex drive).

We like to believe we are run by logic and emotion. Sometimes we are. But when something we do or don't do can affect – even a little – our safety or the propagation and safety of our genes, the Reptile takes over. If your cognitive or emotional brain resists, the Reptile turns it to her will. The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you.

In other words, the Reptile invented and built the rest of the brain, and now she runs it.

Why is she so powerful? No life form is immortal, so its existence presupposes gene survival from generation to generation. We don't eat just to live; we eat to live long enough to pass on and then protect our genes. That requires us to fight to maximize survival advantages and minimize survival dangers. Otherwise evolution eats us. Goodbye genes.

But humans are puny fighters and easy prey. We're slow, fragile, clumsy, we have comparatively weak hearing and seeing, and we stink so much that predators and most of our prey smell us miles away. But our brain makes up for those weaknesses. The brain gathers endless amounts of new information and then uses it to make survival decisions. Our ability to make complex decisions gave us enormous survival advantages over other animals, and vastly enhanced our ability to survive within changing environments.

Everything else our brain does (art appreciation, higher learning, shooting hoops) is a by-product. When survival is not at stake, the Reptile goes on auto-pilot and lets the rest of the brain fritter, free to do whatever it wants. But when our genes' survival chances can be affected, the brain shifts into Reptilian survival mode and nothing else matters. For example: A master violinist's lifelong dream is fulfilled when he finally owns the world's most precious Stradivarius. But if the Strad were suddenly the only wood to burn to keep his baby alive overnight, by morning there'd be one less Strad.

Just as the fastest running occurs when running for one's life, so does the most powerful decision-making occur when survival is at stake. **So in trial, your goal is to get the juror's brain out of fritter mode and into survival mode.** You do this by framing the case in terms of Reptilian survival.

Once awake, the Reptile has two powerful tools. First: In order to make us obey, the Reptile gives us a splash of Dopamine, the ultimate pleasure-giver (among other things). Control Dopamine and you control the person. We are all dopaminaholics.

That's the Reptile's *pleasant* tool. She uses it to get you to do what she wants.

The Reptile has a darker and more potent force: anxiety and terror, which she uses to keep you from doing what she does not want. When you make or contemplate a decision the Reptile rejects, she

makes you feel really bad. In fact, our emotional systems evolved mostly so we could feel enough terror or pleasure for the Reptile to control us. The terror is so powerful that someone whose brain is forced to make an endangering decision despite a flood of terror can end up with permanent brain damage – such as post-traumatic stress disorder, which often involves physical shrinkage of part of the brain.²

We are Dopamine-tropic (we like it) and terror-phobic (we fear and hate it). That's how the Reptile controls us.

Does all this mean we take orders from a pea-brained snake? Yes. When we face decisions that can impact the safety of our genes, the Reptile is in full control of our emotions as well as what we think is our rational logic.

Justice ...? In trial, “justice” helps mainly when you show that justice equates with safety for the juror’s Reptile. To show this, you need not violate the Golden Rule restriction (but see Appendix B). You will bring jurors to figure out that community safety is enhanced by means of justice. You are not asking jurors to sacrifice justice for the sake of safety. You instead show that justice creates safety.

So remember the major axiom, which we cannot repeat too often:
When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.

Now let's listen directly to the Reptile:

² See, for example, Carlson, Neil R. (2007). *Physiology of Behavior* (9 ed.). Pearson Education, Inc.

TWO

THE REPTILE SPEAKS

(Translated from the Reptilian)

I exist because there is danger and lethal competition in the world. If there were not, I would not exist.

I have simple needs: for my genes to survive, spread, and prosper. Don't bother me with other stuff. All I want to know is "what's in it for my genes?"

I am not you. I am your genes. I will make you protect them within you and within your progeny.

I am somnolent. Without survival at stake, I sleep.

I want to kill whatever threatener wakes me.

I don't like you. I don't like me. I don't like.

Except I like my genes. Not your neighbor's genes. Your neighbor has his own Reptile. I will work with neighbor Reptiles only if it helps me. Otherwise I'd as soon kill them.

I am not cooperative except when cooperation helps my genes survive.

Justice is of no interest to me except when it can help my genes survive. Otherwise, I don't give a _____ [untranslatable].

I waste no time or energy. I do things the easiest way. I work only when I have a chance of overcoming a survival threat. Otherwise that snoring you hear in trial is me.

I don't work for God, if there is one. My goal is everlasting life for my genes on earth. Your everlasting life is between you and God. Genes don't go to heaven or hell. If there is a God, by the way, s/he likes Reptiles. God made me before you. I am your prerequisite.

I do not get angry. I make *you* angry so you will do what I want you to.

I do not get scared. I make you scared so you will do what I say.

I am not smart. I invented smart for you to be able to do what I want.

I have no feelings. I invented feelings to make you do what I want.

First things first. I deal with the most immediate danger first. You won't much notice the second danger until you take care of the first. Otherwise some lion will bite off your butt while you're worrying about the tiger half a mile away.

I run the show. You do not.

I am not moral. I invented morality to make you do what I want.

I am the source of all your important desires. Sex to continue my genes. Importance so mates will want you and your society will protect you. Altruism, so society will protect you. And so forth.

I am the immortality of your genes.

I hate:

Lack of clarity. It's a danger sign. I don't go where things are not clear.

Anything hidden. It's dangerous.

Anyone who hides anything.

Anything that hurt or scared us when we were very young.

Immobility.

Confinement.

Arrogance. Anyone who thinks he's better than me is a danger.

Gratuitous cruelty. It means something is dangerous when it does not have to be.

Loneliness. It's dangerous.

Greed. (Not mine.)

Competition. (Against me.)

Lying to me. Dangerous.

Hypocrisy. Very dangerous.

A smile that does not include the eyes. Danger sign.

Ass-kissing attempts at humor.

Ass-kissing compliments.

Ass-kissing of any kind. Can't trust it.

Legal language. Not clear. Anything not clear is dangerous.

People who use legal language.

I accept:

Me.

Importance.

Unrestricted mobility.

Altruism.

Power. Mine.

Gratitude. To me.

Family. (Mine.)

Greed. (Mine.)

Anything that made me feel safe and secure when I was young.

Openness of others.

Anything or anyone that can help me survive.

THREE

THE TOXICOLOGY OF TORT-“REFORM”

(How They Hijacked the Reptile)

Until now, the Reptile has been tort-“reform’s” tool. The forces of tort-“reform” used the Reptile to terrify more than a third of the public by fraudulently portraying plaintiff’s lawyers as a menace in the following ways:

1. Lawsuits undermine the quality and availability of health care for your family. (Threatens survival.)
2. Lawsuits ruin the local economy, threatening jobs and thus endangering your ability to feed and house yourself and your family. (Threatens survival.)
3. Lawsuits make everything more expensive, taking money you need to care for your family. (Threatens survival.)
4. Lawsuits suppress the development of new products that can keep you and your family safer. (Threatens survival.)
5. Lawsuits endanger religion. The tort-“reform” campaign has persuaded many well-meaning religious folks that plaintiff’s lawyers donate money to get liberal politicians elected, who in turn will appoint liberal judges, who in turn will make rulings to take God out of public schools, force evolution into the schools, and permit abortions and gay marriage. These religious folks are victims of a brilliantly conducted tort-“reform” fraud campaign that claims you threaten their ultimate survival.

All five survival dangers wake the Reptile. A third or more of almost every jury pool believes that a plaintiff's victory endangers the community in some or all of those five ways. You cannot overcome that belief in (or out of) trial by explaining that the tort-"reform" claims are false. The road to bad verdicts is paved with attorneys who tried. Logic cannot budge a Reptile out of survival stance.

Tort-"reform's" worst destruction has been in the courtroom, but it has also achieved massive judicial and legislative suppression of your work: caps, preemptions, hostile judges, etc. And as of this writing in 2009, it's getting worse.

Because tort-"reform" has succeeded at the Reptilian level – in other words, because so many people firmly believe you are a menace to their survival – it is too late to respond with logic alone or even with emotion. Remember who's running the show. Appeals to logic or emotion make the Reptile dig in her claws and fight you harder. The failure of the plaintiff's bar to understand this has led to counter-productive attempts to battle tort-"reform" by means of logical and emotional appeals. That's like trying to placate a raging alligator by petting its nose.

By defrauding the Reptile into working for them, the insurance industry, chambers of commerce, and large corporations have achieved history's most powerful jury-pool poisoning. When that poisoned third of the jurors learn they have been called to court for a civil case, their Reptiles are up and working, commandeering logic and emotions, and ready to kill you because you might be ("might" is the Reptile's criminal burden of proof) a menace. The Reptile, when working for the defense, has no consideration but to protect herself from you. So she makes her juror think and feel he is being fair rejecting you. We have seen this in case after case since well before the turn of this century.

Fortunately, we now know how to get the Reptile to work for our side. And unlike her earlier defense work, the Reptile's work for us

is honest because it is based on what is real, not fraudulent. So it belongs in trial.

The Reptile prefers us for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, “Give danger a pass.”

Second, the courtroom is a safety arena. Trials were invented (by the safety-conscious ancient Greeks, not the burn-‘em-at-stake early English) for the purpose of making the public safer. So when we pursue safety, we are doing what the courtroom was invented and maintained for. That puts the honestly informed Reptile on our side. All we have to do is honestly inform her, as you will start to see on the next page.

FOUR

ANTIDOTE FOR TORT-“REFORM” POISON

(An Introduction to Danger)

The jury system’s founders and the crafters of its laws intended it to be the community’s safety tool. The goal was to enable the community to decide if it was in danger. If yes, the system provided a reliable fix.

So community safety is a legitimate juror concern. In trial, it relates directly to what the defendant did. Community safety is part of the public policy reason for fair compensation, which is simply a matter of jurors following the law. In sharp contrast, tort-“reform” considerations are legally unrelated to the case, and their purpose and effect have to do solely with jurors violating the law by drawing on improper considerations to under-compensate.

By default, Americans believe that the purpose of the *criminal* justice system is to keep them safer. They get angry when it does not. As jurors, they make the system serve that purpose as often as they can. That’s why mediocre criminal prosecutors with weak violent-crime cases, despite a beyond-reasonable-doubt burden, usually win – while many of the best plaintiff’s attorneys with their minuscule burden have trouble doing well even in strong cases. The difference is that the criminal defendant’s alleged violent crime represents an obvious Reptilian survival threat. The Reptile doesn’t give a hiss for “beyond reasonable doubt.” When the goal is survival, “might have done it” is plenty.

Unfortunately, jurors do not automatically know that safety is also the purpose of the civil justice system. So the Reptile does not automatically get involved. Decide against kindly old Dr. Jones? Or

the nice lady who accidentally ran into your client from behind? A well-known company whose products we have used for generations? Some homeowner across town whose dog bit your client? A cop who hit a fugitive harder than necessary? Nope. None of these will push the fear buttons the way violent crime does. Jurors (i.e., Reptiles) do not automatically view such defendants as survival threats.

This is partly due to a psychological comfort-mechanism called “defensive bias.” Defensive bias derives from the fact that the Reptile ignores survival threats that cannot be meliorated. When we see something bad happen to someone because of something we think we cannot change (a lethal hurricane and flood, or a mistaken diagnosis, or an invisibly dark object blocking the road at night), the Reptile does nothing. She has not survived for millions of years by wasting energy. Instead of expending her precious resources for no reason, she makes us believe we are not subject to that particular danger. One way she does this is by making us think we’d have done something different in that situation: “*I’d* have been careful enough to get out of New Orleans before the storm hit; *I’d* have asked for a second opinion; *I’d* have been looking carefully enough to see anything that big in my headlights.” So we blame the victim: “He should have been more careful. Like I would have been!”

We are this way because evolution punishes the crime of wasting resources, and the sentence for that crime is extinction. A Reptile who wastes time, energy, worry, or adrenaline on dangers that cannot be meliorated is left with insufficient resources to survive. Between defensive bias and the forces of tort-“reform,” you need a miracle to win.

But when the Reptile sees that a fair verdict will enhance safety, even by a little, the Reptile leaves defensive bias behind.

This gives us our primary goal in trial: To show the immediate danger of the *kind of thing* the defendant did – and how fair compensation can diminish that danger within the community.

This is close to what violent-crime jurors think: they see the immediate danger of the kind of thing the defendant did – and they see that conviction can diminish that danger.

“Immediate” danger is important, because tort-“reform” dangers are mid-to-long term and the Reptile gives full priority to immediate and short-term. Even the mid-term tort-“reform” danger of plaintiff’s attorneys making “too much” money gives way to the immediate dangers a fair verdict can diminish. After all, the Reptile is a Reptile, not a chess-player.

The Three Questions.

To gauge whether a defendant’s act or omission was negligent – and whether it represents a community danger – jurors need answers to these three questions:³

- 1. How likely was 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 kinds of situations?**

Answers to the three questions show jurors the width and depth of the act’s potential to harm. That range defines the necessary required care.

So:

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

The only difference between freak accident and public menace is frequency. Freak accidents rarely awaken the Reptile because they cannot be prevented. But when something happens often, the Reptile gets concerned. By definition, an ordinarily careful or

³ You can get in more or less of this material, depending on the kind of case, the judge, and how well you can justify each point as material to how careful the defendant should have been. You can probably get in more than you think, and every piece is important.

prudent person does not do anything that causes needless harm. And the more often something causes harm, the more likely it will again – so the more dangerous it is. That higher level of danger requires a higher level of care.

There are two ways to evaluate that likelihood: Theoretical and fact-based. And fact trumps theory. That is fundamental both to science and logic.

Theory: If you follow a vehicle too closely and have normal human reaction times, you may hit it.

Fact: “4,295 injury wrecks were caused last year by people following too closely.”

If no one were ever hurt despite the reaction-time theory (drivers following too closely can hurt people), then the reaction-time theory would be wrong. Fact proves (or disproves) theory.

Around the year 1900, many “authorities” had a theory: Driving faster than 25 mph would suck the air out of your lungs and kill you. That theory soon gave way to the fact that once people started going faster than 25, none were hurt in that theoretical way. Today we consider that theory silly – not because we’re qualified to evaluate the theory, but because the fact clearly trumps the theory: No one ever dies from going faster than 25.

This principle is often important in causation situations. A defense “expert” can theorize forever about why a low-dent or low-speed wreck means no injuries. But that theorizing collapses in the face of the simple *fact* of frequency: “Last year 4,295 people were thrown out of work for six months or more by wrecks with minor dents and wrecks below ten miles per hour.”

The assertion that “no dents” means no harm is at best just theory, so you should have the right to show how fact contradicts it. (Frequency, obviously, is fact.)

Lacking information about frequency, no one can determine any act's real level of danger. This is why frequency is one of the primary measures by which all safety experts, safety commissions, and regulatory agencies determine how safe is safe enough. There is no rational justification for keeping this kind of information from jurors.

So when the defense says, "a 10-mph bump can't hurt anyone," *frequency* is as probative as you can get. The defense hates it because it raises the required level of care, demonstrates causation, and shows the widespread community danger of this kind of act. So expect the defense to fight the introduction of frequency facts.

You may think it can't come in, but if you are clear that it is to show the act's level of danger, it should.

Related to frequency: How hard is it for people to protect themselves from this kind of danger? For example, to what extent did the act create a *hidden* danger? Or to what extent are *helpless* people – children, the elderly, etc. – potential victims? What proportion of the population could have reacted quickly enough to save themselves? And how helpless and endangered are we when we are, say, stopped at a light and someone coming from behind is not looking?

2. How much harm could it have caused?

By default, jurors gauge an act's danger (and thus the level of care that was required) mainly by the harm it caused in this specific case.

Many lawyers make the same error. The valid measure is the *maximum* harm the act *could* have caused. Someone driving 140 mph who only broke someone's toe is outrageously dangerous, far less "prudent" than ordinary care requires. The basis is never the harm actually caused; it is always the potential maximum. After all, the defendant does not know in advance that he'll just do a little bit of harm. So he has to decide how careful to be based on maximum foreseeable harm.

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

The truck driver chose not to get enough sleep and so caused a wreck? Not getting enough sleep is dangerous in a wide range of activities. Your expert should explain the danger of lack of sleep by analogy to other situations. For example, how would choosing not to get enough sleep be dangerous for, say, school crossing guards? Or surgeons? Or a school teacher's ability to protect the children in her class in an emergency?⁴

Case: A doctor damaged a baby's brain by ignoring fetal heart monitor warnings. This means he violated differential diagnosis rules. So show how *that kind* of violation can cause harm in various other medical situations: an E.R. doctor examining someone with chest pains, a pediatrician examining a child with a sore neck, etc. When a skier or someone using a product or a guy bowling is hurt by a negligent act, show other circumstances in which the defendant's *kind of violation* is dangerous. Premises negligence at a movie theater is the same kind of act that can endanger kids at an elementary school and patients in a hospital.

Your experts can say, "Allowing slippery stairs in a movie theater is like allowing slippery stairs in a school or hospital; no matter how careful people are, some are going to fall and get badly hurt." Or, "Ignoring the rules of a Differential Diagnosis will kill patients whether they are in the labor and delivery room as in this case, or in an emergency room, or in a children's clinic, or in any other medical setting." Then have the expert give examples of how it can hurt or kill in each setting. This both explains the nature of the negligence in your case and shows the width and depth of the danger of that kind of negligence.

Less dangerous in other contexts: When an act is less dangerous in contexts that jurors may be familiar with, show what makes it more dangerous in the situation of this case. For example, following three car lengths behind is safe for a car to do – but potentially deadly

⁴ As Rhode Island attorney and Roger Williams School of Law professor Mark Mandell points out, choose your analogies carefully. For example, in a movie-theater premises liability case, if you have a school administrator on the jury, don't analogize to premises-danger rules in a school.

when an 18-wheeler does it. For jurors to understand the difference, you must show them all the ways in which trucks are more dangerous than cars, and how each of those ways makes it more dangerous for the truck to be only three lengths behind (can't stop as quickly, can't maneuver as well, can cause far more dangerous wrecks, can crush cars beneath, etc.). Otherwise, jurors who know little about trucks could conclude that following three lengths behind is safe for trucks as well as cars. That results in an improper negligence decision.

Tentacles of Danger.

Answers to the three preceding questions show the perilousness of what the defendant did – information the jurors need in order to decide whether there was negligence. The answers are Reptilian because they show that the tentacles of danger extend throughout the community.

Example: Seattle attorney and Inner-Circle member Paul Luvera and his partner Joel Cunningham sued the manufacturer of a faulty device used in open-heart surgery. This was not the kind of thing to awaken most Reptiles, because most people don't think they're ever going to need open-heart surgery.

It was a particularly difficult case. In its more than million uses, the device had never hurt anyone. That alone lets the Reptile sleep, because neither Reptiles (nor people) worry about being the victim of a one-in-a-million occurrence, especially when there seems to be no way to prevent it. Many of us have better odds of being hit by lightning, but we don't walk around cowering.

Worse: The venue was extremely conservative and insular, and the client was a Sikh Indian, replete with turban and turbaned sons – wonderful and decent folks, but the kind that such communities think of as terrorists. ("Turban = terrorist.") Even without the

terrorist fear, the Reptile does not worry much about dangers to people she perceives as very different. In fact, in Reptilian terms, the more harm that happens to people unlike herself, the better.

As if all that were not enough, in the middle of trial the U.S. Supreme Court decided that manufacturers of some medical devices are exempt from lawsuits. The ruling did not apply to this case, but it was headline news for several days.

Jurors would have known about it, potentially pushing them even farther from finding this case justified.

Mr. Luvera had only one thing going for him (other, of course, than being Mr. Luvera): A decade earlier, some doctor in Japan had sent the manufacturer a note that the device had overheated – but on a table, not in a patient. Focus group jurors were not impressed. "Oh for God's sake," they said, as they often do when their Reptiles are sleeping. "Nothing made by human beings can be perfect. To err is human! One in a million! And just on a table! Nothing can be safer than one in a million. The plaintiffs are asking the impossible. This is ridiculous!"

Why?

Because they saw no relevance in this case to their own lives. They felt no personal connection – or at best only a very indirect and unlikely one – between their own safety and what the manufacturer had done. Insofar as they saw any connection, they saw no way of doing anything about it. How can a verdict make anything safer than one-in-a-million? They had no reason to identify with the plaintiff or his family, and no way to do so even if they wanted to. So the only danger the jurors saw to themselves was the tort-"reform" harm of a big plaintiff's verdict. "You know who's going to be paying for this, don't you?"

Mr. Luvera handled this in large part by showing *that the kind of thing* the defendant had done was an immediate threat to everyone in the community – thus shoving tort-"reform" considerations not

only to a back burner but off the back of the stove. He showed that this case was not about a unique event or an accident, and that it was not just about his client. He showed that it was a ready and waiting menace to everyone in the community, including those who think they'll never need heart surgery.

How?

With elegant simplicity. His expert explained that anytime anyone goes into a clinic or hospital and looks at all the medical equipment – on carts, bolted to walls, on tables, in cabinets – devices that go in you, around you, over you, up you, or the kind you go in, around, over, or up – every one of those devices, even those little hypodermic needles for blood tests – if the manufacturer had violated the patient-safety rule that was violated in this case, that device could kill the patient.⁵

As of that point, the case was no longer about some rare surgery or a terrorist in a turban or a medical device that had never hurt a patient. Now it was about a lethal violation directly relevant to the jurors and their kids. Now, by means of a compensation verdict, the jury could show that when any company commits this kind of violation, the consequences will be payment of full compensation. Now, jurors – despite their xenophobia – could fully identify with the plaintiff, because people of every different kind, even those at war with each other, quickly get together when endangered by the same outside force. Mr. Luvera made the jurors and his client into allies. And now, jurors could see that the case represented lethal threats that are more immediate than the tort-"reform" mid-to-long-term dangers.

Result?

A record compensation verdict and substantial punitive damages.

⁵ The success of this brief statement derives from the effect on the Reptile of the Friedman/Malone rules, which are essential in every case. See Chapter Six below, and *Rules of the Road*, by Patrick Malone and Rick Friedman.

As you will see, this technique is just one of many Reptilian methods that work not only in trial, but in mediation and even witness preparation.

And yes, it is applicable to stipulated cases (see Chapter Twenty).

Again, here are the three questions so you don't lose the thread:

- 1. How likely was 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 kinds of situations?**

Jurors don't come in knowing the answers. For example, they rarely know the full danger created by a physician's failure to do a proper differential diagnosis. They don't know the danger of a driver glancing away from the road long enough to hit the stopped car in front at just 15 mph.

Once they know the answers and understand the public menace such practices create, and that a proper verdict can diminish the menace, the Reptile is in your employ. This is true even with a tort-"reformed" Reptile, because the dangers you've shown are more immediate than the posited dangers of tort-"reform."

Possible to Meliorate.

Once you have established the community danger of the defendant's act or omission, you are most of the way to waking up the Reptile. But remember: The Reptile does not fight dangers unless you also show how the dangers can be meliorated. You must convey to jurors that they are in charge of the level of required

safety in this community, and that by means of their verdict they have great power – even in small cases – to affect it. “You are the guardians of the community.” Justice *enables* them to protect.

It’s not that jurors will think, “Gee, fair compensation will instantly make highways safe!” But to the Reptile, a small increment of melioration is better than none, and much better than allowing things to get worse. After all, tort-“reformed” jurors believe that a verdict against you, even in a small case, will help them. The only difference now is that they are going to help themselves by helping your client get justice, instead of helping the defense get an unjust pass.

Depending on venue, you can argue to a greater or lesser extent that a proper (fair, just, etc.) verdict will prevent, lessen, or distance the danger. In many venues you can argue in closing the public policy underlying compensation and negligence laws – which includes public safety. But even if you cannot, your answers to the three questions will lead the Reptile there on her own.

Does enlisting the Reptile mean appealing to jurors’ emotions?

No. Our method and purpose is to get jurors to decide on the entirely logical basis of what is just and safe, not what is emotionally moving. Jurors are often emotionally moved, and we always want jurors to “feel” strongly that we should win. But the Reptile gets jurors to that point not on the basis of sentiment, but what is safe.

We are often asked, “How does all this negligence stuff relate to causation and damages?” It relates in the most important way: It gives jurors personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil them. Only a verdict your way can make them safer. This does not mean that jurors will decide dishonestly or unjustly. It simply means they will no longer be led by fraudulent tort-“reform” terrors. Instead, jurors will focus on the real dangers that lie at the heart of your case and extend throughout the community.

Again, remember – memorize! – the major axiom: **When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.**

FIVE

WHAT DOES THE REPTILE MAKE US WANT?

Everything about us evolved as a tool for our genes' survival – everything from brain to toenail, opposable thumb to goose bumps, terror to sense of humor, anger to gentleness, every instinct, and even the appendix, which still serves a survival purpose today. Anything that did not at some point increase the chances of survival did not itself survive.

Pleasure. One of our most powerful survival traits is the pleasure we take in certain things. Sexual pleasure, for example, did not evolve to amuse us. Sexual pleasure is powerful enough to impel sex, an absolute necessity of gene survival. Even in our society – the least "primitive" in history – sexual drive shapes and motivates what cognitively seems an inordinate portion of our culture. In vain do the forces of purity and abstinence resist. The Reptile's command is "Just do it!" And the reward is an extra-large dose of Dopamine.

Okay, in trial our sex-drive trait is not much use. But some pleasure-motivated survival characteristics are of great use. Judges appeal to one of them when they tell jurors to take satisfaction (a kind of pleasure) in fulfilling their jury duty. That's a mild Reptilian appeal: your ancestors who fulfilled their duty were more likely to have survived, because groups (tribes) survive better when members fulfill their group functions (i.e., their duty). And in times of duress, the group protects members that fulfill their duties, and not the loafers who don't.

But *duty* is a relatively weak Reptilian drive, so of only limited use in trial. So let's look at another pleasure-motivated (i.e., Dopaminergic) evolved trait.

Altruism. When a juror can feel altruistic by means of a fair verdict, she will be more impelled to provide one. Brain scans show that when a person does something altruistic, the Reptile Dopamines us into feeling pleasure. Altruism is a survival trait stronger than duty. Societies are cooperative ventures, and altruism is the ultimate form of cooperation. So the altruistic individual makes his tribe – and thus himself – more likely to survive. And altruists are unlikely to harm other people in the community. So during periods of danger, society tends to protect its altruistic members because they are less expendable as well as safer than others to have around.⁶ So altruism is a powerful “select-in” trait. Not as powerful as sex, but powerful enough to drive behavior.

Why would this help in trial? Because altruism happens only in the face of a want or need. No one altruistically gives a multi-millionaire money. The Reptile puts money in a verdict for someone else (i.e., makes a juror Dopaminically altruistic) when the money can help the Reptile protect herself by making the community safer.

So it's never enough to tell a juror that your client “deserves” money. Who cares? You need to show that the “deserved” money will do some good for your client. This lets the Reptile make the juror feel the pleasure of altruism in providing a fair verdict – *thereby protecting the Reptile*.

CAVEAT: Never explicitly appeal to altruism. Just show how the money will help the client or society. “Full compensation will tell companies that if they come here and needlessly endanger our community, they will be made to pay in full measure.” Or, “It's up

⁶ To understand just how powerful the altruistic act is to our self-preservation, see *Save the Cat* by Blake Snyder. We want to kill people who needlessly kill a dog. We love and want to protect people who self-sacrificingly save a kitten, even if they are otherwise reprehensible. (This is also one of the best script-writing books – because its lessons have always worked on theater and movie audiences, as they will on jurors.)

to you to decide how badly a company can violate safety rules before this community will rise up and make them meet their responsibility.”

Now here's a Reptilian drive motivated by the pleasure of much more Dopamine, so it's much stronger than altruism:

Importance. Virtually everyone derives deep pleasure from the pursuit and attainment of importance. Importance helps Reptilian survival, because in rough times, the group protects its important members and sacrifices the less important. Importance even trumps altruism – by a lot. So the ancients sacrificed lovely but easily replaceable and therefore unimportant young girls, instead of any of the very few irreplaceable – and therefore important – proven generals. This is Reptilian economics.

The Reptile gives people pleasure in bragging rights. So you should give jurors something to brag about: let them see that the verdict you seek will make them important, while a defense verdict won't.⁷ (E.g., “Either this case will be long-remembered, or forgotten by the time we all leave the courthouse.”) A juror who sees that a fair verdict on your behalf will make him important, even briefly, within his neighborhood, town, tribe, tavern, workplace, or nation, and who understands there's no importance in siding with the defendant or in providing a low verdict, has a Reptile-motivated reason to side with you.

Even beyond bragging rights, the simple knowledge of helping to make the community safer carries a sense of importance. As this book goes on, you will see a number of ways to let jurors see they have this opportunity.

Importance even makes it more likely that a person will find mates.

⁷ See for example, the “most important case” section in *David Ball on Damages*.

Tort-“reform” has made a third of the public feel – long before trial – that deciding *against* you will make them important by protecting the community against you. For years, that dark factor has motivated unjust outcomes and undermined the ability of judges to provide fair trials. You reverse this by saying something like, “You have in your hands the power to tell people [companies, doctors, drivers, whatever] that they can't violate public-safety rules around here without people like you saying, 'Enough! Pay full compensation.' That's what makes your work important.”

The more important a juror feels in deciding your way, the more adamantly he will do so.

In applying the law from Judge Smith, you act on behalf of everyone in Randolph County. Some say a jury is the community's conscience, or the community's guardian. This is because you speak for the community. So the closer you come to providing full compensation, the more important your voice will be – by making it clear that Randolph County won't let companies get away with violating safety rules and hurting people.

Even without a punitives issue, you are usually within bounds in pointing out the effects of proper compensation *if* you do not use those effects as a measure of what the compensation should be.

A jury represents the community. The jury's job is to apply the law to the facts – on behalf of the community. So as you do that, consider the effect your decision has on the community.

A little research will show you how explicit you can be. (See Appendix B.)

Justice. Justice is not a Reptilian drive. It is, rather, an *excuse* – a feel-good rationale – for people to protect themselves and their families. When a juror's Reptile thinks you're more a danger to her

than is the defendant, the Reptile makes the juror see the evidence in the defendant's best light.

Reverse this. Show the Reptile that a good verdict for you facilitates her survival. Cases are not won by logic, because in every trial, both sides have a logical path to winning. Otherwise it's a directed verdict, or should be. So you need to get the Reptile to tell the logical part of the juror's brain to act on your behalf. To get the Reptile to do that, you have to offer safety.

In ancient times when the tribe believed that burning a virgin to death pleased the gods, people wanted to make themselves logically think it would be good for her. "Don't worry, Crthanxeia dear, the gods will take you to their bosom!" Don't laugh; we do the same thing today. No matter what mental gymnastics it takes, we almost always make ourselves believe our survival measures are "just." Both sides in almost every war do that. "God's on our side!" or "Those poor devils will be happier once we force them into our way of life." Both sides think that way.

Fortunately, in trial only our side offers safety by means of justice. Few civil defense wins can make a community safer.

What about protecting wrongfully accused defendants? Isn't that a good thing? Absolutely. But plaintiff's lawyers can't afford the time or money to prosecute a defendant who did nothing wrong. You don't get paid win or lose, and you gamble your own resources.

For years, tort-"reformed" poison has kept many jurors from making decisions based on the case. Our enlistment of the Reptile has the opposite effect. It unites jurors – including the poisoned jurors – under the banner of "legitimate justice = legitimate protection." And it relies not on outside-of-trial factors, as does tort-"reform," but factors material to the case.

Logic Revisited.

Today's neuroscience shows that **the logical part of the brain is the servant, not the master**. That's why you can never trust what a juror or anyone else tells you about why they made a particular decision. They only *think* they know. It's the primitive part of the brain that controls decision-making. It's the Reptile, even more primitive than the emotional part. It certainly is not this Johnny-come-lately, whippersnapper "logical" part – servant to the Reptile.

Some of America's smartest attorneys are hampered by their touching faith in the power of logic. But if my Reptile feels safer making you lose, then dammit, you lose.

Is this blasphemy against the Creator who gave us logical thinking? No. S/he also gave us the greater gift of survival, and entrusted it to the most trustworthy part of the brain: the Reptile.

Emotion, too, works for the Reptile. The emotional part of the brain makes you want to decide the way the Reptile directs. In fact, as the more primitive part of the brain, emotion has far more to do with the decision-making process than does logic.

Let's look at how this works.

The "Selfish Jury."

We told groups of research participants case facts about a man whose widow claimed was killed by medical negligence. We told the participants that another group would decide the issues for the parties, but that this group was here solely to render a verdict which would help the community. We told them to take into account only what would be good and bad for the community. Here's what they told us:

BAD EFFECTS OF GIVING MONEY:

It would make doctors leave the state.

It would increase insurance rates.

It would make doctors more indecisive.

It would encourage more lawsuits.

It would make doctors run unnecessary tests.

These bad effects exactly echoed tort-“reform.”

GOOD EFFECTS OF GIVING MONEY:

It would tell other doctors to be more careful.

It would make the community safer (and feel safer) because doctors are accountable.

It would put the public on guard so they'll ask their doctors more questions.

It would get rid of bad doctors.

It would make doctors set better, clearer standards.

It would make for better care in the future.

It would make doctors run all the necessary tests whether or not they want to.

We then asked the participants to use both lists – and nothing else – as their basis for a “selfish” verdict. In other words, we wanted to see which were their greater concerns.

On their own, the participants reached the unanimous conclusion that the bad effects (the tort-“reform” issues) were, as they said, “long-term effects that might or might not happen.” They compared this to the good effects: what were the near-term, near-certain dangers that a plaintiff’s verdict would reduce?

So this mixed group – with more than the usual number of tort-“reformers” – unanimously dismissed *all* tort-“reform” issues and decided the community would be better off – *safer* – with a plaintiff’s verdict.

No fuzzy psychology in this. It’s brain chemistry, start to finish. We do have some free will as to *how* to protect our genes, but we have virtually no free will as to *whether* we will. This is for the same reason that you can’t suffocate yourself by holding your breath. It’s controlled entirely by the same part of the brain; the R-Complex – the Reptile – runs the survival show. The regulation of breathing – and every other kind of survival imperative including full control of survival-related decisions – is housed in the Reptilian brain.

So, for example, it is all but impossible to logic your way into killing your own child. Almost the only way it happens is when the Reptilian control of the brain has gone seriously awry.

Our “selfish” research jurors showed us what real jurors do in trial – we have all seen it happen – when jurors feel they are protecting their communities, their families, and themselves. It happens rarely in civil cases, but frequently in violent crime cases. (See p. 226). Yet when you lead the community’s civil jurors to see 1) a danger to themselves that 2) a fair verdict can diminish, you have successfully enlisted the Reptile. When jurors do not see both of these things, many jurors default to finding ways to decide against you in order to protect themselves from the myths of tort-“reform.”

Stress.

Our research partner Gary Johnson points out that when faced with the prospect of danger, the Reptile makes us feel stress. The verdict goes our way when it can send the jurors home with less stress than a defense verdict. So when you provide the Reptile a reason for you to win, she paves the way for you to win by diminishing the prospect of stress for a plaintiff's win. A juror worried about the negative consequences of a jury verdict is not going to side with you.

In other words, the goal is to let the Reptile make the decision. Anything else creates stress.

CAVEAT: The Reptile will not help if your case is not legitimate. The vast majority of jurors want to feel they are doing the right thing. You have to give them a logic-based way to do that, which means there must be a legitimately logical way for jurors to see the case your way.

In trial, you will start your community-safety campaign as early as jury selection. (See Chapter Ten.) You will awaken the Reptile by showing reasons for her to protect herself, and then giving her the legal and logical means to do it.

SIX

SAFETY RULES AND THE REPTILE

CAVEAT MAJEUR. For complete guidance to "The Rules," see the master work: Malone and Friedman's **Rules of the Road**. Master its techniques before taking another case. You need it all, not just the fragment below, which we have borrowed and heavily adapted for the Reptile.

ALGEBRA LESSON:

SAFETY RULE + 0 = 0

SAFETY RULE + DANGER = REPTILE

Never separate a rule from the danger it was designed to prevent.

Safety rules are powerful trial tools. But the only kind of safety-rule violation the Reptile cares about is the kind that can endanger her. The greater the danger, the more the Reptile cares.

Some safety-rule violations are too specific to endanger the juror's Reptile. "A coal-mining company is not allowed to turn off the lights while workers are in the mine" applies only to the Reptiles of miners. But it becomes useful when positioned as a special case of a more general rule, such as, "A company must not needlessly endanger its employees" or "A company is never allowed to remove a necessary safety measure." That connects it to everyone with a job.

Why Rules?

When you were very young – before your cognitive brain was much developed – you saw that some rules protect you. But not all.

“Don’t snitch your kid sister’s food” is nonsense to your Reptile. The Reptile *wants* your kid sister’s food. But “No one is allowed to steal *your* food” is a Reptilian survival rule. That’s why when you were a kid, if you stole a french fry from another kid’s plate, his “immature” rage was probably out of proportion to one french fry.

Like Peter Pan, this “immature” human characteristic won’t grow up, though it may learn to express itself differently. As you get older, your Reptile gets better at making you protect yourself against anyone (except maybe your own kids) who steals your food or breaks any other kind of safety rule your Reptile relies on.

Your Reptile does not care when you break a rule that protects others. But when someone else breaks a safety rule that protects you, your Reptile takes over – usually by infuriating you at the rule-breaker, trying to impel you to do something about it. This is why you’ll curse at a passing speeder (80 mph) on the highway, even when you’re speeding at 70 in that 55 mph zone.

For Reptilian purposes, a safety rule has six characteristics:

1. It must prevent danger.
2. It must protect people in a wide variety of situations, not just someone who was in your client’s position. If a rule is too specific to accomplish that, then it must be a special case of a more general rule that does. You’ll see below how to accomplish that.
3. It must be in clear English. Reptiles recoil from legalese and technical jargon. Unclear = unsafe.

4. It must explicitly state what a person [or whatever] must or must not *do*. “Speeding is dangerous” merely implies a rule. “Drivers must drive at a safe speed” is a rule.
5. The rule must be practical and easy for someone in the defendant’s position to have followed. E.g., “It’s easy for a physician to follow the steps of a differential diagnosis.”
6. The rule must be one the Defendant has to agree with – or reveal himself as stupid, careless, or dishonest for disagreeing with. “You agree that truck drivers are not allowed to needlessly endanger the public?” The defendant can’t answer, “We can if we want.” He’d instantly be a confessed menace to the Reptile. (NB: The defendant need not admit he violated the rule; you just need him to agree that it’s a rule.)

The book *Rules of the Road* will teach you how to find rules in a wide variety of places: industry standards, law, standards of care, professional ethics, governmental and other regulations, company policy,⁸ common sense, religious scripture (see Chapter Fourteen), etc.

Accident Versus Rule.

Since no one can prevent inadvertence (mistakes, error, accidents, misjudgments), the Reptile ignores it. So never refer to Defendant conduct as accidental, a mistake, a misjudgment, or inadvertent. Be strict about this with yourself and your witnesses.

The opposite of inadvertence is *choosing to violate a safety rule*. The car crash might have been “accidental,” but it happened because someone chose to violate a safety rule – such as “A driver

⁸ Company policies are useful, but some jurors think a company has the right to violate its own policies. So you should show that the company established the policy as some kind of *quid pro quo*. For example, the company’s written policy to safety-train employees was required to get insurance or a state license. So compliance is not voluntary.

has to watch where he's going and see what's there to be seen."

Unlike inadvertence, a safety-rule violation is something the Reptile can prevent people from doing in the future.

Jurors who won't allow much money for medical *mistake* (a kind of inadvertence) will want to yank the license of a doctor who violated patient-safety rules – and sometimes, as our research astonishingly showed, even put the doctor in jail!

A defendant might say, "No, I didn't break any rule – I just wasn't paying as much attention as I should have – it was a momentary lapse." But it's still a rule violation: "A driver has to pay attention at all times. If she allows her attention to wander, and as a result she hurts someone, she's responsible for the harm." *Attention* cannot decide to wander away unless you let it. The individual is in charge: If you want to pay attention you can – unless, say, you are on medications or very tired, which are other kinds of rule violations.

So remember: Every wrongful defendant act derives from a choice to violate a safety rule.

Reptiles ignore: "The physician mistakenly diagnosed infection instead of cancer." Reptiles get involved when they hear, "The physician *violated the patient-safety rule* requiring him to rule out cancer."

Loser: "The trucker missed the light." Winner: "The trucker *violated the public-safety rule* to watch where he was going."

How Do You Deploy Each Rule?

1. In paper and oral discovery, and then in trial, get the other side to agree with each rule, as explained below.
2. Show how the rule decides a verdict issue.

3. Show that violating the rule is related to violations that endanger everyone, not just someone in your client's situation.

4. Show that the more dangerous a violation can be, the more careful the defendant had to be to follow the rule. To do this, go beyond the level of harm in this case. The defendant only broke your client's arm, but the same violation could have killed someone. That's the measure by which jurors must determine if the defendant acted carefully enough.

Even when there's no harm, ordinary care remains what a "prudent" person would do in the face of the worst dangers of the violation – i.e., she would follow the safety rule. (See p. 33)

5. Show that the defendant, by trying to escape responsibility for choosing to violate a public-safety rule, is further endangering the community, and showing others that they too can get away with it.

The "Umbrella Rule."

Every case needs an umbrella rule. The umbrella rule is the widest general rule the defendant violated – wide enough to encompass every juror's Reptile. Here's the umbrella rule for almost every plaintiff's – even commercial – case:

A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients].⁹

⁹ In some cases, you may want to word it this way: "A _____ is never allowed to gamble needlessly with the safety of the public [or 'patients,' etc]."

If you omit "needlessly," the defendant can escape, because there are almost always unavoidable risks: risk of surgery, act of God, unavoidable event, etc. The defendant is at fault only for creating or allowing danger beyond that.

Broaden. In shaping the rule, go beyond your specific kind of defendant. Instead of "A lawyer is never allowed to needlessly endanger a client's interests," go wider: "Any professional hired to give advice – such as a doctor, a lawyer, or an accounting firm – is never allowed to needlessly endanger whoever hired him." This broadened version touches more people.

CROSS Q: Mr. Accountant, a professional, such as a doctor, or a lawyer, or an accountant, is not allowed to needlessly endanger the person who hired him, correct?

A: I can only talk about accountants.

But jurors now know it applies to everyone.

Q: And you can talk about accountants with authority.

A: Yes.

Q: So an accountant is not allowed to needlessly endanger a client's interests.

A (*Waffle waffle waffle, but soon*): Correct.

Q: Tell us why not.¹⁰

¹⁰ Ask this even when you don't know the answer, because it makes no difference what his answer is. If his answer does not include some of the worst results of violating the rule, lead him.

Med mal:

Q: Dr. Defendant [or Dr. IME], a professional, such as a doctor, or a lawyer, or an accountant, is not allowed to needlessly endanger the person who hired him, right?

A: I can only talk about doctors.

Note how even that tiny waffle helps you: The jury knows that *no one* is allowed to needlessly endanger anyone, and expects the witness knows that. So the answer is disingenuous.

Q: So a doctor is allowed to needlessly endanger patients?

A (*If he's stupid he will waffle. Otherwise*): No.

Q: In any circumstances?

A:(*Waffle waffle waffle, but soon*): No.

Q: Why not?

Or in a taxi wreck:

Q: A company is not allowed to needlessly endanger the public?

A: I have a taxi company; I can't answer for other kinds.

Q: Okay, then is a taxi company allowed to needlessly endanger the public?

Etc. And eventually:

Q: How often does your taxi company expose the public to needless danger?

A defense objection will imply there's something to hide.

Case-Specific Rules (Under the Umbrella).

Once you have established the umbrella rule (no needless danger), go on to case-specific rules. "A car maker must make seat-belts that hold people in place." (Because otherwise the car maker would be needlessly endangering the public.)

"A surgeon must see and identify what he's cutting before he cuts." (Or he's needlessly endangering patients.)

"A commercial-truck driver must have his brakes inspected every 24 hours." (Otherwise the driver is needlessly endangering the public.)

So the case-specific safety rule is a sub-set of the umbrella rule that protects us all, not just someone in the position your client was in.

Spreading the tentacles of danger.

Case: Obstetrician violates differential diagnosis requirement to rule out or treat a possible dangerous cause of non-reassuring fetal heart monitor reading during labor. Juror #3 is a 65-year-old male with no children, wants none, contemplates having none, knows no one planning to have any, hates babies, thinks humanity should skip two generations of babies. He might feel a little sorry for the grieving parents, but a little sorrow does not win cases. He has no way to identify with the danger of the obstetrician's violation. So his (Reptile's) verdict can be controlled by tort-"reform"-induced worries about the harm big verdicts do to him and his community.

Have your expert explain the dangers of the obstetrician's violation by analogies to other differential diagnosis situations. "So for example, if a 65-year-old man walks into an emergency room with

chest pains, or if a doctor sees a lump in someone's breast, or if a doctor sees a high PSA on a blood test...."

Analogizing to familiar situations gets past the narrow circumstance of this case, clarifies the rule, and shows how dangerous the violation is to everyone in the community, not just some stranger's baby. During discovery, get the defense to agree with your expert's analogies, and agree that violation is dangerous in those other situations. And make the defense explain why those violations are dangerous in those analogous situations.

That renders the general danger uncontested. Hello, Reptile.

Your own expert can say, "Doctors [*or whoever*] who ignore this particular rule in any branch of medicine [*or whatever*] play Russian Roulette with their patients' [*or whoever's*] lives." So you can say it in opening. And what is the defense going to say when you ask, for example, "Doctor Defendant, would you agree that a doctor [*or whoever*] who violates the safety rules of Differential Diagnosis is playing Russian Roulette with his patients' lives?"

Ask the defendant who else he has violated those rules with. "Did you provide John the same level of care as your other patients?" (Ask this kind of question in all cases, not just medical. "Did you use the same level of care in John's apartment as in your other rented houses?" "Do you drive as carefully at other times as you were driving when you hit John?") If the defendant says yes, a juror who decides the defendant was negligent in this case now sees him as a general danger. And if the defendant says no, he's admitting he needlessly endangered John. If he answers, "I don't know," you can get both benefits.

So the fetal heart monitor case is no longer merely about babies being born. It's now about everyone who ever has to see a doctor or send their kids to one. Broadening further, it is about anyone having to trust that *any* hired professional will follow the safety rules. This helps jurors personally understand the importance of full

compensation, as opposed to a verdict diminished by a dishonest tort-“reform” movement that has undermined the honor and authority of the civil justice system, including its judges.

Link to the Reptile.

Here’s how to link your most case-specific rules back to the umbrella rule:

Case: Your client skied into a rock wall at the edge of the trail.
Specific rule: "A ski resort must not allow dangerous obstacles at the edge of a trail." Juror #6's Reptile doesn't care because juror #6 does not ski. Non-skiing jurors will mutter "assumed risk" or "two broken legs aren't bad, he can still use a computer," etc. So either you lose the case or win and get little money.

Now’s the time for the generalized umbrella rule: "No public facility – such as a sports facility, or a school or library or bank, or a shopping mall – is allowed to needlessly endanger the public." That’s Reptilian to everyone. Then work step-by-step from your general umbrella rule down to the specific rules: "Ski resort must not allow dangerous obstacles at trail’s edge."

So:

1. [*Very general = Reptilian*]: "No public facility – such as a sports facility, or a school or library or bank, or a shopping mall – is allowed to needlessly endanger the public."

Now move step-by-step towards the specific:

2. A public facility must remove any needless dangers.

3. If the danger can't be removed, the facility must warn.
(Not warning creates a needless danger.)
 4. When a danger cannot be removed, even with a warning the public facility must, when possible, make the danger visible enough for people to see it in time to avoid it.
 5. A ski facility must follow the same rules as every other public facility.
 6. So a ski facility is never allowed to endanger the public that uses the facility.
 7. So to prevent needless danger, a ski facility must not allow anything dangerous at trail's edge.
 8. If there is a needless danger at trail's edge, the ski facility must remove it or move the trail.
 9. Until that is done, the ski facility must warn skiers in time to avoid it.
- Etc.

The step-down process is always the same, such as, "No one is allowed to needlessly endanger the public" down to "Truck drivers must be on duty no more than 14 hours at a stretch."

With multiple specific violations (such as "no test" and "no medication"), you'll have multiple parallel links. They make for great, Reptile-alerting visual exhibits.

Backwards. In closing, work backwards from most specific (few if any Reptiles) to most general (all Reptiles).

Here's a medical "backwards" example:

1. To prevent unnecessary danger, when an obstetrician sees there's a possible urgent danger that a baby *might* not

be getting enough oxygen, the doctor is required to get the baby out before any lack of oxygen could possibly harm her.

2. That's because the obstetrician is never allowed to ignore signs of any possible urgent danger.

3. That's because every kind of doctor is required to rule out or treat a possible urgent danger soon enough to keep it from harming the patient.

4. That's because every kind of doctor is required to follow the differential diagnosis rules.

5. That's because violating the differential diagnosis rules needlessly endangers the patient, and ("Umbrella Rule"): No physician of any kind is allowed to needlessly endanger any patient.

The Reptile and the Standard of Care.

Read this even if you don't do standard-of-care cases. You'll see why.

The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows – demands! – only one level of care: the safest. And the Reptile is legally right. The second-safest available choice, *no matter how many "experts" say it's okay, always violates the legal standard of care.* Here's how:

1. A doctor [*or whatever*] is never allowed to needlessly endanger a patient [*or whoever*]. In other words, a

“prudent” [or *careful, depending on the instruction*] doctor does not needlessly endanger a patient.

2. When there’s more than one available way to achieve exactly the same level of benefit, the doctor is not allowed to select a way that carries more danger than the other. That would allow unnecessary danger, which doctors are not allowed to do.

3. So a “*prudent*” doctor must select the safest way. If she selects the second-safest, she’s not prudent because she’s allowing unnecessary danger.

The law demands no less, because *no prudent person or company chooses to expose anyone to unnecessary danger*. So second-safest is always negligent. In medicine, the medical risk-benefit requirement formally prohibits doctors from choosing a second-safest available choice.

This applies to any situation in which there are multiple ways to accomplish the same level of benefit.

Outside of medicine, the law still prohibits the second safest choice: “Ordinary care” does not mean average care; it means that which a *prudent* person would do in the same situation. Anyone who needlessly endangers is not prudent. So standard of care as well as negligence laws in general require the safest available choice. No second-safest.

The standard of care is not what other doctors do. It is – exclusively – what *prudent* doctors do. It makes no difference if the defendant met *other* standards of care. In medicine, *every* choice must meet the risk/benefit requirement: “No unnecessary risk,” meaning “safest available choice.” That’s all the Reptile demands from anyone. And she really demands it, once you show her that the violation can hurt her and that she can do something to prevent it from happening to her.

The defense has to admit (or be a danger to the Reptile) that *prudent* doctors (or whatever) don't expose anyone to unnecessary danger.

This can be worded in many ways. Examples:

There is no such thing as a standard of care that allows a doctor to needlessly endanger his patients.

To achieve a desired benefit, a doctor must expose a patient to no more danger than necessary.

If there's a safer way available, the doctor must choose it.

All else being equal, the doctor must select the available choice that puts the patient in the least danger.

They all come down to this:

The only allowable choice is the safest available choice.

From jury voir dire through closing, show how this Reptilian rule applies not just to this specific case (obstetric or whatever), but to every kind of medicine.

If you are lucky, the defense will be stupid enough to claim that doctors are allowed to make needlessly dangerous choices. That will horrify the Reptile. No prudent doctor allows unnecessary danger. No prudent taxi-driver. No prudent anybody or anything.

Sample for defendant and his “experts” (deposition and trial):

Q: Physicians are not allowed to needlessly endanger patients?

A [*“blah,” but sooner or later*]: Correct.

Q: That's standard of care?

A *[blah but eventually]*: Yes.

Q: When diagnosing or treating, do doctors make choices?

A: Yes.

Q: Often, several available choices can achieve the same benefit?

A: Yes.

Q: Sometimes some of those are more dangerous than others?

A: Yes.

Q: So you have to avoid selecting one of those more dangerous ones.

A: Correct.

Q: Because that's what a prudent doctor would do.

A *[Blahblahandblah – objection! shaddup! Blah and:]* Yes.

Q: Because when the benefit is the same, the extra danger is not allowed.

A: Yes.

Q: The standard of care does not allow extra danger unless it might work better or increase the odds of success.

A: Yes.

Q: So needless extra danger violates the standard of care?

A [*yakketyyakomigodyakblah but finally*]: Yes.

Q: And there's no such thing as a standard of care that allows you to needlessly endanger a patient.¹¹

Obviously, real cross-exam is not so neat and clean. But if you practice this in advance with a friend who can wriggle out of anything, you will be able to render the real witness unable to escape without threatening the Reptile.

Along the way, make the defendant and his opinion witnesses explain how risk-benefit analysis works – and its purpose: to prevent needless risk. In medical cases, the defense cannot attack risk-benefit analysis without countenancing needless endangerment. To the Reptile: “Case Closed!”

Without Standard of Care.

The method and result are similar: “A taxi driver must not needlessly endanger the public.” The driver and his company have to agree. The defense attorney has to agree. The judge has to agree. The defendant's mother has to agree. A prudent person does not needlessly endanger others. If you needlessly endanger, you are negligent.

So the law and the Reptile are 100% in harmony.

Level of danger defines required level of care.

Another negligence characteristic the Reptile loves:

The more dangerous something is, the more careful a _____ [e.g. driver, doctor, products manufacturer] must be.

¹¹ You might want to add: “Doctors are entitled to use their on-the-scene judgement?” – “Because they are in the best position to judge?” – “So the doctor's judgment shapes his decisions?” – Under what circumstances is a doctor's judgment allowed to needlessly endanger a patient?” (Ain't this fun?)

When you don't explain this, jurors think 18-wheeler drivers need be no more careful than car drivers. But trucks are immeasurably more dangerous, so truck drivers must be immeasurably more careful. Or they are not prudent, and therefore they are negligent.

So to decide the necessary level of required care, jurors need to know *all* the dangers of trucks (can't stop or maneuver as well as a car, cause more harm when they hit someone, they go off track when turning, etc.).¹² Hello, Reptile!

When showing jurors how dangerous something is (such as a truck, or diagnosing a patient, or manufacturing a product, or glancing away from the road long enough to hit someone in front of you at 12 mph), explain why you are showing it: for jurors to have the necessary information to see how dangerous a violation is. Jurors rarely understand this from jury instructions, so it's up to you: *The greater the danger, the higher the required level of care*. Ask about this concept in jury voir dire. "So, Mr. Juror, because your job can cause more harm than others, you have to be more careful ...?" It's part of your opening. It peppers direct and cross: "So, Expert Smith, because this can hurt so many people, it has to be done more carefully than, say, _____?"

And it's plain old common sense.

In closing if not earlier, explain that everyone – including Mr. Defense Attorney – agrees that the greater the danger, the greater the required care.

Connect this to the jury instruction on negligence: "Because no prudent person chooses to needlessly endanger anyone, he uses enough care to match the danger level. At a minimum that means following the safety rules. And just following the safety rules would have made him careful enough not to hurt anyone."

¹² Download trucking case article on damagesforum.net.

Memorable analogy: “If I carry a dead rattlesnake through a crowd, it’s not dangerous, so I need not be careful. A live rattlesnake in a box could get loose, so I have to be pretty careful. A live rattlesnake in my hands is extremely dangerous, so I must be extremely careful.”

Ordinary care.

Many lawyers – and even some judges – think “ordinary care” means *average*. This misconception leaks to the jurors, who then deny negligence on the grounds that what the defendant did seemed “average” – meaning lots of people do it. By this logic, going 77 in a 65 mph zone is not negligent because the average person does it. But 77 in a 65 zone unnecessarily endangers the public, no matter how many people do it. It’s negligent. (Remember that we allow ourselves, but not others, to break a safety rules).

Contract.

Anyone who does something careless that hurts anyone else is responsible for the harm. That is our social contract with each other, and it is the law – so it is a real contract. Explain it. Explain that when a driver [or whoever] gets behind the wheel [or does whatever], she implicitly agrees – in *advance* – to be responsible for any harm she does if she violates any safety rules.

And no matter what other companies do, a car maker implicitly agrees in advance to be responsible for any harm it does by violating any safety rules.

Otherwise the community has to foot the bill.

Violating that agreement and getting away with it leaves people free to violate more safety rules. The Reptile forbids that. So when a car maker has a practical way to make the car safer, chooses not to, and creates or allows unnecessary danger, he has long ago contracted in

advance to be responsible for whatever harm his violation does. The Reptile will demand enforcement of that contract so that the community will be safer.

Similarly, no matter what every other doctor does, when a doctor guesses instead of rules out, or cuts without identifying what he's cutting, he has agreed in advance to be responsible for any harm his needlessly risky choices cause.

And no matter what other drivers do, when a driver violates the safety rule requiring her to keep her mind on her driving well enough to always pay attention to where she's going, she has agreed in advance to accept responsibility for any harm she does. That includes the pain and suffering.

So the umbrella rule – “no needless danger” – is society's (thus the Reptile's) most important safety rule. It's really two rules:

1. No matter what anyone else does, you must be careful enough not to cause or allow foreseeable danger.
2. When you violate #1, you have agreed in advance to pay for care, lost income, suffering, pain, disability, etc. “When someone gets away with breaking the agreement, they and others have less reason to be careful in the future. So the community is endangered. And the community has to spend dollars needed for its own care to take care of this person instead.”¹³ (These arguments are effective mainly within the context of violated safety rules.)

¹³ Use this same argument to show that defense “experts” – such as IMEs who violate the rules necessary to coming to a scientific conclusion – are a public menace. By fabricating conclusions, they endanger everyone, because it allows dangerous people to get away with being dangerous.

Constitutional Guarantee.

Consider for your closing, “When someone is injured or killed by negligence, the Seventh Amendment to the United States Constitution gives every American a promissory note: a promise to repay for the injury through the judicial system. The heart of the judicial system is the jury. So the plaintiff is here today calling for payment on their promissory note guaranteed by the Constitution. By your verdict, you order it to be paid.”

“But All the Other Kids Do It!”

In closing, say:

What is Ford saying when they show charts that Chevies roll over as often as Fords? That every company can get away with endangering the public? That Ford knows what it’s doing is dangerous but they don’t care, as long as others do it too? We don’t raise our kids that way and the law does not allow companies to act that way.

Ordinary care does not mean menacing the public, no matter how many companies do it. If it did, we’d become a nation of vehicles rolling over and killing folks, based on the perilous excuse that it’s okay because “they all roll.”

Explain that that’s why “all the other kids” who do it are watching this case: To see if they can escape paying when they go on needlessly endangering the public. “Nobody gets to carelessly carry live rattlesnakes through crowds just because all the other snake handlers do it too.”

Rule: “A company is not allowed to endanger the public just because some other companies do too.”

Use Rule A to Prove Rule B.

Use the rule the defense accepts to prove the more specific rule the defense rejects. Often the defense will agree with your general rules but not the specific ones. For example, the defense will agree that a doctor must never needlessly endanger patients, but disagree that she had to have gotten to the hospital room in 15 minutes. Simply show how taking longer than 15 minutes needlessly (and therefore impermissibly) endangered patients, so was not allowed.

Punitive Damages.

The usual precursor to punitive damages is that the defendant knew that what he was doing endangered others yet he did it anyway (reckless, wanton), or knew what he was doing violated a safety rule or law yet he did it anyway (reckless, willful). So once the defendant agrees to a safety rule and admits he knew it at the time, you can be in punitive damages territory. Consider early whether a punitive approach might be practical and desirable. The answer is not always yes, but if it is, the Reptile may be a good friend.

“It Never Hurt Anyone Before!”

Or, *“It’s been used millions of times and caused only a handful of injuries!”* In products liability, premises liability, and similar cases, jurors often feel that nothing made by humans can be perfect, so the plaintiff is demanding too much. To deal with this common attitude, your safety expert (or you) should say,

We all use thousands of things. Companies manufacture thousands of things – things that hurt people only once in a while, or maybe haven’t hurt anyone yet. When the dangerous design of one of those things hurts someone,

even though the company knew there was danger, they say, “But it never hurt anyone before,” or “It hardly ever hurts anyone!” The safety rule and the law say that whether it ever hurt anyone or not, if the manufacturer [*or whoever*] knew it could injure, the company was required to fix it. Why? **Because if you add up all the people who are hurt by all the different products that “hardly ever hurt anyone,” they add up to a major danger every day to every member of the public.**

Give examples. Then:

Saying, “It never hurt anyone before” is like a reckless driver saying he’s never hurt anyone before. Result? Thousands of highways deaths every year – almost all caused by reckless drivers who never hurt anyone before.

Sooner or later, every danger claims a victim. Add them up and it’s one of America’s biggest single causes of needless serious injury and death. That’s why the law does not care how many times it happened before. The law just asks if the company knew in advance there was a danger.

Which Verdict Will Make Them Safer?

The juror’s decision rests on the Reptilian question of which verdict will make her safer. Collision at 10 mph; your client is badly hurt. The juror is confronted with two possible dangers: a) people driving carelessly, and b) tort-“reform” harms.

If you do not show that 10-mph collisions are a public menace that has badly hurt many people, then the Reptile has no way of knowing that a verdict for your side will help make her safer. So she’ll default to a small or zero verdict to help protect her from the harm lawyers do to the community. To do that, jurors give themselves the mental *excuse* of believing – unsupportably – that 10 mph collisions don’t

cause harm. So you must show that the greater and more immediate danger lies in giving a pass to – and thus encouraging – people who do this kind of harm.

Rule/Theme.

Raleigh, NC attorney Donald H. Beskind points out that a rule is really a theme transformed into a behavior imperative. For example, “Profits over safety” becomes “A company is not allowed to sacrifice safety to profits.” This makes all the difference in the world – including, among many other benefits, the fact that the defense that would never agree with the theme has to agree with the same concept expressed as a rule.

And of course, safety rules (“... not allowed to cause needless danger”), unlike almost all themes (“...didn’t have to happen”), are Reptilian.

In other words: Themes are intellectual; rules are Reptilian.

Don’t forget the major axiom: **When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.**

Contributory and Comparative Negligence.

Of course the same rules apply to your client – but with a huge difference. In most contrib or comparative situations, your client hurt only himself. The Reptile does not care when other people hurt themselves, because it’s almost never a danger to the Reptile. So she has little or no motive to react. But when people break rules that endanger others, “others” means the community, which always includes the Reptile. So she has a substantial motive to react.

This does not mean you will win every contrib or comparative issue. But with Reptilian trial advocacy, your chances are much greater.

SEVEN

CODES

(Know Your Audience)

Here is the most important advice for any performer or presenter: “Know your audience.” This chapter provides the best way – the Reptilian way -- to know your audience, and what to do with that knowledge.

Clotaire Rapaille, currently one of the world’s great marketing experts, developed a way to know the audience – and connect with them – even when they are total strangers. It works by ferreting out our most common and fundamental connections to particular concepts, products, words, actions, entities, roles, or anything else.¹⁴ Those connections are Reptilian (meaning involved with survival safety or menace), as you will see.

In each instance, the connection is expressed in just a few words, often only one. More than a few would be too complex to accurately describe the connection.

Rapaille calls this connection the “Code.” The Code is not a cognitive understanding of what something is; it is, rather, the way in which the Reptile relates to it.

For example, Rapaille shows, the American Code for good health is “mobility.” Mobility is not the *definition* of good health. But we relate to the concept of good health within the framework of mobility.

¹⁴ See *The Culture Code*. Clotaire Rapaille. Broadway Books.

More to the point for trial, as you'll see below: the Code for bad health – i.e., our strongest relationship with bad health – is loss of mobility. Not pain, not medicine, not even life expectancy – but *loss* of mobility. After all, from the time we were tykes, being sick meant being immobile: not *going* outside, not *going* to school, not *going* out to play. A decade later it meant not *going* to the prom. And that connection never goes away, right up until everyone's inevitable and final loss of mobility: not *going* anywhere, at least not on this planet.

Obviously, good and bad health mean a lot more than mobility or its lack. But mobility or its lack is our primary way of relating to the concept of health. Later in this chapter you will learn how to apply this Code in trial.

Here's a Code example that will make the concept clear: Early in Rapaille's marketing career, he was asked how to bolster Proctor & Gamble's coffee sales. P&G's attempts were not working, despite emphasizing quality and robust taste. Rapaille knew that the best way to sell something (or to persuade) is to start where the audience is, not where you want to get them. You do this by identifying the public's core relationship – the Code – with what you are selling or trying to persuade them about.

So to sell coffee, you need the Code for coffee.

Rapaille was puzzled by the relationship between Americans and coffee. We slug gallons of it without really liking it. We fill it with taste-disguising stuff: Milk. Sugar. Three kinds of pseudo-sugar. Fifty-five flavors of flavoring. We make it taste like anything but coffee. Why? What's going on here? Rapaille knew that the only way to sell the stuff was to find our *real* relationship with (i.e., our "Code" for) coffee. People say, "I like the taste," but few do. Or they'll say, "It wakes me up," though there are better-tasting caffeine sources.

So what Code expresses our real relationship with coffee?

The research method Rapaille used to find out, and which we adapted, is described on his website (rapailleinstitute.com) and in his books. **But unless you are an expert in designing controlled research, we do not recommend trying it on your own. It took a lot of refinement and a lot of background experience with various research methods for us to adapt it to advocacy use.**

The initial stage is to identify the average American's very first association with, in this instance, coffee. For most Americans (unlike, say, most Japanese), that first association comes from our earliest years when we awaken in our crib or side-railed bed. The house is filled with the *smell* of coffee. Next thing, Mommy or Daddy shows up, usually Mommy, or maybe even Grandma. We get held, pampered, fed. It's the most secure and protected most of us will ever be. So for the rest of our lives, the Reptile associates the smell of coffee with security, warmth, well-being, family, and total safety. No hint of threat.

The *taste* of coffee has nothing to do with that association, because we didn't drink coffee at that age. We just smelled it in the house, and maybe on Mommy's breath. So, as Rapaille discovered, the American Code for coffee is "smell." As a result, the Reptile makes us seek out coffee because the smell makes the Reptile feel safe. The smell is comforting, nurturing, almost embracing. So the Reptile maneuvers us into wanting that smell. Waking us up is just a side benefit.

Once Rapaille knew that the Code in America for coffee is smell, he moved P&G's marketing campaign away from taste and substituted "aroma." Their ads featured folks waking up and taking deep breaths of the aroma wafting in. P&G's market share quickly rose. Competitors soon imitated the concept, so most now emphasize aroma – the thing buyers crave because of its positive relationship to the Reptile.

So the buyers who had said they were buying for taste or to wake up were wrong – as usual. **We almost never know why we make decisions, because our reasons are rarely conscious, though we usually think they are.** As with coffee, we don't even usually know when they are survival-related decisions. But the Reptile knows, and as Rapaille is fond of pointing out, "the Reptile never loses."

Rapaille's research identified a number of Codes that can be used in trials, and we continue identifying new ones. But remember: the word "Code" is not to be used in trial, nor is the wording of a Code. So never say, "The Code for doctor is hero." Codes show *you* the relationship between something and the Reptile, so that you will know how to best present that "something" in trial.

Code for Health: "Mobility."

As mentioned above, for advocacy purposes one of Rapaille's most useful Codes is the one for health: "Mobility." That means the ability to move a limb, to walk, to drive, to get around. An injury that impairs mobility is "Off Code." As a result, *lack of mobility* vastly outweighs the other consequences of injury, such as pain. So treatments, devices, or other aids to restoring mobility are Reptilian necessities, and jurors place greater value on them. And the lack of mobility is the most evocative of harms.

The Reptile values mobility not for convenience but for survival. Our greatest Reptilian bad-health fear (not necessarily conscious) is that it hinders movement. Any animal whose ability to move is hindered is less likely to survive. Movement is as fundamental to survival as is breathing.

So any act that endangers mobility is a major concern of the Reptile. Our research partner Jim Fitzgerald confirmed this in a spinal injury case in which he focused on mobility problems. He knew that lack

of mobility gets more of a reaction from jurors than pain; this is because in evolutionary terms, survival with pain is possible; survival without mobility is not. The resulting damages verdict confirmed this principle.

Negative Codes.

Not every Code is good. “Health = mobility,” “coffee = comforting smell,” and “physician = hero” are positives. Negative Codes are just as strong. Rapaille cites a disgusting but accurate example. The Code for Olestra (a substitute for fat which marketers assumed would revolutionize the food industry) turns out to be “diarrhea”! This happened because the results of some early testing were reported to the public. That Code ruined the product’s chances of revolutionizing the food industry. It’s not merely that we dislike diarrhea; it is that our Reptilian associations with it have to do with danger. This is because we first encountered diarrhea when we were very young – ours or someone else’s. We did not like it. When we had it, it was easy to worry that our parents would not like us. We didn’t get picked up or hugged or cuddled or cooed over. We got held at a distance and washed off. It hurt. Extreme motility hinders mobility. And in evolutionary terms, the stink of diarrhea attracted predators. So diarrhea is as threatening to the Reptile as the smell of coffee is comforting. And diarrhea became Olestra’s Code. Goodbye to that particular food revolution.

Code for Hospital: “Processing Plant.”

The diarrhea Code won’t help you in most trials. But other negative Codes will. For example, Rapaille found that the Code for hospital is “meat-processing plant.” Bad sights, sounds, and smells; long, rude, dehumanizing lines and waits; insensitivity; not enough time with doctors or nurses; technicians in a rush who treat you like number 37 in a 137-person day; a tempo seemingly designed to dispose of you as fast as possible; and suffering, crying, death. This impersonal

Code – Processing Plant – is implanted during a child’s earliest hospital visits either as patient or visitor, so it becomes an indelible Reptilian imprint.¹⁵

So in a hospital case, confirm that the defendant hospital was *On-Code*, and thus a threat that the Reptile must resist. The jurors come to you with the negative Code (processing plant) already in place. Meet them where they are – which is the purpose of Codes. Ask your client (and the jurors in voir dire) questions about the characteristics that make the Code for hospital “processing plant”: “How long did you have to wait? How long did the doctor spend with you? How carefully did she explain what was going on?” The answers confirm the Code the juror comes in with, and get the jurors thinking about it.

Raleigh attorney Don Beskind often works photos of the hospital into testimony. The way most hospitals look confirms the “processing plant” image.

All this lays the groundwork for your primary mission: to show that a proper verdict will make things safer for the community. The Reptile wants to comply. Just remember that the Reptile does not get involved unless she sees that the danger is to her, and can be meliorated.

Do You Want Off-Code or On-Code?

Sometimes you want jurors to feel that something was on-Code; other times you want jurors to feel something was off-Code (i.e., conflicted with the Code).

¹⁵ This Code might be in transformation as children’s hospitals increasingly focus on improving the environment for kids. But for most adult jurors today, the earliest imprint was not to the nifty children’s wing. So at least for a while, “meat-processing plant” is widespread.

For example: the Code for health is good: *mobility*. You want jurors to see that your client's health before the wreck was on-Code (he had full mobility). But you want jurors to see that his health after the wreck was *off*-Code (little or no mobility).

Or in a hospital case: The Code for hospital is bad: meat-processing plant. That's great if you're suing a hospital. Just show how it matched the bad characteristics of its Code: patients treated like numbers, no one shows up when you need them, etc. But if you need zero negligence on the hospital, show that it was *off* of the bad Code: Instead of a cold and impersonal assembly line, the hospital was warm, personal, caring, communicative, etc.

When the Code for X is *bad* and you want jurors to see that the X in your case was bad, show that it was *on*-Code – that it had the characteristics of that negative Code. When you want jurors to see that your X was good, show it was *off*-Code – that it had characteristics opposite those of the bad Code.

And vice-versa.

To gather ammunition to show that someone or something is on-Code or off-Code, find as many characteristics of the Code in your case as possible. Mobility = can't walk, can't get to work, can't get things off a shelf, can't get away in an emergency, etc. Processing plant = impersonal, dangerous, uncaring, rushing, etc. Then show jurors those characteristics.

Connect to the negligence: Show how your on-Codes and off-Codes relate to the issues in the case. So, for example, show that a nurse was off-Code because she did not have the characteristics of a *care-giver*, which the next paragraph explains is the Code for nurse. But don't stop there. You must also connect those off-Code characteristics with what the nurse *did* that was negligent. "If she'd cared she would have checked the dose before giving the medication."

Here's the drill:

1. Determine the applicable Codes.
2. Gather the ammunition for each Code – everything in the case that has to do with the Code.
3. Use that ammunition throughout trial to maintain connection with the Reptile.

Code for Nurse: "Care Giver."

Rapaille identifies the Code for nurse as "care giver."

So show how the defendant nurse was off-Code: contrast what she did with the characteristics we attach to "care giver." (Or when appropriate, the opposite: To help show she was not negligent, show that she was on-Code.)

Here are other codes, some from Rapaille and some from our research:

Code for Injustice: "Incompletion."

Our research showed that the code for injustice is "incompletion" – waiting for the other shoe to drop. Completing the injustice means balancing it – via a real apology, or compensation, or revenge, or genuine remorse, or a "come-uppance," or "just deserts." Without that, the door is left open for someone to do the injustice again, or for someone else to hurt us because we did not "complete" (i.e., make up for) an injustice we did to him.

Because an injustice remains a danger for as long as it is not closed out, the Reptile has made it memorable and uncomfortable. That's

why we store memories of unfinished injustices for so long, whether we did them or they were done to us.

Whether a person committed the injustice or was its victim, the gnawing feeling of its incompleteness lingers, often for years, even for life. Adults remember “bad” things they did as children (or that were done to them) for which they were never punished; if they (or whoever did it to them) had been punished, the chances are high the memory would be long gone. The same thing is often true with injustices experienced later in life. If the shoe has not dropped, we wait for it. If the injustice was severe enough, the waiting can be torture.

One major reason the civil justice system developed was to complete injustices – i.e., to drop the other shoe. Human beings want it to drop so badly that some mechanism for making it drop is built into most religions.

But the completion must be *real*. A false apology makes the injustice feel worse. That’s the connection to stipulated cases. When the defense says at the last minute that they’re “meeting their responsibility” by stipulating to liability, point out that the stipulation is a cynical maneuver that actually makes things worse. The defense made your client worry for months or years that they’d never accept the blame, that he’d never get the help he needed, that they were blaming him. Further, fake completion causes more harm. And to the Reptile, it means that the wrongdoer (and others) will do it again.

A false apology is also hypocritical, which puts it near the top of the Reptile’s kill list (see Chapter Nine).

Even a minor incompleteness injustice can nag at us forever. A major one – whether we did it or it was done to us – can keep us from getting on with our lives.

In 2007, the great Seattle attorney Lem Howell was suing a trucking company and its driver in a difficult-liability trucking case. During the damages portion of the case, he saw the defendant truck driver looking more and more devastated over the course of hearing and re-hearing the awful harm he'd done.

This was remorse. Remorse makes future violation less likely, so the Reptile feels safer. Remorse is so powerful that its presence or absence is often the pivot in death penalty cases. (Remorse = life. No remorse = death.) When any civil or criminal defendant shows believable remorse, the other shoe drops so the Reptile sees little need to do much more. This steeply diminishes civil verdicts, as it was about to do in Mr. Howell's case. So Mr. Howell needed a way to show that despite the truck driver's visible remorse, the other shoe had not yet dropped.

To deal with this, in closing Mr. Howell stood very near the grieving truck driver and told the jury, "Folks, justice in this case does not help only the plaintiffs. Everyone – including this man – needs justice so they can get past this and get on with their lives as best they can. That cannot start until everyone on both sides knows that full justice has been done."

That showed the Reptile that remorse was not enough, because not only the plaintiff but the defendant needed completion: justice. Perhaps surprisingly, our research had showed conclusively that a person who commits an injustice often needs completion as much as does the victim of the injustice. **So in most trials, neither side can get on with their lives until they know justice has been done – even when one of the sides is doing all it can to avoid justice.**

Mr. Howell reports that in nearly a half-century of practice he had never felt such resonance from the jury.

So he went further. He said, "Mr. Defense Attorney, when this case is over, no matter how it comes out, you need to make sure this fellow [*the truck driver*] gets the help he needs." In other words,

Mr. Howell became the perfect Reptilian energizer. And in the verdict, the jury Reptiles responded in the best possible way.

In many cases you can argue that people on both sides cannot get past what happened until justice is done. Jurors will understand its importance and act accordingly.

Code for Trial: “Opportunity.”

Early in our research, Keenan calls Ball and asks, “How can our culture cherish babies more than anything else, yet not provide a fair verdict when negligence kills a baby?”

Ball says, “Keenan! It’s two in the morning!”

Keenan says, “Yeah. Get up and get to work!”

Never give Keenan your phone number!

But Keenan had a good question. Why so little money for something so precious? What might the Reptile be able to do about it?

And is there a Code that can help us?

Our ensuing research, along with research into how people have evolved to regard the offspring of others, showed us this: While Americans sympathize with parents who have lost a baby, if we’re not the parents and especially if the parents are strangers, we consider it a comparatively valueless loss. Babies have no footprint in the world. They provide no service to anyone. They are useless. And people can have more; babies are free for the making. In this context, **the Code for *someone else’s* dead baby is “interchangeable,”** outrageous as that may seem. The Reptile sees no survival advantage to herself in compensating the parents. “How does compensating help *me*?” You have to show her. Here’s how:

The Code for a trial is “opportunity.” As with most Codes, that can be good or bad. You will make it good.

Start by meticulously avoiding the concept of “hopeless tragedy.” No case should sink into the useless pit of tragedy. The Reptile ignores tragedy because she can’t do anything about it. Instead, the trial – not the baby’s death but the trial – is an *opportunity* for jurors to use the horror of your baby’s death as a way to make their offspring safer.

That’s why the Code for trial is opportunity.

Jurors do not come in automatically seeing a trial as an opportunity for safety. But you can show them that indeed, every case is – *if* they decide our way. The defense has no safety to offer. Almost always a defense verdict makes the community *less* safe. But “opportunity” is the Code for anything that has the potential to make the community safer – which you can do in every trial.

We found the power of this concept when we looked at how jurors react to the most tragic, hopeless cases of all: the death of an infant. We saw that “out of the worst can come the best opportunity” is Reptilian to the core. The human race has always survived its endless tragedies by means of **the powerful Reptilian imperative to use devastating events as a springboard from which to create safety.** This is why the opportunity-from-tragedy theme is the culmination of almost every great work of dramatic and narrative literature, as well as the Scriptures of most religions.

Human lineages that did not have much of the opportunity imperative died out for obvious reasons. So in every kind of case, your success with the Reptile lies in how well you touch the “opportunity” Code. Gloom and doom don’t win cases for you. Hopelessness hands the case to the defense.

Jurors come in already knowing how tragic it is for the parents; you don't need to point it out. Instead, you must show that the trial is about hope and better survival. In cold terms, it's a lost-and-found case: The plaintiffs lost something – and in that loss we find hope for making ourselves safer.

Small cases work the same way. (See Chapter Nineteen.) Every injury presents a hope for a safer future. Position the jurors as the cultivators of that hope.

Code for Family: “Essential Circle,” meaning “everyone there.”

This is among the most powerful and important Codes, because injury usually affects both family and the client's relationship to family. For the vast majority of Americans, family is the ultimate safety net.

The most common early association people have with family is “everyone there.” To the Reptile, everyone being there is important because each family member has a role or a potential role: creating more babies, nurturing and training, the young growing older to ensure safety of the older members, the elders providing experience-based guidance and wisdom, etc.

So the concept of “everyone there” at, say, Thanksgiving, is about Reptilian safety. As the family circle cracks, so does safety.

Family is the primary repository for the Reptile's genes. (The Reptile does not know about sperm banks.) To the Reptile, the family is a bank containing all her assets: The First Pleistocene National Genes Bank, which as of this writing is in better shape than most financial banks. A Reptile can have multiple banks (connected to multiple families), and each one – to the Reptile – is important. So Americans raised in a normal family setting are quick to feel how

removal or serious harm to someone in a family is dangerous for the whole family. If you then show that the family loss was due to a threat that can affect the juror's Reptile, she will do whatever she can to protect herself from it. In trial, that means a fair verdict for the plaintiff. (So trial = safety opportunity.)

Don Keenan did some focus groups for a wrongful death case in which the father of an immigrant family had been killed. But the children were grown, and the man had not generated much income. So what could be the basis for a decent verdict? Family: *everyone* together, the *complete* circle. The focus-jurors' main concern was that the two grown sons now had no one to teach them the restaurant business they'd come to America to pursue with their father. This loss vastly outweighed the comparatively vague "lost American dream" argument. So show the Reptile something more fundamental: the safety of her next generation of genes. That is the Reptile's *raison d'être*.

Code for Home: "Re–,"

. . . as Rapaille terms it. He means "return," "reunite," "resolve," and "reconfirm." Think of it as "back in place." It has close to the same meaning as family.

Code for Loneliness: "Exposed."

In evolutionary terms, isolation = danger. The Reptile knows there is safety in numbers. That's because in the environments of our early lineages, few things were more dangerous than being alone. When you're alone you can't watch your back.

So the Reptiles that survived were those that hated isolation. They provided motivation to be around people, even unlikable ones. Other lineages died out because without someone to watch their backs, something ate their backs.

In other words, to the Reptile, being alone for long is a death sentence.

People value their “alone” times, but those times usually have to be short-term and voluntarily. After a short time, the Reptile makes isolation mildly unpleasant in order to motivate you to get with people, where it is safer – though you don’t necessarily think of it that way; remember, your conscious mind is not running the show. When isolation continues, the Reptile turns up the unpleasantness to push you harder to get with people. If you don’t or can’t – if the isolation is enforced, as in prison or *as the result of an injury* – the Reptile turns the pressure way up: GET WITH PEOPLE!

The Reptile hard-wired us with this imperative over the course of many generations, so it is barely dependent on situation. Throughout the entire history of every culture, one of the worst fears has been being alone. Humans are creatures of family, herd, tribe. Or team, club, corporation. Being alone, or abandoned, or cut off, or in any other way bereft of company is a ghastly fate. It’s one of the greatest fears of aging. It’s why the rare visit from an offspring is so life-giving. Hollywood and fairy tales and literature all know that the surest way to elicit tears is to show someone left all, all alone. And when the loneliness stops, our tears turn to joy.

Mom’s constant admonition: “Don’t go alone!”

To make a scary situation more frightening, be there alone – as we learn from almost every good horror movie.

The best Christmas gift: the visit. The worst Christmas: the elderly lady alone in her apartment expecting her children to visit and they never show up.

The Reptile makes loneliness painful to bear and awful to witness – simply because it is dangerous. So, for example, we might think that in prison it’s safer to be in solitary away from other dangerous prisoners. But that’s logic. The Reptile is far more afraid of

isolation. So when you're alone too long, the Reptile pushes you so painfully hard to de-isolate that if you don't get with people, you can end up with long-term mental and emotional damage.

What about hermit monks? They believe they are not alone, but with God. That's good company.

Loneliness and isolation are of great importance in trial. Many injuries result in isolation. Others result in *virtual* isolation, meaning that there is isolation despite family and friends being nearby and available. Examine your case thoroughly for such losses. Ask your client and her friends and family. Consult with social workers and other care givers for clues. And remember that few people will admit to being lonely.

Examples: Many brain-injury victims withdraw from society and even family, isolating themselves in their room. The house can be crowded but they are alone. And injuries involving loss of mobility (see Code for health, above) are bad enough, but far worse when combined with loneliness.

Especially look for how money can help diminish the isolation.

Example: A car with hand controls provides not merely transportation to therapy; it also provides a return to the companionship of society.

When you show that violation of safety rule(s) leads to such deeply Reptilian harm, many jurors will find loneliness worse than physical pain, and far more worth providing money for – especially if money can provide company. Most people empathize more with loneliness than with unmitigable physical pain, because pain is less of a danger to the Reptile than is isolation. And unlike pain, you can do something about isolation: get with people.

Even when the word isolation does not appear in the elements of damages, isolation exacerbates those elements. Pain, for example, is often exacerbated when the victim is isolated.

CAVEAT: As with any major kind of harm or deficit, jurors who share the isolation your client has been forced into are less likely to give money for it.

A David Ball confession: “35 years ago on the day before Thanksgiving. I’m in line at a Minneapolis supermarket, cart piled high with the next day’s victuals. Enough for the eight we’re expecting. In line in front of me: an elderly man (the age I am now) buying a single TV turkey dinner. The image was the quintessence of loneliness. To this day I cannot get out of my mind that I did not invite that lonely man home to share our Thanksgiving dinner and the company of our friends. I let him walk away. Alone. To this day, every Thanksgiving carries overtones of that violation of humanity on my part. If I go to hell, that violation will be why.”

Empathy does not mean sympathy. Empathy means feeling some of the *same feelings* as the person in trouble. The same parts of our brains are at work, creating in us the same feelings as the person in trouble. This is not the same as mere sympathy, which is not what the victim is feeling and involves a different part of the brain.

For example, when we see and react to loneliness in another person, we actually feel some loneliness, not just the sadness of sympathy. So we have a selfish – Reptilian – reason to make the person feel less lonely. We cannot feel anyone else’s physical pain, so we are less moved to fix it. But we easily feel – and thus want to fix – loneliness. That’s why the saddest movies and books are about loneliness, not physical pain. And it’s the main reason loneliness is more powerful than pain when jurors determine verdict money.

Code for Humiliation: “Outcast.”

It is perilous for a group animal such as a human to be cast out of the group; it usually means death. (See loneliness, above). A sure way to be excluded is to look or act in ways the group will ridicule.

So the Reptile developed a powerful tool to keep you from doing (or being) anything ridiculous: incomparably awful feelings of shame and humiliation. This pain is so searing that you probably remember almost every time you have felt it. The Reptile teaches by means of awful pain: “Don’t do that again!”

When your group finds you ridiculous or silly or pathetic, you feel ashamed and humiliated. Even honest people will lie to avoid it. Few things are worse. Think zit in 11th grade. Think fly open. Think Stephen King’s *Carrie* just before she explodes the school and the town.

More to the litigation point: Think bad facial scar. Think awkward limp. Think bad smell (colostomy bag).

Pore through your client’s losses to find every bit of potential and realized humiliation and shame. Have your fact witnesses describe how your client feels in certain situations – the child in the market screaming when he sees your client’s scars, the surreptitious but all too visible looks of disgust she gets when she sits down in a restaurant, the stares, the repulsion: all forces making her an outcast.

Conflicting Codes.

While most Codes are common to most of the population, some can vary widely according to population group: young/old, rich/poor, liberal/conservative, etc. This is no problem for marketing, which needs only a portion of the population, sometimes just a few percent, to buy the product. But to win cases we need most if not all the jurors. So we often must work with conflicting Codes. Fortunately, that’s usually easy. For example:

Code for Physician:

Is it “**Hero?**” Or is it “**Assembly-line Worker**” – such as might work in a meat-processing plant (= hospital)? Rapaille identifies the Code for physician as “Hero.” For the older population, it is. But our research shows that for much of the younger population, the Code is “assembly-line worker.” Older folks have associations with good old Dr. Barnes who came out in the middle of the cold night to help us, who was wise, who was kindly, who did all that could be done, who cared, who called all the shots, etc. That adds up to “hero.”

Younger folks are more likely to have experienced doctors mainly in today’s medical industry: managed care, insurance ruling the day, doctors rushing, no such thing as a house call, the patient is just a number, etc. That adds up to “assembly-line worker.”

Use both Codes for physician not only in med mal cases but in every case involving an IME (meaning “independent” medical examiner, an absurdly misleading title).

Jurors for whom the physician Code is “hero” don’t necessarily think all physicians are heroes, but “hero” does describe their personal relationship to the *concept* of physician. Here are some of the “hero” characteristics:

The physician is supposed to care about us.

She is supposed to know what she is doing.

She is supposed to be honest.

She is supposed to be fair.

She is supposed to use her knowledge (her power) to do good, not bad.

She is supposed to put her patients’ health first.

She is supposed to go above and beyond the call to treat and test to protect health and save lives.

She is supposed to battle for us without giving higher priority to anything else.

She is supposed to follow patient-safety rules.

So for those physician=hero jurors, in discovery seek out everything specific to the doctor and what she did that conflicts with any physician=hero characteristic – that is, everything the doctor did that was off-Code. Reptile thinks: “That’s not what we already know they should do, so it’s dangerous.”

For physician=assembly-line-worker jurors, show how the defendant or IME was on-Code by finding everything the doctor did that matches “assembly-line worker.” For instance, the defendant doctor was uncaring, or rushed, or impersonal, or careless, or treated patients like numbers, etc. Again, the Reptile makes a judgment: “That’s what we already know they do, and it’s dangerous.”

So you have met both sets of jurors where they are: at their deepest Reptilian connections with the concept of physician.

IME or other Defense “expert”: His methodology ignores medical science and medical rules in order to come to conclusions that are bias-driven and money-driven. He misuses his medical “knowledge” to hurt people by preventing them from getting help they need. He asks the jury to gamble with the client’s future welfare. Rather than helping he makes things worse by implying the plaintiff is the one

lying for money.¹⁶ (It's so easy for the nefarious to ascribe their own bad motives to others.) And like an assembly-line worker, he does exactly the same thing in case after case after case. Those things are off-Code to the physician=hero juror, and on-Code to the physician=processing-plant worker.

Along the same lines: Some physician organizations, including some that certify specialties, are off-Code for physician=hero jurors and on-Code for physician=assembly-line-worker jurors. Such groups publish "authoritative texts" intended for litigation, not treatment. In trial, where permitted, contrast those texts with those used in the clinic and in medical schools. Explain why the litigation texts are not used for treatment. This shows them off-Code for doc=hero jurors. A little research will even show you how some of these groups foment faux-statistics, such as those pretending to show that the invention of the fetal-heart monitor has not reduced the number of

cerebral palsy cases. Show this is a fraudulent numbers trick, and that "experts" who testify on the basis of such pronouncements are way off-Hero-Code: lying, uncaring, etc. Heroes do not defraud.

CAVEATS: Remember to never use the word "Code." Just direct attention to the Code's component parts. Let the jurors make their own conclusions. You cannot force this process. (And don't use the word "hero." You don't want jurors thinking you're demanding that a doctor has to be a hero to avoid being negligent.)

In voir dire, ask open-ended Reflective Questions (see p. 120) about the jurors' on-Code and off-Code experiences with doctors. Base the questions on the constituent characteristics of doctor as hero.

¹⁶ See *Polarizing the Case*, Rick Friedman (TrialGuides); and *Exposing Deceptive Defense Doctors*, Dorothy Sims (James Publishing). And see the work of forensic epidemiologist Michael Freeman (spinalinjuryfoundation.org/DrFreemanbio.htm); he's at the forefront of scientifically showing that much IME testimony is bogus medical science (= off-Code). Armed with all of these resources, you will always be able to show when defense doctors are off-Code.

Here are some suggestions to select from. (Remember to follow each one up with “Please tell me about that.”)

Some folks feel that they used to get better medical care ten or 15 years ago. Others feel things are still okay. Which are you closer to?

What would you like to be able to expect from doctors?

How does that compare with what you and your family actually get?

How long does your doctor usually make you wait?

How long does she spend with you?

Do you get to ask questions?

Does she make sure you understand her answers?

Some folks these days feel like their doctors don’t care enough, the way they used to. Others feel things are okay. Which folks are you closer to?

Some people feel like their doctors don’t always know as much as they should. Others feel things are okay. Which folks are you closer to?

Some folks feel like their doctors aren’t always honest with them. Others feel things are okay. Which folks are you closer to?

Some folks feel like they and their kids are not as important to their doctors as they used to be. Others feel things are okay. Which folks are you closer to?

Some folks feel that doctors are not spending enough time with their patients. Others feel there is no problem. Which folks are you closer to?

Some folks feel like their doctors don't listen to them the way they used to. Others feel they do. Which folks are you closer to?

Anyone ever been treated by several doctors for the same problem? How well did you feel they were communicating with each other about your case?

What do you wish your doctor would do that she's not doing? Why do you think she's not doing it?

Some folks say that when they go to the doctor or take their kids or elderly parents to the doctor, they feel like the doctor is always in a rush. Others don't feel that way. Which folks are you closer to?

Some folks say that when they go to the doctor or take their kids or elderly parents to the doctor, they feel like they're on an assembly line. Others don't feel that way. Which folks are you closer to?

Do you think you have any way you can help make things better?

This kind of open-ended, non-leading questioning yields a lot of information you need for your selection decisions. Just be sure not to exploit any answer to try to make points for your side of the case. You're already helping your case by asking these questions, because **as the jurors think through how to answer, they are priming themselves to evaluate the defendant or IME in light of their incoming foundation of doctor-as-hero or doctor-as-processing-plant.**

Code for Immigrant: “Outsider.”

Particularly these days, “outsider” translates into two conflicting concepts, depending on the immigrant, the juror, and the situation.

To some, “outsider” is bad, a danger: It means alien, intruder, freeloader, lawbreaker, danger, someone here to grab what we have. “Thief.” People who feel this way develop the Reptilian defense mechanism of xenophobia.

To others, “outsider” is good: it means “a welcome newcomer,” hope, reinforcement, someone interesting and culturally enriching, one more hard-working American helping to build the nation.

If your client is a recent immigrant, do not try to show jurors that their Code for immigrant is wrong. *You cannot do that with any Code.* Instead, show that your client is:

- Off-Code from the point of view of the xenophobes
- On-Code for the others

You accomplish both in the same way: show your client to be such things as law abiding, hard-working, honest, helpful to the community, reliable – all of which are *off*-Code characteristics to the xenophobes and *on*-Code characteristic for the rest. So you accomplish what Codes are intended to accomplish: you meet every juror where she is, not where you want her to be.

By showing xenophobes that your client is off-Code, you do not automatically make them want to help your client. Xenophobes are xenophobes. For them, other people seeking the American Dream – even in proper ways – remain a Reptilian survival competition. But by showing your immigrant client to be off-Code for the xenophobe – i.e., he’s a good, hard-working guy – the xenophobe’s resistance diminishes just a little. The door is cracked open, even though the

security chain is still in place. But once open, that crack is enough for you get through to the xenophobe to show him how the defendant's rule violations are greater community dangers than this outsider. **So as with all things Reptilian, you show that the safer decision for the community (and thus the individual juror) is a fair verdict for your client.**

To establish that your immigrant client is off-Code to xenophobes and on-Code for everyone else, don't rely on generalities. "Good hard worker" tells us nothing. You need specific stories from fact witnesses showing the kind of person he is: vignettes about the extra hours spent on the job for months to get enough money for Christmas presents.

CODE CAVEAT: With or without voir dire, on every jury there can be Code divergences you don't know about. A juror who is a recent immigrant may or may not share some common American Codes. Or the Reptile of a juror who as a child was often beaten awake by a coffee-drinking parent is likely to find the smell of coffee disgusting, not comforting. If a juror's earliest experiences with hospitals were comforting, fun, and reassuring, "processing plant" may not apply.

You won't usually know. Not many jurors will admit, for example, to being abused as a child. Or you might not find out that a juror's mommy worked in a hospital and often took him there to play in the nursery, possibly creating a code quite different from Meat-Processing Plant.

So always assume you have some jurors who do not share the common Code. That requires you to think through what you are going to say *and what not to say* with that juror in mind. For example, when establishing that a client's family was on-Code, be careful not to say anything like, "These things keep kids from turning out bad." A juror who grew up in a dysfunctional home does not want to hear you say she turned out bad. You can say, "Very few kids can grow up without these values in the home and still turn out

okay.” Now you have complimented rather than insulted the juror who grew up okay without those values.

One of the South’s best attorneys learned this lesson the hard way, though he was good enough to win the case anyway. Depending on who you are, the Code for the American Civil War can be any number of things. To many white Southerners, the Code is probably something like “brave rebels.” Granddaddy’s barn had a Confederate flag painted on the side, and he puffed with pride when talking and singing about the good ole uprising. But to most African Americans, the Code is “slavery’s end.”

During jury selection, the Civil War came up while the lawyer was questioning a “good ole Southern boy.” To connect with the good ole boy, the lawyer called it the “War of Northern Aggression.” The good ole boy smiled big. The three African Americans behind him did not.

By playing carelessly to one juror’s Code, the lawyer had deeply offended others.

So as with all powerful tools, you must think through not just how to use Codes, but how *not* to. That means looking at what you are doing from each possible juror point of view. (Just as you must do with everything you say or present to every jury.)

EIGHT

THE REPTILE AS LAW-ENFORCER: HARMS AND LOSSES *ONLY*

This chapter is about using the Reptile and rules to get jurors to follow the law. When they don't, it usually hurts the side with the burden.

The Justice System and the Reptile.

One of America's most important safety assets is our justice system. Once a juror understands this well enough to believe it, she wants the system protected. This is not because she might someday need the justice system; few people think they ever will. More importantly, an undermined justice system means that resources we each need to care for our children and ourselves will be commandeered to care for a person someone else has hurt. So the justice system is a "public-safety feature." This fact can lead jurors to follow the law. This is crucial, because:

Tort-"reform" found the justice system's Achilles' heel: the law. Tort-"reform" has transformed law-abiding people into violators who are quick to ignore the law and the judge, especially when it comes to the rules about deciding money. Even some jurors unaffected by tort-"reform" factors will lower a verdict on the grounds that verdicts increase insurance and other costs, or that money for pain won't do any good, or the plaintiff probably has insurance or other sources of money, etc.

Jurors on our side who wish to provide proper compensation will hear other jurors say, "We're the ones who'll be paying for this!" or,

"All that money won't make the pain go away!" or, "We can't keep doing this to the economy." And the jurors on our side don't know how to rebut it. They don't know it's illegal. Nor do they see that those illegal considerations endanger the public-safety net the justice system provides. And they do not know how to make other jurors stop ignoring the law. As a result, most verdicts, no matter case size, are severely diminished and often wiped out by illegal factors.

The Reptile will help you with this once she sees this is a survival issue. Anything that warps or endangers the justice system is a Reptilian survival issue. This includes lying IMEs and anything else that can undermine what the Founders created for the survival of our genes.

The following method gets jurors to follow any law – such as preponderance – that you deem essential to a fair verdict.¹⁷

The method's use as described below gets jurors to limit their damages considerations solely to what the law allows. That excludes the illegal factors fabricated by tort-“reform.” To achieve this, you will raise law to the level of theme. (“Theme” is not some clever phrase. It is the establishing and maintaining of a concept as one of the lenses through which jurors continually view the trial.)

The method starts in jury voir dire, if you have any. If not, it starts in opening. But read the voir dire section below to understand what to do later in trial.

Here's the drill:

1. Jury Instruction. If asked, many judges will add this jury instruction. Or ask her to simply say it after giving the instructions:

¹⁷See "Making Preponderance Work"; David Ball. *Trial*, 3/08. Or download at damagesforum.net.

During deliberations, if a juror is not following the law I have just given to you, the rest of you must make sure I am told.

If the defense argues against this, point out that the only reason is that they don't want the jury to follow the law. This is unbefitting an officer of the court. Everyone who values the justice system should welcome such an instruction or informal statement from the bench. Even if it's later deemed error, it can only be harmless error. No decision will say, "We reverse because the trial judge told the jurors to follow the law."

2. Jury Voir Dire for Harms/Losses-only Theme, Phase A. This method has two voir dire phases. Finish Phase A before breathing a word of Phase B.

Phase A question. After you've gotten jurors warmed up to talk with you easily, and you're well into the rest of jury selection, say:

In cases like this, juries decide how much money should be in the verdict. To decide, jurors take two things into account: the *harms* and the *losses* the defendant caused. Nothing else.

"In cases like this" is a crucial phrase. With every rule, start with the general application. That bolsters its credibility.

Do not yet refer to the law, the judge, or anything else that might push a juror to answer the upcoming question the "proper" way. Instead, lower the threshold to the "bad" answer:

Some folks think that's not fair. They think it's fairer to factor in, say, whether money can do some good, or whether it might seem like too much for one person, or whether a large verdict might raise prices for things we all have to buy, or whether the person has another source of money, or whether it might hurt business.

Other folks feel they should stick to just the harms and losses.¹⁸

Mr. Smith, which group are you a little closer to?

If time is short, ask this as a group question:

Who here might be a little closer to folks who think they should consider more than just the harms and losses the defendant caused?

And,

Who might be a little closer to folks who stick just to the harms and losses?

And,

Anyone in the middle?

And,

Mr. Smith, I didn't see your hand – which are you closer to?

Use no strong or polarizing terms, such as “Who *agrees* with the first group?” Or “Who has *strong feelings* about ...?” Lower the threshold to bad answers by using phrases such as “a *little* closer,” etc.

Some jurors will say they would want to factor in “how much [liability] proof there is” – i.e., more proof = more money and vice-versa. Don't argue with them; just ask, “Tell me about that.” Get them to hold forth on this as much as you can. It will be good

¹⁸ If a judge says, “Just ask if they'll follow the law,” point out that following the law is relevant only to cause challenges, not peremptories, for which you need to know more than whether they'll follow a law. Be prepared with your venue's law to support you.

fodder for a cause dismissal – but that motion comes later, in Phase B.

Poison? Don't worry about jurors' answers "poisoning" other jurors. Despite the old myth, one juror's answer does not poison another juror.

Follow-up questions. As with every voir dire follow up, avoid the blunder of asking about a specific topic – as in, "Will that keep you from following the judge's instructions?" Always keep your follow-ups open and general: "Please tell me about that," and "Please tell me a little more about that," etc. As consultant Eric Oliver advises, insofar as you have time, keep asking "tell me more" until the juror has no more to add. "Tell me about that" gets more information, reveals the juror's most salient thoughts about the topic, and – very importantly – makes a juror feel you care about what's on *his* mind, not yours. If these open-ended follow-ups don't ultimately get you the specifics you need, then you can ask.

3. Voir Dire for Harms/Losses-only Theme, Phase B. Do not use any of Phase B until you finish Phase A with every juror.

Phase B question. Start Phase B with:

I had to ask that last question because you will be *required* to decide money based only on the harms and the losses the defendant caused. You cannot lower or raise your verdict for any other reason. No worrying about _____ or _____ or _____ *[insert improper topics, including any that came up in Phase A.]* Just harms and losses. Mr. Defense Attorney agrees: you must

determine how much money only on the basis of the harms and losses the defendant caused. At the end of the trial, the judge will tell you it's the law.¹⁹

Go to a juror who had trouble with harms and losses only.

Mr. Jones, you talked about wanting to factor in whether the injured person might have some other source of money. Sine that's an outside consideration – not one of the harms or losses the jury will be limited to – what trouble might you have, even a little, being a juror?

Mrs. Smith, you said that when deciding on money, you'd want to factor in how strong the proof is. I think you said you'd allow more money if you're very sure the defendant did something wrong, and you'd allow less money if you're less sure. Since that's not one of the harms or losses the jury will be limited to, what trouble might you have, even a little, being a juror?

As before, no matter what they say, respond with, "Please tell me more about that," etc.

Try not to rush either Phase. The more time you spend on this, the stronger the foundation you will set in place for your harms/losses-only theme.

¹⁹ With a judge who does not allow you to specify the law you are trying to find out about, try this: "Mr. Juror, everyone – me, the Defense Attorney, and the judge – we all agree that the only things you can use in making decisions is the evidence you hear in this trial. Nothing else. Now, the only evidence you'll hear about how much money should be in the verdict is the level of harms and losses the defendant caused. So, Mr. Juror, how hard will it be for you – even a little – to be a juror making his decisions about money only on the basis of those harms and losses, and ignoring everything else, such as sympathy for either side, or any other considerations except for the harms and losses the defendant caused?"

Before settling on this kind of compromise, explain to the judge that there is no effective and clear way to argue the facts without first putting them into the context of the law. Trying to do so is a disservice to jurors, because it deprives them of necessary guidance. After all, they did not go to law school. So in deliberations, power will unfairly accrue to the jurors who have – or pretend to have – some knowledge of the law. That deprives jurors of their important right to have equal weight on the jury.

Further, our studies show that jurors learn virtually nothing about the law by listening to the judge read it. They need help from the attorneys. (David Ball can provide an affidavit to that effect.)

Together, Phases A and B accomplish three things:

1. They initiate the harms/losses-only theme.
2. They identify jurors who will factor in illegal considerations.
3. They reinforce the Reptilian theme of jurors following the law on determining verdict size.

4. Final two Voir Dire questions. Your final two voir dire questions help you get jurors to follow the law. They are the “jurors’ rights” question, adapted here from the work of the brilliant lawyer and consultant Dr. Sunwolf.

Folks, jurors have two important rights. I need to ask you about them.

First: Jurors have the right to hear all the testimony. So during trial, if a witness says something you don’t hear, will you all be okay raising your hand and saying [*turn to the judge*], “Your Honor, I did not hear the witness; would you ask her to say it again?”

Everyone okay with that?

Then:²⁰

Here’s an even more important right: You all have the absolute right to be on a jury that follows the law. No one – not me, not Mr. Defense Attorney, not another juror, not even her Honor – is allowed to put you in a position where you have to go home afterwards knowing you’ve been on a

²⁰ You might want to insert here, “You have the right to see all the exhibits. So if someone is blocking your view ...,” etc.

jury that violated your oath by ignoring or violating the law when making its decisions.

So in deliberations, if someone is not following the laws the judge will give you, will you all be willing to have your foreperson knock on the door and tell the bailiff you need the judge to come talk to a juror who's disobeying her instructions? Okay? Good.

Everyone going to remember to do that? Good.

And will you yourself be careful to follow the judge's instructions and laws so it won't be necessary for other jurors to do that? Great.

5. Harms/Losses Only – Opening.²¹ In opening, begin your damages section with “we expect” to avoid an objection:

We expect the judge to ask you to decide how much money should be in the verdict. The only two things you will be allowed to take into account are the harms and losses the defendant caused. So during trial, we'll show you those harms and losses.

This continues your harms/losses-only theme. At every opportunity, keep that theme in front of the jury. Tell them, for example, that they need to know the degree of pain not so they'll feel sympathy, but because it is one of the harms and losses the defendant caused, and on which they'll need to base their dollar amount.

Don't let any part of your damages-related presentation drop the harms/losses-only theme.

²¹ See detailed instructions for the optimum structure for opening in the latest edition of *David Ball on Damages*.

6. Harms/Losses Only – Visuals. Use visuals – you can make them yourself – to portray this theme. The title of the board (this is too important for a slide) is, "What are the Harms and Losses?" The board's content must clearly and quickly answer the title question.

7. Harms/Losses Only – Direct Exams. Direct exams of damages witnesses – including experts – should revolve around the harms/losses-only theme. So, for example:

Dr. Expert, these folks [i.e., the jury] may have to make some decisions solely on the basis of John's harms and losses the defendant caused. Are you prepared to talk to us about that today?

Some judges might not let you say, "They have to make some decisions solely on ..." etc. So just say:

Dr. Expert, are you prepared to talk to us today about John's harms and losses?

Use the phrase frequently:

Doctor, let's move to another of John's harms and losses.

And,

Mrs. Jones, can you describe some of John's harms and losses to us today?

And,

Doctor, we're here today about John's harms and losses from the wreck, not about problems he had before. Please tell us how you have been able to tell the difference

Make "harms and losses" and "harms and losses only" part of the central vocabulary of the case. Don't be surprised later to hear the defense and even the judge pick it up.

8. Harms/Losses Only – Cross-Exams. Same approach. Examples:

Dr. Corrupta, you never talked with John's family about his harms and losses?

Dr. Bogusaria, you've never had a patient with John's level of harms and losses?

Dr. Feilbieten, in your 22 years as a vocational consultant, have you ever seen anyone with John's harms and losses get work as a carpenter?

9. Harms/Losses Only – Closing.

1. Highlight and read aloud the relevant sentence or two in the instruction for each damages element.
2. Remind jurors that everyone agrees this is the law – judge, defense attorney, everyone.
3. Explain the element in plain English.
4. Explain that everyone – including the judge and defense attorney – agrees that the levels of all the harms and losses caused by the defendant are the *only* things jurors are allowed to use to decide money. No sympathy for either side, no worry about prices going up, etc.
5. Explain that if a juror in deliberations tries to use improper considerations to decide money, other jurors must tell her to stop. If that does not take care of it, jurors must tell the judge – because no juror has to go home

knowing the jury they were on made a decision outside the law. As Moe Levine often told jurors, "Reach the right verdict for the right reasons."²²

6. Explain that they don't have to argue with a juror who wants to break the law. They just need to notify the judge.
7. Explain that the law says that every one of the harms and losses the defendant caused must be compensated. This is the law, not a matter of choice.
8. By demonstration, show jurors how to apply the damages facts to the law for each damages element. Applying the facts to the law is their whole job, so show them how to do it. It's not enough just to tell them. Show them how, step by step.

Explain the Reptilian impetus behind this approach (without using the word "Reptilian," of course). "A juror who violates the law endangers the community by undermining the justice system, and by giving safety-rule-breakers permission to be safety-rule-breakers."

Finally: remind jurors that they swore to follow the law – and that one of the most important rules is to "*take no oath or affirmation in vain*." (See Chapter Fourteen on using Scripture.) So they cannot allow any other juror to veer them away from the law, because each juror is responsible for making sure the jury follows the law.

Fragmenting. Don't worry about fragmenting a jury when you tell jurors to force law-breaking jurors to follow the law. They are already fragmented: you have some who will want to follow the law and others who won't. If jurors on your side don't understand the law or don't know how to make others follow it, they will cave in because there's nothing else they can do. That results in a jury

²² See *Moe Levine on Advocacy*. Forward by Don Keenan. TrialGuides.

unified against you. Only when your jurors make others toe the legal line will you have the kind of unity you need.

NINE

HYPOCRISY

In survival situations, we seek out whom to follow and whose advice to accept. But some people – often among humanity’s worst – exploit survival situations by pretending to be helping us when they’re actually helping themselves at our expense. So the Reptile has given us many ways to spot hypocrisy, and made us despise it.

Use the power of hypocrisy in trial. For example, when a company brags that it cares about safety and you show that they knowingly endangered the public in spite of their “safety” claims, their hypocrisy will seem worse than their safety violation.

So be on the lookout for defense hypocrisy you can show. And be certain there is none on your side. So in a premises liability case, make sure – even before taking the case – that there’s nothing on the internet, true or false, about any dangerous premises your client controls. If jurors learn of that hypocrisy, it can poison everything they think about your case. You need to know about everything before the jurors do, so you can figure out what to do about it.

The most common hypocrisy we confront is the “pay me enough and I’ll say anything” defense witnesses. They are motivated by money and lavish lifestyles. They have phrases such as “I’m here only to see that the truth is told.” So once that “expert” has elevated himself to an oracle of truth, ask, “You’re not motivated by the money you make?” They will deny that money has anything to do with their motivation. That denial should open the door to their lavish lifestyles. It’s fair game to cross examine on how many garages in his house, size of swimming pool, etc. Do a Google Earth search of the expert’s home; often, you’ll find the tennis courts,

large swimming pools, gated mansions, etc. Juries make the connection and the hypocrisy starts cooking the expert for Reptile food.

In facing a defense causation “expert” who had never lost a case, Don Keenan learned of his lavish lifestyle. In testimony, Don got the “expert” to affirm he was not motivated by the money but was “simply in court to see that the truth was told.” Based on what Keenan had already learned, he asked, “So Doctor, I guess it helps you to tell the truth when you drive from the airport in a stretch limousine, are put up in a two-bedroom suite at the Ritz Carlton Hotel, and demand a fruit basket and a bottle of champagne?”

Once the Reptile suspects significant hypocrisy, she swings into combat mode. She makes our emotions vomitorially repulsed. And she makes us cheer when the hypocrite is brought down. She offers us a ton of Dopamine when we help demolish the hypocrite – i.e., she makes us feel very, very good.

David Ball has many favorite Don Keenan stories. Here’s one about a hypocrite: In a particularly difficult trial, a nationally known obstetrical opinion-witness was saying anything necessary to get a defense verdict. In deposition, he had taken a position which, as it later turned out, contradicted the defense theory. For a truthful person, the flip-flop the defense needed from this witness would have created a dilemma. But honesty was not one of this fellow’s impediments. And he had a secret weapon. He was attuned to the kind of jury he would face: conservative Southern, with deep religious beliefs. So on direct in trial, he explained his flip-flop in a way that would bring admiring chills to this kind of jury. He explained, with appropriate humility, that he was sitting in the hospital cafeteria thinking about this case – when all of a sudden, lo and behold! He had an epiphany. A *righteous reversal*, he exclaimed, “Like Paul, when that Biblical flash on the road from Damascus came down from out of the sky, brighter than the sun, blinding him, and converting him right there on the road to Tarsus!”

For reasons explained in Chapter Fourteen on Scripture, this jury of decent, faithful folks found this a powerful, moving, and “true” explanation of the “expert’s” flip-flop.

Keenan gets up for cross. He’d taught Sunday school for years. He knows Scripture. And he knows what it means to unmask a hypocrite. So rather than challenging the complex medical substance of this character’s testimony, Don goes for his credibility:

Q: Doctor, you’re a religious man?

The doctor puffs out his chest and indignantly answers.

A: I’m a God-fearing, committed Christian!

Q: Doctor, you know your Bible as well as you know the medical basis for your opinions in this case?

In high dudgeon, the doctor responds.

A: Sir! I know my Bible *better* than medicine!

Q: Better than you know medicine?

A: Absolutely!

Q: So you told us about Paul coming from Damascus?

A: I did.

Q: Going to Tarsus.

A: Yes.

Q: That’s in the Bible?

A: Don't you know, Mr. Keenan?

Q: Do you, Doctor?

A: I surely do.

Q: But you are dead wrong when you say Paul was traveling from Damascus to Tarsus.

In shock, the doctor can't respond. Keenan – doing his best Elmer Gantry portrayal – holds the Good Book high over his head, and cites that God's light blinded Paul when he was leaving his home in Tarsus on his way *to*, not *from*, Damascus.

An irrelevant detail? To a more secular jury, sure. But to this jury – the one the doctor had read so well – the doctor's pretense and failure to know the Bible is hypocrisy. It turns his use of the Bible into something approaching blasphemy. (And he'd said he knew the Bible better than he knew medicine.)

The jury's reaction was palpable. So Keenan goes a step further.

Q: Doctor, you tried to invoke Scripture to explain your flip-flop. Now, in doing that, which of the Ten Commandments did you violate?

The doctor sits mute. Not wanting to guess wrong again, he says nothing.

Q: The Ten Commandments tell you not to take the Lord's name in vain. As you did by using the Lord to cover your flip-flop.

Should Keenan have gone on to cross-exam on the substance of the doctor's medical testimony? Some might say yes. But to Keenan, it doesn't get any better than this. He looked at the jury's reaction and sat down, concluding the cross-examination.

There's another moral to the story: The doctor's use of Scripture had been powerful enough to get himself out of an almost impossible jam: a documented flip-flop. So fighting on the same level – with Scripture – was Keenan's best possible response.

Another example of the power of unmasking hypocrisy: In Cleveland, a neurosurgeon killed a woman during brain surgery. On the stand, the hospital administrator talked about all the wonderful and charitable things the hospital does in the community, showing that this is a deeply caring institution. So "...the hospital was heartbroken at the loss of this wonderful woman." Credible remorse is a powerful way to set the Reptile at rest, because it means the danger is not likely to repeat itself. So this had its effect. Jurors had already wanted to believe that the hospital was this caring. On cross, Keenan gave the administrator the chance to expand on how caring the hospital was, by asking if the sorrow and empathy were sincere and heartfelt. "Of course, yes, what else?" the administrator responded, as if hurt that anyone could think otherwise.

Then:

Q: Were you also heartbroken and empathetic over the death of this man's wife when you sued him over the disputed hospital bill – on the first anniversary of her death?

In this situation, the Reptile sharpens her teeth to protect herself from hypocrisy in the way you will make available to her: a fair compensation verdict.

Do not miss hypocrisy in others. Do not allow it in yourself. The Reptile is finely attuned to destroying whoever exhibits it.

In trial, you cannot point a finger and holler, "Hypocrite!" That never works. Instead, re-read the examples to see how Keenan led the hypocrite to expose himself.

TEN

JURY SELECTION²³

The first step in a Reptilian approach is to get jurors personally involved with the kinds of dangers your case represents. As jurors think about the dangers in relation to themselves, the Reptile opens an eye.

CAVEAT: Only a very few plaintiff's attorneys can safely indoctrinate jurors during voir dire. Many defense attorneys can get away with it. You almost certainly cannot. So every question you ask must be clearly information-seeking. But certain kinds of legitimate information-seeking questions can also get the Reptile involved. One of the best is called the "reflective question."

Reflective questioning.

A reflective question is one that, in order to answer, jurors must reflect upon their own situation and experiences, and those of their families. If they can answer off the top of their heads, the question was not successfully reflective. Reflective questions often get jurors thinking out loud right in front of you, so you learn a lot about who they are and how they are likely to deliberate. And they engage the Reptile.

So "Who here has been in a highway wreck?" can be a necessary question, but is surface level. No reflection is required to answer it.

²³ For help with basic jury selection techniques, refer to the latest edition of *David Ball on Damages*. This chapter assumes you know that material.

So find questions that make jurors work through a wider and deeper constellation of their experiences and feelings. It's easy:

Some folks feel that they and their families are safer in cars now than ten years ago. Others folks feel travel by car has become more dangerous. Which folks are you a little closer to?

This reflective question has two essential components:

1. It is genuinely information-gathering.
2. It requires the juror to think about himself and his family in relation to the kind of danger the case is about – even before he knows anything about the case itself.

Whatever the juror's response to your reflective question, follow it up with the open-ended, non-leading, "Please tell me about that." Then, "Please tell me more about that ..." and continue as long as the juror has anything more to say, as far as you have time. Whether a juror simply thinks car travel is more or less dangerous tells you little. The follow-ups tell you a lot. And the Reptile's other eye will open. You're waking her up.

You can adapt the following sample reflective questions to the specifics of any case.

Reflective questions, medical cases:

Some folks feel that medical care has gotten better over the past ten years or so. Other folks feel it's worse. Which group are you a little closer to?

When selecting a doctor [or hospital] for yourself or your family, how do you choose?

If you had open choice of family physician [or hospital], what would you want to know before choosing?

Are you more careful choosing your children's doctors than your own?

What kinds of concerns have ever made you change doctors?

What bothers you about how medicine is practiced today?

You'll find additional reflective questions for med mal cases in Chapter Twenty-One.

If the judge allows a questionnaire, include reflective questions. But you still want to ask some in oral voir dire so you can watch as jurors think their way through. And asking reflective questions in oral voir dire means that a juror's personal involvement in the questions is more likely still there by opening. Questionnaire responses are rapidly forgotten even if filled out that morning, much less days in advance.

Perhaps most importantly, if you really *listen* to answers, jurors will start bonding with you, because as they speak their hearts, you listen with yours. That's the best way to make a new friend and it's the best way to pick a jury.

Road cases:

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

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

What dangers have you found yourself in – close calls or even wrecks – because someone else did something dangerous?²⁴

What are the most common dangerous things you see other drivers do?

What do you hope young drivers learn right from the start?

Do you drive more safely now than when you were young?

These questions and especially their follow-ups are hard to answer without thinking about them. So the jurors get involved.

Products liability cases:

As you think through products you own, which do you think could be made safer?

When some folks go shopping for a manufactured product, like a small appliance or desk lamp or a vacuum cleaner, they compare brands and models on the basis of the safety. Other folks choose more on the basis of price or features. Which group are you a little closer to? [Later: "Is your spouse any different?"]

Some folks feel that ten or 15 years ago, the products that companies were making were a little safer than now. Other folks feel that newer ones are probably safer. Which group are you a little closer to?

²⁴ A common error is to get an answer, follow up, and then move on to another question. But first, ask if the juror has any other answers to the same question – such as other close calls, not just the one he talked about first.

It's okay if jurors are not sure. Follow up anyway. E.g., "What makes you not sure?"

Business cases:

When it comes to financial security, some folks feel they're more endangered now by large corporations than they were 15 or 20 years ago. Others feel safer. Which are you a little closer to?

Some folks feel it's best when companies are allowed to compete any way they want to. Other folks feel safer when the government regulates companies. Which are you a little closer to?

Some folks feel that their own financial problems are sometimes caused by the practices of large companies. Others folks feel that they are the only ones responsible for their own financial situation. Which are you a little closer to?

What kinds of financial effects have you or your family felt as a result of decisions made by large companies?

All cases:

As will some of the questions above, the following questions will help you start the community-safety component of your case. (See p. 49.) We're not suggesting you use them all, though the more the better.

Some folks feel that when it comes to being hurt by accidents, Americans are safer now than ten or fifteen years ago. Others feel we're less safe today. Which group are you a little closer to?

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

Some folks are uncomfortable about making decisions on a jury that might have an effect on the community. Others are okay with it. Which are you closer to? [*This kind of questioning should be allowable even when you're not allowed to make community-safety arguments. Jurors who don't want to have an effect on the community can lean against you if they don't want their verdict to have such an effect.*]

Some folks feel it's a good thing for the result of trials to have an effect on the community. Others are uncomfortable about it. Which folks are you closer to?

Can you think of outside cases that had an effect on this community?

How do you feel about trials having an effect on the community?

You will hear that there are clear safety rules doctors must follow regarding how and when to test, how to diagnose and how to treat. [*Substitute other kinds of rules for other kinds of cases.*] In this case the plaintiff will argue that one set of safety rules apply. The doctor will argue that those rules do not apply. Who here will have a problem hearing both sides and deciding which rules you want in this community?

Sometimes a person sues someone not only to get justice for a wrong, but also to make sure it doesn't happen again. Some folks don't think that's a proper use of the court system. Others are okay with it. Which folks are you closer to?

This case involves [*nature of injury*] _____. Everyone will feel sympathy. Nothing wrong with that. But you cannot factor your sympathy either for [*plaintiff*] or for the defendant, _____, into your decisions about the case. Ms. Smith, how do you feel about that? Some folks are okay with making that kind of decision; others might have a problem with it. Which are you a little closer to?

Though you have to factor out sympathy, one of the things you have to factor *in* is safety: did the doctor [*or whatever*] follow the safety-rules and was he safe enough for treating a patient from this community [*or whatever*]? Some folks are uncomfortable judging how safe a _____ has to be in this community. Others are not. Which are you a little closer to?

The defendant says she did nothing wrong, that she followed the rules and acted safely – but *if* you believe that she did not follow the safety rules and acted unsafely, what trouble would you have, even a little, in deciding on a verdict that would show the doctor that she is not safe enough for the community?

In a criminal case, when someone guilty is convicted, we are all better protected. In a civil case, when someone breaks the safety rules, and so causes harm, is held responsible, we are all better protected. Some folks feel that this is more important in criminal cases than in civil cases. Others feel it's just as important in both. Which are you a little closer to?

Trials can have far-reaching effects. We all know about the McDonald's coffee case. And we all know about the Ford Pinto gas tanks that exploded and the jury held them accountable. Some folks hesitate in being a juror whose decision might have far-reaching effects. Others are okay with it. Which are you closer to?

The law requires civil cases to be tried by a jury in the community where the act happened. Why do you think it's important to try cases in the community where the act occurred?

How does that benefit the community?

Who here has heard of any civil jury verdicts around here based on something such as a hospital or doctor, or a truck or bus, or a manufactured product or anything else that hurt or killed someone?

Some folks feel that it's necessary for the community to know what the jury has done in those kinds of cases. Others feel it makes no difference. Which are you closer to?

Someone once said that a jury is the "guardian of the community." Some folks are uncomfortable being asked to be a guardian. Others are okay with it. Which are you close to?

Does This Stuff Really Work?

Early in our research, David told a group of 20 research participants the particulars of a medical malpractice case. He balanced the facts and presentation in order to get as divided a response as possible. After the presentation, he gave each juror a short case-response form, asking which side they were on and how strongly. As expected, they divided almost evenly: 11-9.

The defense jurors gave very few case-specific reasons for their decisions. Instead, as with real jurors, their reasons were almost all tort-"reform"-based, and so illegitimate. So how do you get them to decide solely on the basis of the evidence and the law, and not decades of tort-"reform" propaganda?

Don asked them a series of reflective voir dire questions, including many of those above. *He did not refer to anything specifically related to the case.* His questions, like others above, were designed to gather necessary information for jury selection. But at the same time, they got jurors thinking about the reality of the case.

When Don finished his questioning, David passed out new copies of the same response form. When we collected them, we found that this time they were not evenly divided. Almost all had moved significantly towards the plaintiff's side.

The shift had nothing to do with the specifics of the case, because nothing more had been said about the specifics. The only new ingredient was that they'd spent time having to think about themselves in relation to community-safety issues related to this kind of case. Tort-"reform" issues faded, as they should. Their second set of response forms showed they were now thinking in terms of the evidence. The illegitimate concerns inculcated by tort-"reform" had almost all disappeared.

We have now seen this in session after session. So yes, it works.

ELEVEN

OPENING FOR THE REPTILE

There are many ways to structure openings. But extensive research shows that hidden dangers lurk in many choices attorneys – including good ones – commonly make. So this chapter assumes that you know the structure and guidelines for opening in *David Ball on Damages*, which we will not repeat here. What follows is the specific Reptilian adaptation of that structure.

1. Rule and Consequences.

Start your opening with one or two major rules. You'll cover the others later. The first rule or two provide the context into which jurors can place the upcoming story of what the defendant did. [Line breaks = pauses.]

[RULE:] Anyone who runs a store,

school,

hotel,

shopping mall,

or any other kind of facility

which the public comes to,

is required

to provide enough security

to protect the public

from predictable crimes.

This wording starts spreading the tentacles of danger over everyone in the community, not just someone in your client's unique position.

Don't run the phrases together. Pauses allow jurors to digest each successive point.

Another way to put it:

The more likely it is

that crime might harm people

at someone's store,

hotel, school, or shopping mall,

the greater the level of security

the facility must provide.

If the facility does not provide that level of security,

and as a result a member of the public gets hurt

the facility is responsible for the harm.

They cannot get out of their responsibility by blaming the criminals.

This is because a facility must never allow
needless danger.

Don't over-explain. You will be tempted to, but don't do it. Move on.

Embedding.

The best way to present the rules is by embedding the umbrella rule within each of your more specific rules:

Umbrella rule: A truck driver is not allowed to needlessly endanger the public. If he does and as a result he hurts someone, the driver is responsible for the harm.

Specific rule with embedded umbrella rule: A truck driver is required to check his brakes every 24 hours or he needlessly endangers the public. If he does not check his brakes and as a result hurts someone, the driver is responsible for the harm.

Or,

Umbrella rule: The owner of a public facility, such as a shopping mall or school or movie theater, is not allowed to needlessly endanger the public. If he does and as a result hurts someone, the owner is responsible for the harm.

Specific rule with embedded umbrella rule: The operator of a public facility is not allowed to turn off monitoring cameras needed for security, or he needlessly endangers the public. If he does turn off the necessary cameras, and as a result someone is hurt, the owner is responsible for the harm.

This is an excellent one-two combination of rules for the start of opening, because it awakens the Reptile without your having to make an accusation – and the start of opening is too early to start making accusations.

2. *Story of what the defendant(s) did.*

Not every American Reptile loves the smell of coffee because the smell does not always recall safe early childhood experience (see p. 156), but just about every Reptile on earth loves stories. This is largely biological, believe it or not. We are born with it. And it is later reinforced: Stories provide a powerful safety/survival/comfort imprint on very young children, and continue to do that for the rest of their lives. So all of us on this planet relate to stories in the same way most Americans relate to the smell of coffee. But there's a lot more that's Reptilian about stories. As Houston attorney Jim M. Perdue explains, stories, our primary means of teaching and learning, present the world in a context of order.²⁵ This is a major Reptilian demand. (Chaos = danger; order = safety.) For this and similar safety-related reasons (clarity, relevance, etc.) the Reptile – using Dopamine – makes you listen to stories and remember them. That Dopamine is why we feel good when reading or watching or listening to stories. Aside from Dopamine, the Reptile also hard-wired the human brain to interlock with stories more thoroughly than any other kind of information communication. Nothing runs a close second. In fact, a lot more of the brain listens to story than to facts, argument, or almost anything else.

The Reptile did this because story serves as a powerful safety tool: it allows us to effortlessly process and remember new information in amounts which the brain has no other way of handling without enormous effort. This helped our ancestors survive. And your story early in opening provides jurors with a memorable framework into which they can easily insert everything else they hear about the case.

²⁵ See Perdue's *Winning with Stories*.

Chronology.

To the Reptile, time goes only forwards. That is why people neither understand easily, nor well remember, stories that are told out of strict chronological sequence. As our brains developed over the course of evolution, there was no use for that. So stick to plain chronology. Otherwise, you will usually confuse jurors and leave them remembering little.

Clarity, simplicity.

Remember that the Reptile demands clarity and simplicity. The Reptile is a Reptile, not a lawyer or English professor. So:

Now let me tell you the story of what happened in this case.

June, 2003. The offices of Cracklesmith Mall Associates, Pittsburgh.

Chief Executive Officer John Sheridan meets with his staff of managers and supervisors.

Mr. Sheridan and his staff read police reports of a series of robberies at their mall.

Mr. Sheridan and his staff ... Etc.

---- [Fill in remainder of your story of what the defendant did]

The customer who was shot was Edward Biggens. The shooting left him paralyzed.

The unarmed security guard stayed in the back room until after the police arrived.

Now let me tell you who we are suing and why.

Of the opening story guidelines in *David Ball on Damages*, the following are of particular Reptilian importance.²⁶

Story is not about the plaintiff but what the defendant *did*. The grammatical subject of almost every sentence in the story should be the defendant's name. You want all the focus on the violator's violations. Forget "humanizing" your client until later. Humanizing your client early in opening puts the Reptile to sleep.

Use present tense. The Reptile listens to present tense and ignores past tense. This even shows up on brain studies.

Use short, clear sentences.

Point no finger of accusation, not even by implication or vocal inflection.

Allow jurors to discover the cause of harm for themselves. At this point in trial the Reptile does not trust you. And when you go from stating a rule directly into the story of what the defendant did, the jurors almost always deduce the cause of harm for themselves. The opening rule tells them without you telling them. For example, when they hear that a facility must keep the place safe and you start the story, the jurors start looking for how someone will be hurt because the facility did not keep the place safe. That's how stories work. So even before you get to the violation causing harm, both violation and harm will seem inevitable. The defense has a hard time undoing this potent form of persuasion. You have delivered the defendant right into the Reptile's teeth.

²⁶ You have a lot more leeway in closing stories in terms of tense, chronology, narrator point of view, making accusations, etc. It is the opening story that must be careful with those things.

You accomplish that without accusations. And that's what you need to do, because your being an advocate too early gets the Reptile nervous.

Smell. Over the course of our research, we re-discovered the extraordinarily evocative power of *smell*. Smell is our most primitive and therefore most Reptilian sense. This is why the smell of coffee translates into so powerful a sensation of comfort. While you want to minimize details in your opening story, a few references to smell can be effective: the smell of burning rubber, the smell of smoke, the smell of disinfectant, etc. When drawing facts from witnesses, look for such olfactory things. Use them sparingly in opening, more in testimony, and weave them into your closing stories. (For further guidance, see Jim Perdue's *Winning with Stories*.)

3. Why we're suing.

Now you can go from reporter to advocate – but still, let the facts dominate.

We are suing Cracklesmith for violating six important public-safety rules.

Then, for each reason you're suing, strictly follow the A & B structure below:

A) State the first violated rule and how you know the defendant knew and violated it.

First, Cracklesmith violated the public-safety rule requiring businesses and public facilities to provide enough security to protect the public from known or predictable crimes. Cracklesmith will admit that they knew they were required to follow this rule.

Before Edward was shot, the police had told Cracklesmith four times that the mall's security measures were "woefully inadequate to protect" the public from the area's known

crime level. “Someone’s going to get killed,” the police predicted. Cracklesmith admits not adjusting security to deal with this. And John Mason, a public-safety expert who was a Pittsburgh policeman for 22 years, will report that Cracklesmith's own records show a high enough level of crime to have required better security.

B) Part B is where the Reptile begins working. In Part B of each rule violation, explain what your expert is going to say about:

1. What makes the violated rule a rule? Partly, of course, that the defense agrees with it. But what else? Industry standard? Common sense? The law? Policy?
2. In what other circumstances than this case can violation of the rule cause harm? This spreads the tentacles of danger. You can get this information from your experts. (How does violation of a manufacturing rule affect products other than the one in this case?)
3. How much harm can violating this rule cause? Jurors usually gauge the seriousness of a violation (and thus the level of danger to themselves) by the level of harm the violation caused in this specific case. So you need to explain the full level of danger (including frequency) that violating this rule can cause.

For example, many jurors think a low-speed collision can’t cause much harm. You have to show them it can and does. An expert (such as a high-school driver’s ed teacher) can cite how often it seriously injures people: “We teach the kids that drivers injure more than three thousand people a year by hitting them at speeds lower than 15 mph.” This helps with causation and also helps the jurors decide how much care is required with respect to following the rule the defendant violated. A high-school physics teacher can also

teach the jury how a 12-mph force on a rear bumper will transfer almost undiminished into the driver's neck and skull.

In Part B, do not discuss this specific case.

As you read the sample that follows, note how it fulfills the three requirements above.

Expert premises safety advisor Ronald Foster teaches at Ohio State's School of Public Safety.²⁷ He'll come explain the public-safety rules for facilities that have been developed within the National Safety Consortium, which studies how to keep public facilities safe. He'll tell us [not "you"] that these rules are universally accepted, are reflected in the laws of every state, and are ultimately just plain common sense. He'll tell us that the most important public-safety rule for facilities requires facilities to maintain a level of security high enough to prevent whatever harm can be prevented.

That means not only crime but every kind of danger, big or small. Like broken stairs, icy sidewalks, fires, anything that can hurt people.

Expert Foster will also explain that "facility" means stores, public and private schools, bus stations, shopping malls, movie theaters, hotels, restaurants – any facility for the public.

²⁷ You can accomplish much of the same thing without an expert, and to some extent even in a stipulated case (see Chapter Twenty). Your client's suffering is exacerbated by her knowledge of how easy it would have been for the defendant to have followed the rules. Ask her about this and she'll probably tell you that "What makes this worst for me is that all he had to do was follow a simple rule." Her therapist will corroborate. And you can use your own analogies in closing, such as, "Not keeping a movie theater safe is as bad as not keeping a schoolroom safe." And use the similarities to illuminate the danger of the movie operator's violation.

He'll tell us what the safety-rule requires. Let's say a store is in a high-crime area. It's not enough for the store just to protect their employees and money behind bullet-proof glass. The store also must protect customers. So it needs, say, security cameras, alarms, maybe even an off-duty cop on guard. It depends how high the foreseeable level of danger might be.

Expert Foster will point out that in, say, a school, there's always a chance of fire. Even if the building is brick. So every school must protect the kids against every fire danger that proper measures can protect against. The school must make sure in advance that they can get the kids out before anyone gets burned. Same with movie theaters, restaurants, doctors' offices, everything. That means enough smoke detectors, loud enough alarms, fire drills, emergency exits, fire escapes, whatever it takes.

So when there's a fire and a kid gets burned because, say, the alarms weren't loud enough, and if that kid would have gotten out if the alarm *had* been loud enough, then the school is responsible. **The school doesn't get to blame the fire for what the school's safety measures could have prevented.**

Expert Foster's rigorous safety studies show that following this rule is what keeps places safe – and that violating the rule is the greatest single reason people are injured or killed. He'll show us that in crimes and fires, twice as many people are killed because facilities don't have the required security measures as are killed by the crime or the fire itself.

That is all you have to do to adapt the *David Ball on Damages* model for opening into a way to reach the Reptile. Regardless of what kind of structure you use for opening, be sure to include the elements described above. They establish and start to spread the tentacles of danger.

TWELVE

EXPERT TESTIMONY

When using new methods, one of the most common attorney errors is to deploy them in jury voir dire, opening, and closing – and forget about them in testimony, falling back on old ways. But you have to keep the Reptile *always* alert. You're not just tacking on a few new things. You're altering the nature of the entire trial, including testimony. So:

The most important Reptilian consideration for expert testimony is the way they are required to do their jobs – the rules of the expert road. This is because failure to follow those rules can be a Reptilian flag, since 1) violating rules is one of the most common causes of harm, and 2) every juror has to do his own job properly.

Plaintiff's Testimony.

So have your experts explain each step required to come to a valid conclusion: what experts must do, step-by-step, to arrive at a reliable conclusion. That constitutes the right way to do the job. Have your experts explain the steps in general before putting them into the context of the case.

Then have your expert explain what can go wrong when someone omits a step or does not do it thoroughly. For example, one requirement in almost all situations is to gather *all* the available information. So your expert should explain how a conclusion can be grievously wrong if someone gathers just some of the available information. Again, do this outside the context of the case; we are establishing the standards to use later.

Then have your expert plug in the specifics of how they used each step for coming to their conclusions in this case. The persuasive power of doing this outweighs everything else about an expert, such as credentials, looks, personableness, field experience, etc.

Finally, have them show that the defense “experts” skipped steps.

An “expert” who leaves out required steps is a menace to people who rely on his field to do its work safely, and to the justice system. Is this the way he does his work in the clinic or the design room or anyplace else? Is this how he teaches it to students getting ready to go out and do it? If yes, that expert is a menace. If no, he’s deceiving the jury as to how the work must be done.

Here’s how to do all this in testimony:

1) Your expert begins her testimony by explaining the step-by-step requirements for doing the kind of analysis called for in this case. Include:

- a) what each step is
- b) how it’s done
- c) why it’s important (what good does it do?)
- d) why omitting it or doing it wrong results in bad conclusions
- e) where steps are taught and followed
- f) who or what requires them

In explaining, your expert should provide illustrative examples from situations unconnected to this case. That makes for clearer explanation as well as relates the case to things jurors are more

familiar with. (So, for example, if step one of your medical expert's process involves gathering all available information, she can use a common-sense analogy of, say, detectives solving a violent crime: how a piece of information – which they didn't bother to get – can hurt the case and let a murderer escape.) And by using analogies that can touch jurors in ways other than the situation in this case, you keep the Reptile directly involved.

2) Your expert shows how she herself followed every step.

3) Your expert shows how the other side's "experts" did not follow the steps, and exactly how that undermines and invalidates their opinions.

You can position each step as a rule, often a safety rule. A defense doctor who does not gather all the information would needlessly endanger patients if she did that in her clinic. This makes her a danger to the Reptile. A doctor's faux-medicine is dangerous when treating patients. And by basing her testimony on it, she's undermining the court system's power to keep citizens safe.

Tentacles of Danger.

From a Reptilian point of view, one of your expert's most important tasks is to show how the rule violations in this case can cause harm in other contexts. For example, how can a shopping mall's violation of the rule requiring sufficient security endanger students in an elementary school or people going to the movies? Or how can a pharmaceutical company's failure to warn be explained by an analogy of a failure to warn about a dangerous condition in someone's workplace?

Some experts are reluctant to do this on the grounds that they are not experts about those other areas. Help them see how they can do it. For example, the shopping-mall safety expert might not know much about elementary schools, but he can certainly say that too few fire alarms in a shopping mall is just like having too few in a school. And the ob-gyn expert went to medical school, so can certainly explain that a proper differential diagnosis in a labor and delivery room accomplishes the same thing – safety – as it does in a cardiac ward or emergency room.

And any expert can use any analogy for purposes of explanation and clarity.

Defense Testimony.

In deposition and again on the stand, first have the defense “expert” affirm how important she believes it is that science be used with integrity and honesty. Get her to the point where she is indignant at such questions. That makes her a hypocrite when her faulty methods are exposed. And as Chapter Nine explains, hypocrites are the Reptile’s favorite food.

For more help discrediting defense opinion witnesses so that you can show they are a Reptilian menace, see Rick Friedman’s *Polarizing the Case* (TrialGuides), and Dorothy Sims’s *Exposing Deceptive Defense Doctors*. They help you show jurors how bogus defense testimony is not a difference of opinion but an intentional lack of science and thus the kind of violation that endangers the public.

In addition, Dr. Michael Freeman, a nationally-known Forensic Epidemiologist,²⁸ can help you show the outrageously improper and unscientific use of the kinds of medical “estimates” that so often undermine our damages cases. For example, he shows that a

²⁸ <http://www.spinalinjuryfoundation.org/DrFreemanbio.htm>.

physician's estimate of your client's life expectancy is junk science. He proves that minor damage to a vehicle is not valid evidence of the degree of injury. He does this well enough to give you a chance of keeping photos out that show low vehicle damage. Dr. Freeman begins with the basics of the scientific method that the defense must agree with (such as "observation trumps theory"), and works step-by-step to the inevitable conclusion that the defense "expert" is scientifically bogus, or that the defense evidence (no dents on car) should not be admitted.

Dr. Freeman's goal is to keep the defense's scientific junk out of the courtroom. But for the sake of the Reptile, we often want the defense's scientific junk in. It shows that the defense case in itself constitutes its own kind of public menace. Garbage that masquerades as science is a form of hypocrisy and undermines community safety in many ways, including the justice system.

Early in trial, don't preach to jurors about the danger of undermining the civil justice system, or it will seem self-serving. But by closing, when jurors know the defendant to be a safety-rule violator, and that the defense opinion witnesses played fast and loose with the rules, the jurors are more likely to accept it.

Defense "experts" and the rules.

Remember that a rule must be danger-related, and that the defense must agree with it. So get every defense witness to agree with every rule – and then get them all to say why violating that rule is dangerous. When you can, get them to say that all that danger is exactly why they would never violate such a rule. That makes their violation not only dangerous *per se* to the Reptile, but also moves them into hypocrite territory.

Defense “experts” and the tentacles of danger.

Get defense “experts” to admit that the safety-rule violations in this case can cause immense harm in analogous situations. [See Chapter Eighteen on Depositions.] The defense “experts” will waffle. Good. Reptiles don’t like waffles.

THIRTEEN

CLOSING²⁹

“Without full compensation, no one is safe.”

– Naja C. Naja, Legal Philosopher

Your most important Reptilian task in closing is to show how the dangers represented by this case affect the community. Before writing your closing, reread every “tentacle of danger” topic throughout this book.

This is fundamental. An effective Reptilian closing funnels the entire case down to a matter of community safety versus danger.

Remember that “danger” is not limited to the specifics of your case, as in “violating the safety rules of a differential diagnosis can endanger anyone who might have cancer.” Your focus from opening through closing must be on the fact that violating the safety rules of a differential diagnosis threatens *anyone* who might have *any* dangerous condition. And violating *any* medical safety rule can endanger anyone in *any* medical setting.

Public Policy, Legislative Intent.

Where allowed, cite public policy and legislative intent in closing. The knee-jerk reaction of many attorneys and even some law professors is that you can’t do this. But in most circumstances they are wrong. Raleigh attorney and law professor Donald H. Beskind points out that most states have a case that says the function of tort

²⁹ This chapter is about the Reptile in closing. For a comprehensive guide to closings, see the latest edition of *David Ball on Damages*.

law is deterrence of future negligence. That tort law includes not only punitive damages but concepts of negligence and compensation. See Appendix B for venue-to-venue “Golden Rule” guidance, and do your own research to find out the limits, if any, of arguing public policy.

Explain it this way: The jury system exists to protect the community. The government built the courthouse for that purpose. The government keeps courthouse and courtroom open to the public because *everything that goes on in them affects the public*. That’s what all those gallery chairs are for: the community. Everyone in the community has the right to come watch – because what happens here determines their well-being and safety.

That makes the jury the *enforcer* of safety, just like a cop is the enforcer of highway speed.

When you explain this in the context of the tentacles of danger, the juror understands her official role in doing what the Reptile wants: To make those who create danger meet their full responsibility so that the community is safe.

This danger+Reptile+jury complex has been at the heart of trials from the beginning of the system. Ancient Greeks invented trials to abate a community danger – private, Hatfield-McCoy-like feuds. The endless retaliations of private revenge upon private re-revenge kept the community at bloody cross-daggers. In 458 B.C., Western theater’s first major play – Aeschylus’s *The Oresteia* – shows the first jury safely putting an end to a long private feud.

This astonishing play portrays a Reptilian pack of implacable community caretakers called “the Furies.” The Furies do not rest until all wrongs are righted. Anyone impinging on community safety must be taught a lesson, so the Furies rip him to pieces. In a

“republic” that actually encompassed only upper classes, the Furies protected even beggars and outsiders, because – 450 years before Christ – they knew that when the least among us is endangered, so is everyone.

You should not be surprised to learn that the Furies, the *guardians*, have eyes that constantly drip blood and snakes for hair. In matters of survival, the Furies always win. Sound familiar? They are the classical manifestation of the Reptile, 2450 years before Dr. MacLean posited the Reptilian brain.

Only after much persuasion did the Furies come to accept the jury as a new way to protect the community. All other jury functions are latter-day add-ons of lesser importance.

Even today, the Furies lie coiled within the heart of the jury system, driving the community’s most powerful safety tool. **The Furies of old are the juries of today.**

What does this have to do with public policy and legislative intent? The law expresses and codifies society’s social norms and mores. Negligence, compensation, and punitive damages laws are intended for the expression and furtherance of (among other things) the social norm of *wanting the community safe*. That’s why the Reptile relies on juries to keep us safe. No other institution, individual, or system can do it – unless you believe that guilty people float and the innocent sink, which was medieval England’s version of justice.

Juries as an instrument of community safety has always been obvious to jurors in criminal cases, but not in civil cases. The Reptilian approach fixes that. When you lead the defendant to admit that “There’s no such thing as a standard of care that allows a doctor to needlessly endanger his patients,” or, “There’s no such thing as a safety rule that allows anyone to needlessly endanger other people,” and then show that he needlessly endangered, the defendant is caught in a trap of logic and firmly in the grip of the Reptiles. You have shown jurors a community danger. Now show

that jurors are officially given the power to suppress or encourage that kind of danger – whichever they choose.

So even if you cannot directly refer to public policy and intent, you can probably still say:

It's up to you to decide how far someone can go in violating public safety rules in this community before the community's jurors stand up and say, "Enough! Now you must meet your full responsibility."

And,

If you think it's okay to break these safety rules, then say so – which you can do by just allowing less than the full amount of compensation. If you think it's *not* okay to break safety rules and endanger the community, then say so – which you can do simply by deciding on full compensation.

In almost every case, the defense proposes nothing that can further community safety. On the contrary, the tort-“reform” movement claims that any plaintiff's verdict endangers community safety. But the dangers our side protects from are 1) real and 2) graver and 3) more immediate. Rather than trying to do what is best for the person they injured, everything the defense usually asks the jury to do can only increase the plaintiff's suffering and the community's endangerment. The defense is almost always a community danger.

And a fair verdict can neuter them, to put it politely.

Don't stop at showing how the defense case is wrong. It is usually worse than wrong. Solely to save its money, the defense often proposes profoundly ugly plans, such as those that would grab the child away from his mother and lock him in an institution – exactly what we do with criminals! The defense then hypocritically pretends the plan is for the child's benefit. They use self-interested and dishonest “expert” testimony to “prove” it. Show that it is

hypocritical, dangerous, and, when they get away with it, a menace to the community – by allowing the most dangerous in the community to go on being the most dangerous.

If they get a pass on this, what do you think will happen next?

“No man is an island.”

No Reptile can protect herself alone. She protects herself by protecting the community. The concept of “No man is an island” shows the Reptile that what’s good for the community connects directly to her, individually – and is good for her.

See p. 229 for one example of how to use this in closing. Here’s the original, which is for a large case, by Pat Maloney, Sr.³⁰

Obviously, a juror's service is a public trust. Obviously, a juror's verdict is public property. We must all live now in your public trust and your verdict must now serve us as public property for all times. In rendering your verdict, therefore, you do indeed write history which is recorded here in this courthouse for all times, for all people and for all generations to come and see what you have written under these circumstances, not for this moment, but for all ages. It is only you who can write this particular history.

Shortly, you are going to hear a request for the most historically large sum of money probably ever asked for in any courthouse, anywhere, anytime. In doing so, you must realize your verdict forever stands, now and forever, until your grandchildren have grandchildren. In my judgment,

³⁰ From Closing Arguments – Child Injury and Wrongful Death Cases, Vol I. Ed. Don Keenan. P. 225.

you are going to be one of the proud members of whom it will be said you gave so much, because the situation demanded so much. Therefore, let that verdict be a proud moment in history for you and all others.

Several hundred years ago, there was a man by the name of John Donne, who was a great churchman, great patriot, but most of all, he was known and remembered because he wrote very eloquently. He wrote these words which apply to your jury verdict which you will shortly write. He said, "Ask not for whom the bell tolls. No man is an island. We are part of one continent. So ask not for whom the bell tolls. The bell tolls for you." Naturally, it can never be suggested or said your verdict is not going to touch you in some way, in your own life, and the community, generally, because that's your role and that's your office. Not only in the most important role of all, and that's the assessment of actual damages, but also the imposition of exemplary damages. Now we're going to talk about exemplary damages and the role and the function of exemplary damages as they relate to you as jurors. They are your opportunity to send a message to a miscreant and thoughtless manufacturing operation which should read, in effect, "scrub up your act so this terrible tragedy may never, never happen again...."

Mr. Maloney's closing boils down to this:

Do we not have the right to defend ourselves against acts like this?

Follow that with:

A jury is the most powerful group a person can belong to. That's why most countries don't have them.

Make the plaintiff take the money!

Our research showed that once jurors understand that a full verdict will protect the community, they will actually want the plaintiff to take the money. And they will want to let her know it is okay to take the money because it will be doing some good.

This Mother is reluctant to take money. It feels to her like blood money – like using her child’s death [*or injury*] for money. It’s up to you to tell her she needs to take every cent. Next time she visits his grave [*or, e.g., puts him through his leg therapy*], she needs to know that as far as justice can do anything, it has been done. Not partly done. Completely done. You need to tell her that, with your verdict. It’s not about bringing back the dead [*or fixing a spine*]. It’s about letting everyone else go on with their lives knowing that the community has done everything in its power. In many ways, that’s the purpose of the jury. Without that purpose fulfilled in full, there is no closure. There is no justice. And we are left with no safety.

Here are other approaches:

“Incomplete Verdict.”

A verdict that allows only part of the money is an incomplete verdict. What is wrong with that? Incomplete verdicts encourage future danger. Incomplete verdicts turn a county into a danger magnet: People who do not plan to follow safety rules cluster where they won’t be held responsible. Incomplete verdicts throw a dangerous burden on the community – forcing the public to use money needed for their own families to pay the injured person’s care, instead of putting the burden on whoever broke the safety rules and caused the harm.

Without complete verdicts, no one is safe.

“Defense Knows What’s Safe.”

Show that the defense knows exactly what sufficient safety is – and that they apply it to their money, not to the plaintiff or the community.

Folks, compare the level of care with which they³¹ protected Indira back in the clinic [*or on the highway, or whatever*] with the level of care they’ve been using right in front of you to protect their money. Compare how easily they violated the safety rules in the clinic with how meticulously they follow the rules necessary to their being allowed to even come here to try to protect their money. You saw it in front of you the whole time. If they’d been half that careful back in the clinic, they’d never have hurt Indira.

They are here carefully protecting what they think of as their right to needlessly endanger people.

Suppose that back in the clinic, instead of Indira they’d had their million dollars in 50-dollar bills on the table, how careful do you think they’d have been to be absolutely certain that no one could get in and steal it? There’d have been no one wandering in an hour late, no one choosing not to call for help when things started to look dangerous, no sending all the guards home because things “might” be safe.

And that’s just to protect money. You need to tell them that in this community, the safety of people is more important than the safety of their money.

³¹ This is the generic “they” – encompassing both the defendants and defense counsel.

The problem is that they don't put much value on human well-being and safety. You saw it for yourselves: a few minutes ago they told you that we are asking for too much for what they did to Indira's well-being. See that pattern? They did not value human safety and well-being back in the clinic, and they still don't right in front of you. So what do you think will happen if you give them a pass, if you let them off with a bargain-basement verdict?

And what will that tell the community? "Human well-being and safety *on sale* in Cumberland County!"

"Judgment."

Gary Johnson tells you to explain to jurors that their dollar verdict is not a "judgment." It is a calculation that goes on the verdict form. A verdict does not *give* or *award* money; it *allows* the money.

In this way, the verdict form becomes the Reptile's mechanism for making herself safer. It's like providing a soldier with artillery – with the ammunition being nothing but a full and fair amount for compensation.

"Two Standards of Care."

Argue that in this case there are two standards of care: One to protect the patient and the community, and a second to protect doctors and hospitals that don't do the first. Make the jury understand that they now get to choose which standards will apply in their community.

FOURTEEN

SCRIPTURE AND THE REPTILE

(No matter what you think about using Scripture, do not skip this chapter.)

“Let justice roll on like a river, righteousness like a never-failing stream.” (Amos 5:24)

“The Lord loves justice and does not abandon the faithful.” (Psalm 37:28)

“Pray as though everything depends on God, and then work as if everything depends on you.” (St. Augustine)

“Hate evil, love good, maintain justice in the courts.” (Amos 5:15)

“There are no atheists in foxholes or juries.” (Gary C. Johnson)

“God, you know, He listens!” (Pauline Sulds – David Ball’s grandma)

Be your own judge of what you can use of this chapter. Some venues restrict religious references. Some juries might be offended by it. But in most circumstances, and used the right way, Scripture – Old and New Testament, the Koran, any other – can be a powerful Reptilian force.

Where you are not certain about how well jurors will accept Scriptural quotes, say something such as, “Whether or not you believe Scripture is the word of God, the courtroom is not the

proper place to debate. But we all agree that Scripture such as the Ten Commandments are powerful and true rules of a moral and ethical life.” This works even in touchy venues and whenever you are uncomfortable using a Scriptural quote.

For the vast majority of the population – including folks who are not Bible Belters and even those who are barely religious – the ultimate survival resource is God. For almost everyone, the ultimate resort in a severe survival crisis is prayer. Because a Reptilian approach in trial puts the juror’s decision-making into survival mode, anything that helps jurors to see the Almighty’s guidance can be powerful.

To the very faithful, the somewhat faithful, and even most of the non-faithful, Scripture teaches the ultimate rules. Even to atheists, those rules command authority because they represent a collected wisdom that transcends rules derived from a legislature, a hospital authority, a manufacturing association, common sense, etc.

And to believers, those transcendent rules carry the imprimatur of God.

Early childhood is laden with good and bad survival associations, including about religion. This is long before the child even knows what religion is, just as the smell of coffee creates survival associations before the child knows what coffee is. That Reptilian imprint of religion is deep and rich. It involves home, family, community, and other comforting foundations. For those with that imprint, religion is a lifelong Reptilian force. Its survival values attach to anything associated with religion: the buildings, the music, the art, the people, the service – and its words, the cadences of the words, and the meanings of the words.

Moe Levine, an Inner Circle of Advocates founder, invented some themes that became standard for many good attorneys – such as “Conscience of the Community,” “Loss of Enjoyment of Life,” and “Whole Man.” Then he learned something: “Do you know how many years of suffering were required [for me] to finally evolve

these [themes]?” he asked. “If I could sue those who plagiarized me all these years I would be a wealthy man. But I cannot because [these themes] all exist in the Bible. The right to the enjoyment of living. The fact that part of a man concerns all of a man. That anything less than full justice is injustice. That what you leave a man is more important than what you take from him.”

There is a virtually infinite number of Scriptural quotes, paraphrases, and concepts that can powerfully express much of importance in trial.

You don’t even need direct quotations. For example, when your client is a “worthless” or “lowly” or poor person of no importance, why would jurors think he ought to get a lot of money? Because, you explain,

Justice is important *even for the least among us*.

This echoes such Scriptural quotes as

Inasmuch as ye have done unto one of the least of these my brethren, ye have done unto me. (Matthew 25:40)

Even jurors who don’t know the source will respond to the Scriptural overtones of “even for the least among us.”

And you can use direct quotes when you are certain it will not offend some jurors. Here are two:

Do not deny justice to your poor people in their lawsuits.
(Exodus 23:6)

... After Jesus says “love your neighbor as yourself,” a young lawyer asks him, ‘And Father, who is our neighbor?’ Jesus responds with the parable of the Good Samaritan, showing that *our neighbor* means *everyone*. (Luke 10:25 ff)

The quote from Luke encompasses the Reptilian imperative that we are all in this together. “No man is an island.” So when something threatens the community, it threatens all of us and all of our children. That motivates us into being “guardians” of the community.

Below: Many Scriptural and near-Scriptural quotes for trial:

Medical negligence:

The sailor who disregards the stars inherits the rocks. This was written when sailors had only the stars to guide them on the open sea. In this case, the hospital’s diagnostic equipment, its test results, were the stars that should have guided the doctor’s decisions. The doctor who ignores the equipment and tests will inherit the ‘rocks’ – and destroy his patient’s safety.

Prodigal Son:

Virginia attorney Chuck Zauzig had a case involving a son who left home, led a dissipated life, then returned to become a cherished member of the family. Mr. Zauzig told the story of the Prodigal Son.

“You are chosen:”

Our research partner Gary C. Johnson leads jurors to feel they were *chosen* to be here – and not by an attorney. Depending on the kind of jury you have, you can do more or less of what follows. You can do at least some for any jury.

The process can start in jury voir dire. But we can best explain it here by what to say in closing:

1) We don't know why things happen in life. But somehow, against all the odds, you're the ones chosen to be here today for this community.

2) It *seems* random. Of all the people in the county, you were somehow chosen to come to a jury selection. *Somehow* chosen from a list of every single person in the county who has a driver's license or who votes.

3) Then you came here. To this room – crowded with people, wall to wall.

4) Out of the crowd, somehow your name was one of those chosen to come up here. At random.

5) You didn't come here wanting to be on a jury. You wanted to go home. You probably could have gotten off – but for some reason, something made you stay. 70 people went home; you stayed.

6) Who knows why it worked out that way?

7) But whoever's in charge of right and wrong in this world made the right choice. Because I've watched all of you through this trial. How closely you paid attention. How you've been taking notes. Your concern day after day about a total stranger. That's not the kind of thing people do all the time. Something put you here for a reason.

This gives jurors a feeling of purpose beyond their everyday mundane existence: doing something of visible importance for the community – and having a higher power involved in what they are doing. No matter one's beliefs or lack of beliefs, everyone wants to feel they're on this earth, going through all the good and bad, for some purpose – including those who act like they don't. This includes people who already feel important. It also includes the

more common kind of juror: those who feel that after all is said and done, and despite all they have gone through, so far they have really accomplished little in this world. There is a universal and powerful Reptilian yearning for there to be more to life: "Life has to have a meaning greater than this." This is a strong survival drive. It means doing something for your "maker," whoever or whatever you think your maker might be.

Living without effect makes a person a cipher. In fact, almost everyone believes (or at a minimum wants to believe) deep down that they were chosen to be born and that it was for a purpose – part of the big scheme of eternity. The more educated, sophisticated, accomplished, or even scientific people are, the more they believe this. And the less they are those things, the more they *have* to believe it.

And we all want it to be true.

So offer it: Being "chosen" to have an effect on the community fulfills that deep want. It is more than just comforting. It means immortality – which, after all, is the Reptile's sole *raison d'être*.

Scriptural quotes for the general concept of justice:

But let justice roll on like a river, righteousness like a never-failing stream! (Amos 5:24)

Better a little with righteousness than much gain with injustice. (Proverbs 16:8)

A just verdict, not a popular verdict:

Martin Luther King, Jr., said, "You don't measure the character of a man during times of comfort and convenience, but at times of controversy and conflict." You can add, "Your verdict may not be

popular but in your verdict you speak your character." Then cite:

Do not follow the crowd in doing wrong. When you give testimony in a lawsuit, do not pervert justice by siding with the crowd. (Exodus 23:2)

Justice to the poor:

Do not deny justice to your poor people in their lawsuits. (Exodus 23:6)

Justice to immigrants:

Do not deprive the alien of justice. (Deuteronomy 24:17)

Pain:

When God was testing the faith of Job, the worst punishment was physical pain.... He lost his lands and property, his family – but it was not until physical pain was inflicted that Job broke.

Yet if I speak, my pain is not relieved; and if I refrain, it does not go away. (Job 16:6)

Verdict:

The word “verdict” appears five times in the Old Testament.

Go to the priests, who are Levites, and to the judge who is in office at that time. Inquire of them and they will give you the verdict. (Deuteronomy 17:9)

If any case is too difficult for you to decide, between one kind of homicide or another, between one kind of lawsuit or another, and between one kind of assault or another, being cases of dispute in your courts, then you shall arise and go up to the place which God chooses. (Deuteronomy 17:8)

Now, all you Israelites, speak up and give your verdict. (Judges 20:7)

When all Israel heard the verdict the king had given, they held the king in awe, because they saw that he had wisdom from God to administer justice. (1 Kings 3:28)

He told them, "Consider carefully what you do, because you are not judging for man but for the LORD, who is with you whenever you give a verdict." (2 Chronicles 19:6)

The decision is announced by messengers, the holy ones declare the verdict, so that the living may know that the Most High is sovereign over the kingdoms of men and gives them to anyone he wishes and sets over them the lowliest of men. (Daniel 4:17)

And in the New Testament as well:

This is the verdict: Light has come into the world, but men loved darkness instead of light because their deeds were evil. (John 3:18)

Inner Circle of Advocates suggestions for use of Scripture:

Robert F. Spohrer (Jacksonville, FL)

Witness credibility:

The Lord detests lying lips, but he delights in men who are truthful. (Proverbs 12:22)

Truthful lips endure forever but a lying tongue lasts only a moment. (Proverbs 12:19)

Damages in a death case:

Administer true justice; show mercy and compassion to one another.

Do not oppress the widow or the fatherless, the alien or the poor.

In your hearts do not think evil of each other. (Zechariah 7:9-10)

Comparative negligence:

What is man that thou art mindful of him? Something less than the angels. (Psalm 8:3-4)

Bruce McMath (Little Rock, AR)

Justice:

Learn to do right; seek justice, encourage the oppressed; defend the cause of the fatherless; plead the case of the widow. (Isaiah 1:17)

Patrick A. Malone³² (Washington, D.C.)

Let the words of my mouth and the meditations of my heart
be acceptable in thy sight. (Psalm 19)

Jim M. Perdue, Sr. (Houston)

See his book *I Remember Atticus*.³³ Chapter One discusses the use of biblical references in closing argument. It covers the story of Susanna, a number of Old Testament quotes, Jesus's parables, and the teachings of other religions about justice.

In a case a few years back, the defense had argued that it did not matter how good a man Mr. Perdue's client was. In response, Mr. Perdue referenced Paul's letter to the Galatians:

God is not mocked, for whatsoever a man soweth, that shall
he also reap.

That outweighs a whole lot of defense argument.

Paul N. Luvera (Seattle)

Mr. Luvera reports, "I have trouble remembering a jury trial in which I did not quote poetry or literature and refer to Scripture. I don't always say the quote is from the Bible and I never give the citation unless there is a reason. For example, when defendants are blaming each other, I'll say: 'Refusing to take responsibility is as old as the Bible. Remember the story of Adam and Eve and the fruit of the forbidden tree? Eve talked Adam into tasting it. He let her. He got in trouble and blamed her. She blamed the serpent. So what's

³² See http://www.patrickmalonelaw.com/files/a_trial_lawyer_sings_psalms.pdf.

³³ State Bar of Texas.

new? Finger pointing at each other, denying when you are wrong, and refusing to be accountable are well known to all of us."

Safety:

When thou buildest a new house, make a railing for thy roof, that thou bring not blood upon thine house if a man fall from it. (Deuteronomy 22:8)

Brian J. Panish (Los Angeles)

He parallels the "12 jurors" to the "12 apostles."

Final argument:

Come let us reason together. (Isaiah 1:18)

Robert R. Michael (Rockville, MD)

Corporate wrongdoing and the curative effect of a verdict:

I will give you a new heart and put a new spirit within you; I will take the heart of stone out of your flesh and give you a heart of flesh. (Ezekiel 36:26)

For an injured worker who loved his work:

Nothing is better for a man than that he should eat and drink, and that his soul should enjoy good in his labor. This also, I saw, was from the hand of God. (Ecclesiastes 2:24)

Peter Perlman (Lexington, KY)

Justice:

Justice, justice shall you pursue, that you may live ...
(Deuteronomy 16:20)

A man when he is righteous and has done what is just and right... shall surely live, says the Lord God. (Ezekiel 18:5,9)

He who walks in his integrity is a just man, and his children are blessed after him. (Proverbs 20:7)

You shall not be partial in judgment. Small and great you shall hear alike. You shall not fear anyone, for justice is of God. (Deuteronomy 1:17)

Safety:

He who digs a pit shall fall into it. (Proverbs 26:27)

On a verdict (the jury's time to speak):

To every thing there is a season and a time for every purpose under heaven. (Ecclesiastes 3:1)

Moe Levine (New York, NY)³⁴

Enjoyment of life:

³⁴ See *Moe Levine on Advocacy*. TrialGuides.

Think about ... impairment of the enjoyment of living, the most serious of all damages.... [It is] found in Ecclesiastes 8:15: *So I commend the enjoyment of life, because nothing is better for a man under the sun than to eat and drink and be glad. Then joy will accompany him in his work all the days of the life God has given him under the sun.* If all that's left in this tense world of ours is survival, who needs it? Who needs just survival? Just labor. Just work. No pleasure. No enjoyment of life. Is there a worse injury than the impairment of the enjoyment of living? He has been robbed of pleasure. He will have nothing for the rest of his life but survival. He will not only have been robbed of all the pleasures in life. He will have been robbed even of the pleasure of working....

The Whole Man Argument:

One of Mr. Levine's best damages arguments. After thinking he'd invented it, he found it in Corinthians:

For the body itself is not made up of only one part, but many parts ... and so there is no division in the body... If one part of the body suffers, all the other parts suffer with it.

From this he developed the concept of how injury impacts the entire person. He would say "the Bible says" or "Scripture points out" – and then develop the idea from a medical standpoint.

Prayer in conclusion of argument (Moe Levine's last words to juries):

I have prayed that you will find within yourself the strength to do what must be done without regard to personalities involved but with the pride that what you have done is right. Thank you.

If you do use Scripture or near-Scriptural references, it can also help you make sure jurors follow the law. (See Chapter Eight.) Remind them they are under *solemn* oath – so they must make sure everyone obeys the judge’s instructions on preponderance and factoring into their damages decisions nothing but the harms and losses the defendant caused.

Need more? Hire a Bible expert. Or use an on-line search engine to find relevant quotes in every kind of Scripture. Or read Scripture yourself. You might like it.

FIFTEEN

CASE SELECTION AND THE REPTILE

Your Reptilian journey begins before you accept the case.

In non-punitive cases, trial lawyers have always relied on jurors empathizing with your client's harms and losses, and compensating accordingly. For years, some teachers taught that you should start your opening statement with damages, explain how the damages occurred, and show how they could have been prevented. This made the case 100% about your client.

But the Reptile is not particularly concerned with your client. Our research revealed a different picture: ***the Reptile is concerned with the Reptile*** – meaning the individual juror: his world and family, their survival, and little else.

This truth shapes your case-selection criteria. Can you show that the case is about community safety? Can you show things in this case that could happen to anyone? The stronger the yeses, the stronger the case.

A direct reference to “this could happen to you (the individual juror)” would violate the Golden Rule (see Appendix B). But you don't need to make direct references.

After our Reptilian research was underway, Don Keenan accepted the case of a middle-class teenager. The boy hired a customizing shop to install flashy wheels and lug nuts onto his 1970s muscle car. The shop did it wrong. So the boy drove out of the shop onto the highway, where one of the wheels fell off and sent him out of control into the oncoming lane. He wrecked. He was the only one

hurt. The wreck severely damaged his brain and left him quadriplegic.

But jurors often have little empathy for a teenager in a muscle car with souped-up wheels: it's a wreck just dying to happen. So the case could not focus on the boy. Keenan had to find a way to focus on innocent victims in the community who might have been coming the other way – anyone in the community that the boy *could* have ploughed into.

In other words: *What was the community danger?*

This question underlies case selection criteria.

First, Keenan looked to see whether this custom shop had customers throughout the entire urban area, or just in its own impoverished locale. He probably mystified the defense by demanding the ZIP Codes of the shop's customer base. He found that its customers were from the whole community – rich, middle class, and others – and not just the shop's own area. So a wheel could have come off anywhere in the urban area, harming anyone.

He also looked into whether the client base was only teenagers. But nope. The vast majority was aging baby boomers!

So through the Reptile's eyes, this case was about community safety. The substantial alienating effect of a teenager driving a muscle car faded in comparison to the community threat of the customizing shop's safety-rule violations. The tentacles of danger involved the entire community, not just some kid in a muscle car.

A case framed in terms of community endangerment is Reptilian. A hospital-acquired infection case turns Reptilian when jurors see that the victim could have been anyone who walked through the doors. "Anyone" means the community. "Community" includes Juror #3 and her children.

That's the standard for every case. If it deals with community endangerment, it's Reptilian.

The following check list focuses you squarely on the Reptile:

Case Intake Reptilian Buttons (Keenan Law Firm):

1. The Defendant's Conduct/How it could impact random victims:

- a.
- b.
- c.
- d.
- e.

2. Community Survival Issues/Why should the community care about the outcome of the case?

- a.
- b.
- c.
- d.
- e.

3. Systems Failures on a Reptilian Level/What happened that can happen again?

- a.
- b.
- c.
- d.
- e.

SIXTEEN

MEDIATION AND THE REPTILE

Remember that when there is a choice between safety and danger, the Reptile is always involved. So mediations, while less combative and emotional than the courtroom, are fertile Reptilian ground. The fear button for the insurance company and the self-insured is their awareness of a strong chance of a large verdict. A substantial differential between the final defense offer and a higher jury verdict can undermine careers and make heads roll. It's the ever-present guillotine of the profession. Their Reptiles do not like it.

So start by finding out whose head is at stake. This can be tricky, but it's essential. There can be several layers of insurance with different hierarchies within each company: claims committees, district supervisors, etc. Sometimes a first claims agent has authority up to a certain limit, and then a supervisor or some form of committee takes over. But ultimately, someone's head is at stake for the decision. That's where the fear button will be. You can't apply Reptilian pressure to a computer, but you can to someone with something – like a head or a job – to lose.

Settlement Facilitator.

The Keenan Law Firm has long used outside settlement facilitators. An outside settlement facilitator is an independent adjuster with vast experience in claims management, just like the defense people you will be negotiating with. You want a former senior claims manager or district manager.

Ninety percent of the cases that outside facilitators have handled for the Keenan firm have settled well. This success rate is based on, among other things, the facilitator's knowledge of how the other side works, and familiarity with who's doing the work. At higher levels, the claims-adjusting community is small. They have their association meetings, retreats, and meetings where they develop close relationships. So your well-chosen facilitator and the defense people will know each other well.

Your settlement facilitator can help you find the true authority person. While all mediation orders require that someone be present from the defendant with "full authority," this is a fiction. There are phone calls, e-mails, and carrier pigeons relaying messages back and forth – all to conjure up the image of some mysterious Wizard of Oz back at the company office. Your mediation facilitator knows who's the man behind the green curtain, so he can deal just with the decision-maker, not underlings. Just with the neck that's on the line.

A good settlement facilitator will also know the company structures. He'll know the breaking points better than the most experienced trial lawyer.

And of course, defense-claims people would rather deal with one of their own than with you.

Reptilian maneuvering by your settlement facilitator is subtle and reserved. The mere suggestion of what a monster verdict will do is almost a fraternal gesture. It's non-threatening, it's a favor: "What happens to your job if you're wrong?" This implication between friends is immeasurably more effective than a hammering plaintiff's lawyer. And your facilitator can make the implication far more credibly than you can.

Authority Presence.

Demand that the defense guarantee in advance that the person attending the mediation will have – without the need to ask anyone up the ladder – the power to settle for an amount you specify. Make clear you are not requiring that amount as an offer, nor saying the case will settle for that amount. It simply means they must guarantee that the person in attendance has full authority to go to that figure. No phone calls, no e-mails, no jungle drums or smoke signals.

You must be willing to walk away if the authority person is not across the table at the start of mediation. Getting this guarantee is often more adversarial than the mediation itself. But it's worth the trouble, and provides a clear message as to whether the case will conclude.

It is also the first way you tell them that you are stronger than they are.

Once the authority person has been identified, he becomes the focus of the pressure. When he views the numbers as nothing but business, you cannot exert pressure. But if he believes he'll face job consequences in the event of a large verdict, you can apply effective Reptilian pressure.

"What if I'm wrong about my verdict estimate?" That's his fear button. Remind him that there will be consequences for a bad decision. Mention well-known adjusters who lost jobs over even one major misassessment of verdict size.

In smaller cases, the mediator is even more exposed: He'll be younger and trying to work his way up the ladder. He's in no position to weather a major blunder.

Years ago, Keenan's firm had a number of cases with low or no offers. Eventually those cases brought in seven-figure jury verdicts. To memorialize the various insurance companies' stupidity, Keenan bought pieces of furniture, artwork, etc., for his office. He named each piece after either the insurance company or the specific adjuster who made the misassessment. He had a conference table named "State Farm," a lovely oriental rug named "St. Paul Insurance Company," and other items named for senior claims managers. During each new negotiation he'd invite the insurance folks to the office. He'd just incidentally point out the array of expensive items named after their colleagues. Keenan would kid the adjuster: "If you screw up and don't offer enough, I know exactly what I'm going to buy and name after you. It's already picked out!"

Funny? Sure. Better yet, it works. It gets to the adjuster's Reptile by threatening his employment survivability.

Mediators.

A mediator's career success is measured in direct proportion to his closed cases. A mediator who cannot bring closure is short lived. So apply subtle pressure: "This one should be easy to conclude; everyone I've talked to agrees." And, "How many cases have you done that didn't settle? I hope this isn't one." And, "You were selected because everyone knows you can get it done."

Clients at Mediation: Both Sides.

The defense likes the chance to speak directly to your unsophisticated plaintiff and scare him into settling low. You have to prepare your client for this so he's secure – and so that he sees that the real Reptilian threat is falling for the defense threats.

Despite the frequent success of that defense tactic, plaintiff's lawyers rarely require the defendant himself to be at mediation.

You should require it and walk out if the defendant is not there the whole time. Even when fully insured, the defendant usually has reason to avoid a large public verdict – showing to the world what a bad thing he did. Do not underestimate how humiliating a large verdict is to the defendant – and remember the Reptilian power of humiliation. There is nothing wrong with a hint about this.

Some defendants are particularly vulnerable to the consequences of a high verdict. For example, some risk becoming the poster child for a community (or national) danger. Such defendants have more at stake than just the dollar value of the verdict. When they do, their Reptile – and yes, corporations have the equivalent of a Reptile – gets into the act to protect them.

Harvard Law Professor and author Roger Fisher wrote *Getting to Yes*, which is the negotiations Bible. He teaches that a closure should ultimately be found that will make both sides feel good. By motivating the defense with the Reptilian fear of having to be personally responsible for a high verdict, the defense can walk away from a substantial settlement feeling very good indeed – because their head is still on their shoulders.

Control.

You need control of mediation. You gain control not from the strength of your case but from showing the defense that you don't want to settle as much as they do. *This requires actions, not words.* Actions = your refusal to come until they meet certain conditions, and your refusal to stay unless they meet other conditions. The defense will consider your case a winner only when they see that you believe it. They will see that you believe it only when they see your control-gaining actions.

Once they see that, they do not like it. No one likes being controlled by an adversary. So when the defense stays – and thus cedes power to you – you know they want to settle. You have pushed their fear-

button. And your demand gives them the way out of their fear. This Reptilian process works in every size case.

If you think they're not serious about settling, do not mediate. To find out, require that they make a realistic offer *before* mediation. Require other conditions. Refuse to mediate without the right people there. And stick to your conditions. If they want to settle, they will meet those conditions. If they don't they won't, and now you'll know. Your advance conditions – such as a realistic offer before mediation – also gets negotiations underway in advance.

And it positions you as the one with the power, because you'll have shown them you are willing to walk away.

All this, of course, presupposes that you *are* willing to walk away. If you thought this case was worth taking, you have to have the nerve to walk away. As Gary Johnson points out, there are no great trial lawyers who are afraid to take a verdict. The moment the defense sniffs out that you want to settle more than they do, you have lost control and thus lost the chance of a fair settlement (unless by “fair” you mean in the context of your client having a trial-fearing lawyer).

The insurance companies know every negotiation move you've ever made. They know if your comfort level is limited to settling in order to avoid trying cases – or if you will do the best for your client even if “best” means walking out of mediation and into trial. If your trial threshold is too high, change it. **If you are or remain a trial coward, especially once you're armed with the methods in this book, you're in the wrong job and you ought to tell that to your prospective clients.** Your client deserves a lawyer the insurance companies respect. And that respect is independent of any particular case.

Start gaining control in advance. In addition to demanding a reasonable offer before you agree to mediate, send the defense something like the Keenan Law Firm's document on the next page: conditions the defense must understand and accept before you set

foot into mediation. Include some conditions such as #8 that make clear you are not eager to settle and will mediate only on your terms.

SETTLEMENT CONDITIONS

Before Alternative Dispute Resolution begins, the Keenan Law Firm wants there to be no misunderstanding or miscommunication regarding how the firm approaches, responds to, and conducts mediation, or the terms which any settlement must include.

The Keenan Law Firm will:

1. Make a full and complete statement of case during the presentation period, consisting of all issues.
2. Consider all reasonable offers.
3. Provide any information requested by the defense during settlement negotiations.
4. Respond within 15 minutes to a defense offer conveyed by the mediator.
5. Stay at the negotiating table until well past midnight and recommence first thing the next morning, if necessary.
6. Agree to a confidentiality agreement if the tax requirements of the Rodman IRS case are satisfied.
7. Always conduct ourselves with the highest degrees of professionalism and civility, and not resort to emotion, anger, or accusations.
- 8. If the defendant [party] leaves the mediation, we will leave immediately.**

The Keenan Law Firm will NOT:

1. Receive, entertain, consider or respond to any defense offers in the form of a structured settlement.
2. Respond to, entertain, consider, or agree to any high/low agreements applicable to trial.

ADDITIONAL CONSIDERATIONS:

For the case to be settled, the following terms must be met:

1. The amount of settlement must be paid in full into the hands of plaintiff's counsel no later than 30 days after the settlement date. Any payment received or tendered after the 30 days must include interest at the rate of 12 percent per annum.
2. If the case is not concluded at ADR, the Keenan Law Firm will unalterably entertain NO settlement offers until the jury has reached its verdict. The ADR is the final opportunity to conclude this case before the jury has reached its verdict.

If they do not agree to these conditions, do not mediate. If the defense wants to settle they will come back. If they do not want to settle they will not come back, any more than they would have given you much money.

Here are examples of how to gain and maintain and reassert control. As you read, do not just think “large case.” The methods and effect on control, as you’ll see, apply in every size case:

1. Emotional involvement of the defendants.

Case: A 19-year-old died an agonizing death over 13 hours. Keenan (as usual) required the CEO and CFO of the defendant company to be there, along with two company board members. Defense stipulated to causing the pain, suffering, and death. But the parents needed more closure than that would provide.

The Plaintiff’s Power Point presentation included a full-body drawing of the boy with a superimposed photo of his face. Over that were 80 slides of medical-record notations of his body’s deterioration, and medical illustrations of each system shutting down.

Keenan told the CFO to click the Power Point slides and the CEO to narrate the time line and medical records. The defense refused. Keenan stood up and announced, “We’re leaving.” (He’s done this in a number of mediations and never actually had to leave.) The defense quickly agreed to have the CFO click the slides while the CEO read the records aloud. It took more than half an hour. The parents stared like laser beams – not at the screen but at the defendants. As the slides progressed, the CFO and one of the board members had tears in their eyes. Until now they had known nothing about the boy’s agonizing pain as he was dying.

By threatening to leave if the CEO and CFO did not show the presentation, the plaintiff seized total control. By being forced to

show the presentation rather than just watch it, the defendants became too emotionally involved to try to regain control. Result: record settlement.

2. Robert M. Montgomery's "Not Enough" strategy.

In certain cases – when he had the leverage – the legendary Montgomery used the "not enough" approach: "No demand," he would say. "You make an offer." To each offer, he responded, "Not enough; give me another number." When asked for a counter offer, he stood his ground: "Not enough; give me another number." After a dozen increases, his ultimate number was paid – in fact, in some cases the number went far beyond the amount he'd had in mind. He had held control by forcing the defense to mediate his way.

3. Keenan began a mediation by giving the mediator a line-in-the-sand number, and making it clear that the plaintiff had to get every penny of it.

At first the mediator assumed there would be some give-and-take. Keenan communicated the number at the first defense session. The defense made a counter-offer. Keenan did not come down. The defense made another offer. Keenan still did not come down. This went on until mid-day: offer, but no lower demand.

The mediator got angry and chastised Keenan for "not negotiating."

Keenan said, "Who says you have to drop your number during a negotiation? I'm just negotiating in a different way." The mediator was not amused.

Hour ten. Keenan has still not come down. *But the defense is still there*, so obviously Keenan has control. Keenan now tells the

mediator to have the defense lawyer and the insurance people go outside, get into a waiting limo, and take a short ten-minute chauffeured trip.

The mediator wants details. Keenan refuses more details – except that Keenan would not be going on the drive. There will be a chauffeur to drive them. (Keenan does not say that the chauffeur is his paralegal.)

Predictably, the defense refuses. Keenan stands up and announces to his staff, “Let’s pack up, we’re going home.” Keenan packs up. He’s down the hallway on his way out when the mediator comes up and says that the defense is willing to take the drive – if it’s no more than ten minutes.

“Probably seven,” Keenan replies.

The defense lawyer and insurance people go out to the limo and get in. The paralegal-chauffeur drives a mile down a busy highway. At the crest of a hill he pulls off and stops. He asks them to get out. They refuse.

The paralegal says, “I’ve been instructed to say that if you refuse to get out of the car, Mr. Keenan will be gone by the time we get back.”

Again, the defense team reverses. They get out.

The paralegal-chauffeur reads aloud from an index card:
“Gentlemen, please look above to the billboard in front of you. You will see a number printed on the billboard. That was Mr. Keenan’s number before the mediation. That was Mr. Keenan’s number at the beginning of the mediation. That was Mr. Keenan’s number throughout the last ten hours of the mediation. It will remain Mr. Keenan’s number. It will not change.

“Now, if you’d kindly get back in the car I will take you back to the mediation.”

Keenan had rented the billboard. The only thing on it was his dollar figure. It filled the billboard.

Keenan knew that once they saw the billboard, they would know that their only way to settle the case was to pay his number and not a penny less.

The defense team returns to the mediation. They go directly into their separate room. They announce a substantial increase – within five percent of the billboard number.

Would you, dear reader, settle at that point?

Maybe, but why? You now know they are going to pay the billboard number. But they have to play the game. They stay in mediation another 90 minutes. It takes them four incremental raises to get to the billboard number.

Keenan knew back when he’d rented the billboard that if he ever had to show it to them, he could never go back. His bridge was burned. The defense lawyer admitted later that that was exactly the assessment he gave the insurance team, explaining that Keenan had staked his reputation on that billboard.

Without that billboard, the mediation would have ended with the sides far apart because they would not be convinced that his demand was a true bottom line.

Can you always do *exactly* what those three stories illustrate? Of course not. But when you assert and maintain control, you can do the same kind of things and a lot more.

Too many lawyers start mediation by ceding control. Like hat-in-hand beggars, they recite the case as if the defense did not already

know it. So the defense listens and hears mainly how they are going to undermine your case.

You seize control not by rehashing your case for them to evaluate. Instead, regardless of the size of the case, take control by insisting on the advance conditions, as you saw above – such as getting a reasonable offer before you agree to show up, and having the defense agree to points such as #8 on the pre-mediation memo above.

Then throughout mediation, choose and use your control assertion points. “We’re leaving.” If they let you leave, they were not going to come to a reasonable offer. If they don’t let you, you have control. **But if you cave in and stay even if they do not meet whatever condition is in question, you give them control and tell them you will settle low.**

Ever buy a used car? The instant you let on – directly or indirectly – that you just have to have this car, you have ceded control to the salesperson. But as long as your stance is, “It’s not really the right color, the gas mileage is not so good, I just dunno ...” if the salesperson wants to make a sale, he has to move a long way in your direction.

In other words, whoever has the guts to walk away controls the game. A mediation is just partly about being a reasonable or skillful negotiator in the classical sense. A mediation is just partly about how good your case is. It is mostly about who is running the show. When you tell the defendants to read the medical record aloud or get into the limo, you are taking control because if they don’t do it you will walk away.

When you tell them to put on the neck brace your client used, and challenge them to bend over in it, or reach for something or open a door or to scratch their back, they can say no. It’s natural: they are trying to take away your control. Don’t let them. It is reasonable for you to insist that they do it. How else are they going to know

what your client went through? And when they know you are leaving if they don't, you keep control. If they let you leave, they did not really want to settle so you were not going to get a fair settlement. That means trial.

Worker's comp case: The client, a mechanic, got his hand crushed and had to wear a brace to do any more work. "Then no money!" said the carrier. "After all, he can work." And they wanted to force him to have to. This wasn't a case that could afford a billboard. But it could afford a tire and wheel, lug nuts, and a wrench. Keenan asked the adjustor to put on the brace. "Why?" said the reluctant adjustor. "So we can go on mediating," answered Keenan. Once the adjustor put the brace on, Keenan challenged him to get the lug nuts off the wheel. The adjustor could not do it.

At that point, everyone knows who is in control.

In a facial scar case, Keenan offered to have a scar painted onto the adjustor's face for him to walk around with for a week so he could see how it felt. Of course the adjustor said no. Keenan offered to reduce his demand by 10% if the adjustor would do it. And Keenan explained that he was going to put his 10%-off offer in writing so anyone up the line at the insurance company would know, after a big verdict came in, that the adjustor had refused such an offer.

A mediation is not a macho display, but an exhibit of real strength. It marks the difference between real trial lawyers and their lesser colleagues who go by the same name.

SEVENTEEN

CLIENT PREPARATION FOR DEPOSITION AND TRIAL TESTIMONY

(The Keenan Firm's Method of Client Preparation)

Your client, too, has a Reptile within. So client preparation is a Reptilian issue. This is because for your client, giving a deposition is a once-in-a-lifetime, public, and demanding high-stakes performance controlled by a powerful interrogator trying to do as much harm as possible.

To your client, there's something even worse than the possibility of his testimony hurting the case: No matter how sophisticated, your client's immediate terror while testifying will be the fear of looking bad. Humiliation is among the greatest of Reptilian fears.

So during testimony, the Reptile's primary motivation will be to find the fastest way out of the fearsome situation, *no matter what harm it might do to the case*. That can easily mean your client will give answers the opposition lawyer wants – just to be left alone. To avoid humiliation and other deposition terrors, your client will admit to starting the Chicago fire, creating the economic melt-down, and shooting Bambi's mom.

Keenan's Method.

Until now this method has been proprietary, but Don feels it is too much of a Reptilian asset to omit from this book.

To use this method, shed the skin of legal counsel and replace it with the skin of psychological counsel. (Be honest with yourself

about whether you are the best lawyer in your firm to do this.) To move into the skin of psychological counsel, start by understanding that the strict question-answer format of deposition, as familiar as it is to you, is strange to your client: awkward at best, most often frightening. So your primary job is to reduce fear.

A client preparation of just ten or 15 minutes telling your client to listen to the question, tell the truth, not to volunteer anything, and “don’t screw up or you’ll lose the case for us!!” is torture, not preparation. And it is irresponsible. Preparation takes several days – even with a smart or experienced or educated or adept client. Every client has major Reptilian issues to deal with in being deposed, and even more in testifying in front of a jury. Even if he has testified many times before, his terror from the first time has likely hardened into a number of terror-covering bad habits that will hurt his testimony. In fact, it can be harder to prepare clients who feel they are already experienced.

It can also be difficult to get some clients to agree to take the time to prepare with you. Explain that no matter what he has done before, no matter how confident he is, the client preparation process is important for you, not just him. It is the only way you can learn how to work with him in deposition and later in trial. (Do not say, “If you don’t come we’re screwed!” You want to diminish pressure, not create it.)

DAY ONE.

Start by telling your client that if he doesn’t feel ready by the morning of the deposition, you will postpone it – no regrets, no apologies. In this and every other way, get the pressure off and keep it off.

Phase One. Do nothing but ask questions. Do not *tell* your client anything. Just ask open-ended, non-leading questions to get at three things:

A. Your client's *preconceptions* of what will happen in deposition.

Tell me what you think happens in a deposition?

Thoroughly follow up:

Tell me about that.

Tell me more about that.

Tell me *more* about that.

What else do you think might happen in a deposition?

When this topic is exhausted, withhold feedback. You will find it hard to resist jumping in with advice, but resisting is mandatory.

B. Your client's *fears* about what will happen in deposition.

Continue asking open-ended, non-leading questions, this time to get at what your client is afraid of. This treads on Reptilian territory. Clients don't easily reveal their fears, so this takes time. Shortcut it at your peril.

Of the things we've talked about, which ones cause you some concern?

Do not ask, "What are you most scared of?" Don't use the word "fear." "What concerns you" gets at the same thing, if you follow up carefully.

Tell me about that.

Let's try to get closer to that.

Can you say that another way?

I get it. Tell me what makes that a concern.

And when following up what he says, don't ask "why." "Why" makes a responder analyze rather than think deeper.

When he seems to have told you all his fears, ask him about other "concerns" he might have: will they like him? Will they think he looks funny? And any other concerns you think he might have that have not come up. Do this carefully so you don't create new fears. Instead of, "I bet you are secretly worried about the size of your ears!" say, "Sometimes folks are concerned about how they'll look, even when there's no reason to. Talk to me about that." Don't ask him to confirm or deny the concern; just ask him to talk about it.

Most important: *Do not jump the gun*. At this point it is still too early for you to explain anything about content, wording, presentation "style" or anything else, no matter how important. That comes later. When you say at this point, "Wait! I want to make sure you don't go on with that misconception," you'll feel good because you'll think you've said something useful. But you'll derail the primary process – the psychologist's process.

Do not rush this. Take frequent breaks. Schedule a relaxed lunch, not necessarily with each other. Give the client time alone: people often think of new fears and misconceptions in the bathroom.

During the session, take no notes. Have someone else take bullet-point notes of the client's misconceptions and fears. You just ask the questions and listen. People are less forthcoming when the questioner is writing down their answers. People also notice what you do and do not write down, and that can drastically affect what they choose to tell you.

Dealing with the fears and preconceptions.

Once you have gathered every possible bit of information about the client's fears and misconceptions, you should comfortably assure him that you understand all he's told you, and that you understand how he feels. Reassure him that he'll see that all his preconceptions and fears are unfounded.

Many fears will be deep and firmly held, so you can't just say, "Oh, don't worry about it; you'll be fine." That makes things worse. And throughout this first phase, do not make him feel silly for having any such fears. The only way to help someone through his fears is to respect those fears.

Never wait until deposition is imminent to remove fears. By then, the cumulative worry can be ineradicable.

After you've gathered all the fears, address them. For example, most clients fear that the defense lawyer will not let them fully answer questions, that answers must be Yes or No. So explain, "You will always be able to provide a full answer." Later in the process (see below), when you are giving him practice, give him experience doing just that.

Many clients fear that the defense lawyer will cut them off and put words in their mouth. Dispel this by explaining that you will be there to stop anything like that from happening. Explain how you will do that.

Virtually every client is afraid he won't remember all the facts, or that he'll get a date wrong. Explain, "If you'd feel better bringing a fact sheet to the deposition, no problem." And explain that no one expects him to have a photographic memory of every detail – in fact, that would make him less believable. The deposition is not a memory test. This gives the client permission to be okay with not remembering all the details. Point out that, "The defense attorney herself will be looking at notes, so you can too, if you want."

However, do not position yourself as your client's sole protector.

You want to transform the client into being confident that he will be able to protect himself. Explain that this transformation will happen in the next phase of preparation: the Major Truths phase. The Major Truths will arm your client to protect himself from all his fears. Development of the Major Truths is where the preparation process becomes Reptilian by replacing fear with the comfort that derives from confidence.

C. Your client's feelings of *guilt*. Embedded deep within virtually everyone who has been badly hurt will be some strong, Reptilian-level guilt. Plaintiffs feel – usually absurdly – that they should have done something different to avoid what happened. This guilt is real. It can get stronger as time goes on. It almost never diminishes on its own. And whether or not the guilt is justified or logical, it can kill your case.

This kind of guilt is one way the Reptile tries to prevent similar harm in the future. The plaintiff will secretly think, “I should have reacted faster,” or, “I should have asked the doctor more questions,” or, “I should have bought a different brand of lawn mower,” etc. – all meaning the same thing: “I should have done this or that differently, I could have prevented it. And if there's ever a next time, I will.”

This guilt, misplaced or not, is etched into the Reptilian part of the brain. It is so strong that most people who have been badly injured make bad plaintiff's jurors. They usually feel that the plaintiff could have taken those same kinds of “safer” measures.

Do not minimize this problem. Defense attorneys know all about these secret guilts. They probe for them. So if you do not take care of them in advance, the defense will find them in deposition and highlight them in trial. Result: jurors think your client was to blame.

To deal with this, during preparation get your client to pour it all out. You cannot do this as a lawyer expecting quick answers to

questions such as, “So Jack, deep down inside, what’re you feeling guilty about, eh?”

Instead, explain how normal it is for injured people or wrongful death survivors to develop thoughts about what they did wrong, even when all the fault was someone else’s. This is natural and everyone does it. You yourself may have done it; tell the story. And ask the client about the ways in which he has done it.

Explain that when a loved one dies – even from a disease or pure accident, much less someone else’s negligence – it is natural for us all to “know” things we should have done. “I should’ve worked harder to make him quit smoking,” or “If only I’d taken the trouble to be there,” etc. Explain that when a person is hurt, even when it’s 0% his own fault, the brain is hard-wired to make him think he should have done something differently. *No one can avoid or block that kind of thought.*

Do not argue with or deride any feelings of guilt. The instant you feel moved to “correct” a feeling of guilt, keep your mouth shut! Don’t even hint – verbally or visually – that you think “oh, don’t worry about that.” If you do, you will keep other feelings of guilt from coming out, and stop the preparation process dead in its tracks. Just validate the fact that he has those feelings. This lets him pour them all out. And you will hear things you never imagined.

Once you get it started, it flows like a river. To keep it flowing, everything you say and do should be intended solely to keep him talking. Examples:

Nod. News reporters know that nodding keeps a person talking. Nodding says that you honestly want more, that what the person is saying is important. and that you need more of it. (But be careful. There are two kinds of nod – the short, quick, sharp nod that says “okay, that’s all I need – shut up now”; or the slow, contemplative nod that says, “more, please.”)

Whenever the client stops talking, show that you have been listening carefully by repeating the last thing he said, and looking to him to say more. He will feel that his words are important and that you have opened the door to more.

Silence. Apparently, almost everyone who went to law school is terrified of silence, so they rarely allow any. Whenever anyone stops talking (and even before), the lawyer leaps in with something to say. Stop doing this in real life – and don't do it in this preparation session. Just sit and wait while your client thinks and feels his way through to the next thing he has to say. Your silence tells him he's the speaker here, that his words are the important ones, that this session is about him, not you.

When your client stops talking and looks down, he's subconsciously telling you he wants to stop. You will feel a desperate urge to ask another question or make a comment. Don't. The *only* response to the bowed head is your silence. Eventually he will raise his head, see you listening, and go on with what he has to say. With many clients this will happen a number of times. If you stay silent, he will sit there, dig deeper, and give you more.

During this part of the preparation process, you will touch strong feelings – which usually the client has never before spoken aloud. The raw emotions will flow – exactly as you want them to. Don't stop them. Don't make light of them. And while it may be a little cruel, don't even have a tissue in the room to hand the crying client. Don't let anyone go get one. Handing the client a tissue gives him the opportunity to gather himself, regroup, and pull back his emotions – right when that's the last thing you want.

Once it's all out, you have Reptilian guilt on the table. As with your client's fears and misperceptions of what will happen in deposition or testimony, those feelings of guilt will soon be supplanted by the truth of the case. This happens because Phase Two of the

preparation process is, as you will see, so basic, emotional, and gut-level, and gets to the case truths in so fundamental a way, that your client will be left with no guilt.

In fact, even if the case were to end right at that point, you will have done a great service. To be able to relieve a person's guilt and mental suffering over a death or catastrophic injury is life-changing. So by removing the guilt, as you will do in Phase Two of preparation, you will have passed a milestone not only in the life of the case but in the life of your client.

Phase Two: establish the Major Truths. You will find yourself wanting to short cut this section and save some time. If you do that, the preparation will fail.

A "Major Truth" is the client's side of each of five to seven points the defense will try to establish in deposition. You do not *give* the client his Major Truths. You get him to develop them himself, in his own words, not yours. This usually takes the second part of day one.

Limit the number of Major Truths: five to seven. The most complex cases need seven. Fewer is better. Too many means your client can't juggle them all.

To develop the Major Truths, you need to know the five to seven major points the defense will try to establish. They will provide the impetus for each Major Truth.

For example: Your client's deceased husband had owned a business and was skimming the books until he died. Defense claim: His wife (your client) participated in the skimming. But in fact, she knew nothing about the skimming. So her Major Truth would be, "I was a housewife, I took care of the home, he took care of the business." If you let her develop that Major Truth (as explained below) instead of handing it to her, it will be solidly hers.

As a result, your client will not have a random, scattered bunch of stuff in her head, and she will not be vulnerable to the defense. She will use each Major Truth as a funnel for all her supporting evidence about that truth. She will be comfortably certain that each Major Truth is true, and she will be confident giving the evidence that supports it.

The method by which you develop each Major Truth is crucial – and easy. Ask your client “Devil’s Advocate” questions. For example: “You were up to your eyeballs, weren’t you, in your husband’s business, and you helped skim, you knew everything?”

This will provoke her into shooting back a Major Truth in her own words: “No! I was a housewife and I ran the home. He was a businessman and he ran the business.” She’ll go on to tell you the facts that support her Major Truth: 1) We had a rule that he would not discuss business at home. 2) I had no access to the books; they were in the office. I never went there. 3) Unlike our clothing store years ago, I had no role in this business. 4) I didn’t even know where to find the books.

In other words, in response to your Devil’s Advocate accusatory question, she will do the work herself: she’ll tell you the Major Truth, and she’ll connect the appropriate evidence to the Major Truth. All you have to do is hurl the accusation that will provoke her into coming back at you with the Major Truth.

Let’s say your client is a recent immigrant. The defense may try to show he’s a freeloader. So hurl a Devil’s Advocate question: “You left your own country to come here and freeload?” Your client won’t need prompting to shoot back with a Major Truth “I’m a proud American and worked hard to get here.” Then he’ll launch into the facts: 1) I learned the language. 2) I never took a nickel of government benefits. 3) I live in a diverse neighborhood. 4) I’m working a lower-paying job than I had in my country. 5) I’m

sacrificing to be here for my children. He'll do that on his own or with minimal prodding. The Devil's Advocate question provokes him into it.

As your client develops each Major Truth, help her keep it brief and in simple wording. Don't do this for her. To make the Major Truth her own, the words have to be her own.

Then have her write each Major Truth in her own handwriting. No computer. Handwriting.

Then ask:

Is this true?

Is it *your* truth?

Are you absolutely 100% sure?

This cements the Major Truth in place, making it part of your client. So by the end of the first day of preparation, your client will have her own Major Truths in her own handwriting. That's a good day's work. And you are well en route to keeping the Reptile from panicking and ruining the deposition.

At this point, you may be thinking: "I'm a lawyer! I don't have time for all this stuff!" Sorry, but if you don't have time for this, you should not have taken the case. Or you may be thinking, "I'm not comfortable doing this kind of stuff." That leaves you two alternatives: find someone who is to do it for you, or decide for yourself that no one promised "comfortable," and get on with it.

Once your client has developed her Major Truths, explain that they will encompass 100% of her important testimony. Explain that they will be *her* truths, because they are *her* story, what happened to *her*.

Nothing else will matter. Explain that throughout deposition and trial testimony, she will be able to establish her Major Truths time and again – and that this will make her absolutely successful.

As a result, she will not be using you for protection. She will use her own Major Truths. There is something magical about the word “truth” which clients cling to. Tell your client that her Major Truths are her safety net, so if she gets a question she doesn’t know how to answer, she can just go back to her Major Truths and one of them will save her. She’ll see this happen later in the preparation process.

Many clients will be afraid of repeating and re-repeating their Major Truths in testimony. Explain that if the defense lawyer asks the same question over and over, there is nothing wrong with responding with a Major Truth over and over. “You can sound like a repeating parrot as long as the parrot is repeating a Major Truth.” Explain that the defense often asks the same question five or six times to get a different answer – but that getting back a Major Truth foils them every time. Clients in depositions have repeated the same Major Truth a dozen times to a dozen questions in the face of a frustrated defense lawyer – until the defense lawyer has to give up.

The bullet proof vest of the Major Truths derives from three things:

- 1) Making the client develop the Major Truths on her own and as her own instead of getting them from the lawyer.
- 2) Collectively, the Major Truths answer every important defense point.
- 3) Repetition, repetition, repetition. Once the client is fully prepared on the Major Truths, run a multitude of drills. “Tell me what Major Truth No. 6 is.” “What’s Major Truth No. 2?” Do it backwards, forwards, and upside down – until the client knows her Major Truths in her sleep.

DAY TWO.

Keep a flip chart listing the client's Major Truths in sight all day.

Phase Three. Begin with a mild direct exam. This will get the client comfortable with a question-answer format.

Do not break out of the format to discuss an answer or to instruct. If you want more information than an answer provides, ask the question that will elicit it. Try not to lead too much. Keep things relaxed.

And don't rush. This is the non-threatening part of the process, during which your client's answers, stemming from his Major Truths, become part of him not merely intellectually but viscerally.

This part of the process should take anywhere from a half to a full day. You are allowing the client to train himself. You are allowing the Reptile to relax about the "dangers" of deposition or trial testimony. The client is layering in all the information. He is becoming experienced in turning the information into words, and in using his Major Truths as his bases for answers.

As the day goes on, your client will come to see that his Major Truths are his protection – his foolproof safety-net under the high wire. Lead him to see – by your direct questioning – that no matter what happens, the right answer is always within one of his Major Truths. And when the deposing lawyer attacks a Major Truth, the truth will provide total protection. This is why you spent all that time getting your client to develop it.

Phase Four. By late the second day or at the start of the third day, explain to your client that he will now begin answering the kinds of cross-exam questions the defense will ask: threatening questions,

leading questions, unexpected questions, intimidating questions, trick questions, hostile or disbelieving implications, nasty tone, sarcasm, etc. If possible, do not do the cross yourself. No matter how often you tell a client it's "just practice," for the client it is real enough. And good cross-exam is wounding. So doing the cross yourself can create a permanent, even Reptilian rift between you and your client.

Continue the cross-exam until you see that the client can use his Major Truths even under heavy interrogation. With the Major Truths always in sight, your client discovers he can easily return to them, and that they are unassailable.

Examples.

Follow these examples through to familiarize yourself with the concept of Major Truths and how they relate to the facts. Remember that it is your job to provide all of the important defense points and craft each into a provoking Devil's Advocate accusation.

Medical negligence wrongful death of a Jehovah's Witness who had been in a car wreck.

Defense point one: No matter what the doctor could have done, the injuries from the wreck were so bad that the man would have died anyway.

Defense point two: As a Jehovah's Witness, the man refused blood products and thus prevented the doctor from providing proper care.

The Devil's Advocate claim for point one: "The wreck would have killed him anyway!" That provokes your client into saying, "The auto wreck did not kill my husband," a Major Truth. And she'll give supporting facts such as these:

- 1) I was in the car with him and I received only superficial injuries.
- 2) He was stable when they got him to the hospital.
- 3) The doctors never told me or my family that my husband was in critical condition.

The Devil's Advocate claim for defense point two is, "Your husband kept the doctors from doing their job by his refusal of blood products because he was a Jehovah's Witness." That will provoke a Major Truth: "Being a Jehovah's Witness did not kill my husband." And there will be supporting facts:

- 1) He did not die from lack of blood products. He died because the doctors pulled his breathing tube and didn't do anything about his inability to breathe.
- 2) A Jehovah's Witness representative was right there to advise about the blood substitute to be used if the doctors thought blood was necessary. They did not.
- 3) The doctors never told us that this hospital actually distributes that blood substitute to other hospitals.

Plaintiff did his job. In many cases, especially medical negligence cases, you must establish that unlike the defendant, the patient did his job. Devil's Advocate claim: "You didn't do your part of the job!" That will provoke this kind of response: "Yes we did, we did do our job." So the Major Truth is "We did our job." It will have supporting facts like these:

- 1) We went to all of the scheduled doctor visits.
- 2) I ate a proper diet.

- 3) I got the proper amount of sleep.
- 4) We even asked for and paid for an extra ultrasound.
- 5) We asked all the right questions.
- 6) We read all the books and handouts.
- 7) We took all the Lamaze classes.

They did not tell us. Often, defense blame of a failure on the part of the plaintiff can be overcome by showing that the defendant did not provide necessary information. The Major Truth becomes, "They

did not tell us what we needed to know." Continuing the obstetrics example, the supporting facts might be:

- 1) They never told us about the difference in due dates.
- 2) They never explained the importance of maternal temperature on admission to the hospital.
- 3) When the nurses rushed to put me onto my knees and gave me oxygen, no one told me why.
- 4) They never told us that there were things we needed to know that we did not know.

Preexisting problems. In every kind of case, a common damages defense is that preexisting problems, not the defendant, caused the plaintiff's current harm. Devil's Advocate claim: "You've always had bulging disks in your back!" The plaintiff's Major Truth: "I could always function, work, play, and be a mother and homemaker until X." Here are some supporting facts:

- 1) I always worked eight to ten hours daily and never missed a day.
- 2) I always was able to do everything I had to in order to cook all the meals, do all the laundry, take care of the kids – all with no problems.
- 3) I tossed the football with my son, played soccer with my daughter, and did the yard work, all with no problems.
- 4) Until X happened, I could do anything I wanted to do.

Complex cases. Let's look at a complex securities legal malpractice case. A number of affluent people were solicited to invest millions in the Chicago Board of Exchange. The soliciting representative placed their funds with a broker-dealer in Chicago. Ultimately the broker-dealer stole the money. He went to prison and became bankrupt. The clients sued the securities lawyer who drafted the original funding documents. The documents had made it possible for the broker-dealer to steal the money by commingling it with his own account, instead of keeping it separate.

Obviously, this case can be dangerously confusing. For jurors, the easy way out of the confusion – and thus the one they would most likely take – would be to decide that the imprisoned broker-dealer was the problem, and not worry about all the difficult complexities involving the securities lawyer.

To deal with this, the clients developed seven Major Truths.

- 1) "The lawyer's number one job was to protect my money."
- 2.) "The biggest risk was my money in a commingled account and the lawyer never told us about that." (A securities lawyer is required to explain all the risks.)

3) The third Major Truth was necessary because focus groups showed that people thought the Chicago Board of Exchange to be a risky form of investment. But the actual investments with the clients' money did well, so the third Major Truth was "My money was not lost because of a risky investment, but because the lawyer did not do his job to protect my money."

There were four other Major Truths. Each, as did the first three, helped penetrate the defense thicket, thus simplifying and clarifying the securities lawyer's role. They also provided each of the clients with a secure, comfortable, and simple way to own their own evidence. There was no way a defense attorney would be able to rattle the clients' Reptiles into a "let's get out of here" mode.

Result: The depositions of each of the many Plaintiffs lasted more than six hours, and were filled with detailed defense questions. The clients' testimony continually returned to one of the seven Major Truths. So the defense was faced with a brick wall and scored no points.

The Importance of Trust. In many cases, you face a two-edged sword: the negligence was outrageous. But to many jurors, outrageous negligence raises the question of "Why did the plaintiff trust anyone like that?"

This can happen in any kind of case: "I'd have known better than to trust a corporation in business to make money," or "I'd have gotten a second medical opinion," or "I'd never have gone back to a doctor like that," etc. Even with no comparative negligence issue, this can fractionalize the dollar verdict and even result in a no-liability verdict.

The Major Truth for that problem is "I trusted ...": "We trusted the hotel to keep us safe." "I trusted the hospital to keep me safe." "I trusted the manufacturer to make a safe product." Through this

funnel the client can easily provide the supporting evidence that explains the grounds for the trust.

It is sometimes difficult to get at the “I trusted” Major Truth, because in retrospect the client feels stupid or guilty about having trusted. So you must help the client go back in time and see each reason she had for trusting. For example, the Major Truth “I trusted the doctor” is supported by such facts as:

- 1) He had all his diplomas on the wall.
- 2) He was on the hospital staff.
- 3) A friend of mine recommended him.
- 4) He was kind to me.
- 5) He seemed to be paying attention.

As the juror hears each of these and other supporting facts, he asks himself if he would have trusted based on those facts. So the more supporting facts, the more likely the juror will be convinced that he himself would have trusted. This means you have achieved a goal we have been teaching for many years: get the juror to see things through your client’s eyes. This does not violate the Golden Rule. Instead, it does what you are required to do: provide evidence that leads the juror to see that your client acted 100% reasonably – instead of dangerously. This is a powerful Reptilian imperative.

The question of why the plaintiff trusted the defendant can arise even when you do not expect it. Focus groups will help you spot it. So will careful analysis of the case through defense lenses. Don’t miss it. Jurors are often eager to fault your client.

Remember:

1. The Major Truths must come from your client, not you. You provoke the Major Truths (instead of providing them) by playing Devil's Advocate. This creates ownership, and ownership creates confidence and credibility.
2. Up until the deposition or trial testimony, you want repetition, repetition, repetition! The client must be able to repeat her Major Truths and the supporting facts in her sleep.

By deposition day, you want your client to deeply believe she's ready – that no one can rock her boat, that she will prevail, that she will come across well. The deposing lawyer may be a professional, but your client must (and will) feel that truth trumps professional.

Remind your client that at the start you promised you'd postpone the deposition if she wasn't ready. When she says she's ready, tell her, "I know you are and I'm proud of you." The client's chest rises, her head becomes erect, and she walks in to the deposition completely confident. Even eager. And no fear! You'll know you've succeeded when you listen to the deposition – and when, afterwards, your client tells you that the preparation was far worse than the actual deposition.

EIGHTEEN

THE REPTILE TAKES DEFENSE DEPOSITIONS

When you take depositions, one of your main tasks is to establish your Reptilian themes. They will infuse the entire trial. Here's how to proceed:

1. *Establish your general safety rules.* Get every defense witness to agree with your safety rules.

Colorado attorney James L. Gilbert developed what he flatteringly (to Ball) calls the "Ballsy Deposition." It's history's most skeletal deposition – yet it's useful and effective.

Let's say you are deposing a car manufacturer's corporate representative. Here are the questions – *all* of them:

Is a car-maker allowed to needlessly endanger the public?

Even if the car-maker has met all Federal regulations?

So you agree with the rule that a car-maker must not needlessly endanger the public?

Is a car-maker allowed to hide a danger?

Even if the car-maker has met all Federal regulations?

So you agree that a car-maker must never hide a danger to the public?

Give us examples of how that can cause harm to people.

Give us examples concerning other kinds of products of how hiding dangers can cause harm to people.

Give us an example of a car that met all Federal regulations that still had something dangerous on it that should have been made safer. (Be prepared with some examples.)

What other kinds of products can be dangerous even though they met Federal requirements? [*Be prepared with some examples.*]

Is a car-maker allowed to fake its safety tests?

You agree with the rules that a car-maker is not allowed to fake its safety tests?

Give us examples of how faking safety tests can end up hurting or killing people.

Give us examples concerning other kinds of products of how violating safety-test results can cause harm to people.

Is a car-maker allowed to ignore a known danger in its products?

Even if the manufacturer has met all Federal regulations?

So you agree with the rule that a car-maker cannot ignore a known danger?

Does a car manufacturer have to make safety more important than profit?

Even when the manufacturer has met all Federal regulations?

So you agree with the rule that a car-maker has to make public safety more important than profit?

Do you agree that if a car-maker violates any public-safety rules, it's responsible for any harm the violation results in?

The worst that can happen is that the defense experts will agree with you. The best is that they won't, and so seem stupid or dishonest, and thus dangerous to the Reptile.

We're not saying to limit your depositions to just these questions, though in some situations, you might. But Jim Gilbert's skeleton shows you a good way to establish the Reptile in deposition. And it is where to start any deposition.

You can expand on each of Mr. Gilbert's questions as follows:

Is a car manufacturer allowed to fake its safety tests?

Even if the manufacturer has met all Federal regulations?

So you agree with the rule that a car-maker is not allowed to fake its safety tests?

Why is that an important rule?

When it's violated, what kinds of harm could it cause?

What else?

What else?

Etc.

This gets you effective testimony about the dangers of the violation. It's effective because it comes from the defense.

2. Relate general safety-rules to specific safety-rules. Suggested questions:

Doctors have ways to diagnose?

Such as a differential diagnosis?

And doctors have methods to use for treatment?

Patient safety depends on how well the doctor uses those methods?

Or whether he uses them at all?

It's never necessary for a doctor to ignore [or "misuse"] them?

So a doctor who ignores [or misuses] a tool such as a differential diagnosis is unnecessarily endangering the patient?

And you've testified that unnecessary danger is never allowed?

This connects the specific violation to the general rule. Simultaneously, it helps spread the tentacles of danger onto everyone in the courtroom.

And it moves the case from a complex medical battle to a simple matter of whether the defendant followed the rules he agrees on.

3. Show the Reptile how this can happen to her. Use defense depositions to develop the major theme that the result of violating these rules can hurt *anyone*, not just someone who was in your client's particular situation. Suggested questions to do that:

Doctor, being hit in the back [or, e.g., "anyone holding *any kind of* product when it short-circuits" or whatever] could injure anyone the way it injured John?

It could happen to anyone?

To an athlete?

A receptionist?

Even a doctor?

A mechanic?

A sales person?

A bus driver?

A teacher?

A child?

An elderly person?

Like a grandfather?

Or grandmother?

Get the witness to agree that the plaintiff was acting like everyone else: doing day-to-day chores or errands, going to work, picking up the kids, etc. The Reptile believes that anyone doing what they do

every day should not be hurt by someone else violating safety rules. So, "John was doing his job that day the same way he did it every other day."

4. Emphasize "Safety First, Last, Always." Your negligence case is about safety and danger, not medical or technical information. The defendant wants a pass despite having made a choice less than the safest. The Reptile, bless her cuddly scales, allows only the safest. **"No prudent person needlessly endangers anyone."** And, **"Violating a safety rule is never prudent."** So:

In your judgment, is violating a safety rule prudent?

Is needlessly endangering the public prudent?

Everything a doctor [driver, car-maker, whatever] does should be ruled by safety?

A physician [or whatever] must not select choices containing needless risk?

So if there's more than one way to achieve the same benefit, a physician has to choose the one with the least risk?

Because if there's extra risk, that's needless danger?

Which would not be prudent?

No matter how many doctors [or whatever] do it?

Now walk through each specific safety choice-point in the case.

The truck driver needlessly endangers the public when he does not get enough rest between shifts?

The truck driver needlessly endangers the public when he does not have his brakes inspected after every 24 hours of operation?

The truck driver is needlessly dangerous when he skips his pre-run safety inspection?

The trucking company is needlessly dangerous when they do not screen the records of job applicants?

Needless danger is never allowed?

Needless danger is never the standard of care?

Etc.

Obviously, no examination will go this neatly. But if you practice in advance how to corner the waffling defense witness, you will corner them as necessary – and they will look dangerous for waffling about such basic and obvious safety issues. And you will be paving the road for the Reptile to arrive in a Sherman tank.

This section of the deposition is also another opportunity to ask why these things are dangerous, how dangerous they can be, and who they are dangerous to.

People are needlessly endangered when a company does not fix a safety problem with a product?

Anyone who uses the product could get hurt?

Needlessly hurt?

From a needless danger?

Such as someone using it for the first time?

And someone who's been using it for years?

A professional carpenter?

A homeowner too?

Etc.

5. Establish that the defendant did not care about safety to start with. The focus stays on danger – as with every kind of injury case.

What information was available about dangers on your premises?

What part of that information did you look at?

What other information about danger was available?

What did you do as a result of that information?

What part of that information did you not use?

What additional information did you try to find?

What did you find?

What did you do as a result?

What information was available about danger in the adjacent neighborhood?

What part of that information did you look at?

What did you do as a result of that information?

Did the police ever offer information about danger?

Did you ever ask the police for information about danger?

Did you ever ask the police for information about how to prevent danger?

Did you think the police would have helped?

What did they say?

What did you do as a result?

What did you *not* do that they said you should do?

Did you ever ask other professionals for help?

What did they tell you?

What did you do as a result?

What did you *not* do that they said you should do?

Who else did you consult for help?

What did they tell you?

What did you do as a result?

What did you *not* do that they said you should do?

Ever take a walk around your place and ask yourself if there were any dangers you hadn't thought about?

Ever find any?

What did you do as a result?

Ever take a walk around your place and ask yourself how you could make it safer?

How many hours do you work a week?

How many of those hours do you spend dealing with preventing danger?

Detail those things.

Did you know any other ways to make the place safer?
What measures did you take to prevent the kind of danger that harmed John?

Since what happened in this case, have you found any ways of making the place safer?

Did you find anything you could have done before John got hurt?

How did you find it?

Was that knowledge available anyplace before John got hurt?

Remember that every choice to do or not do something is subject to the primary Reptilian test: Did it create or allow needless danger?

Use this kind of questioning in every injury case. The goal is to show that *the defendant did not care enough – or at all – about safety*.

CAVEAT: Be nice. During this kind of questioning it is too easy to bully. In deposition and in trial, don't bully any witness except when you are sure the jury wants him bullied, which almost never happens. Keep your tone mild. Jurors almost always feel sorry for a bullied witness, and when bullied, witnesses almost always get more defensive and thus less forthcoming. Be polite and respectful

of the fact that the witness – including the worst of defendants – is a human being. The Reptile does not trust information you extract by putting someone under unnecessary duress.

6. Establish that the defendant did not care about the person he hurt, and does not care now. (See Chapter Twenty-One for this crucial component of med mal cases.) The kind of person or company that does not show sorrow for having hurt someone poses a major future Reptilian threat. So investigate what the defendant has done since the injury. Rather than caring about the harm he did, he will be concerned only with escaping responsibility.

You tried to give first aid?

Did you offer any other kind of help?

You called 911 before doing anything else?

You called an ambulance?

You tried to provide information that would help?

Did you ever follow up later to see how the plaintiff was doing?

You knew nothing about the harm until you were served with the lawsuit?

Ever think about how much worry you caused the family by denying liability?

Etc.

Adapt this kind of questioning for every kind of case. The Reptile has little use for the driver, manufacturer, premises owner, railroad or taxi or trucking company, or anyone else whose actions show they did not care about the harm they did.

7. Establish that what happened taught the defendant nothing.

The defendant who cares tries to learn from the consequences of his bad choices. The Reptile remains alert when someone has not learned his lesson.

Deposition questions:

Do you wish you'd done things differently?

Would it have been better if you'd done things differently?
Do you hope others will learn from what happened here?

What do you hope they'll learn?

8. Establish that the defendant did not have the knowledge necessary to do the job safely. Safety rule: "A [driver, business owner, doctor, whatever] must have the knowledge necessary to do the job safely." It's not just that a lack of knowledge is dangerous. Unlike a mistake, lack of knowledge is a preventable danger – which makes it the Reptile's domain. "I don't want a taxi driver like this numbskull. Proper compensation will show they better learn their jobs." "I don't want stupid companies making things without knowing how to make them safe. Proper compensation will show companies like them that they better learn their jobs." "The truck driver didn't know how far it would take him to stop? Keep these dummies off the road. Compensation will show them they better *learn before they drive.*"

When the defendant comes across as the least safety-knowledgeable person in the courtroom and the jurors see that in

just a few hours they have learned more than the defendant ever knew, the Reptile goes to work. “Why did this guy get hurt? Oh, I see, there are doctors [drivers, companies, etc.] out there that don’t know what they’re doing. Okay, let’s do something about this immediate danger!”

Jurors can learn the relevant dangers and safety rules on line in little time. So they’ll expect the same of the defendant. On-line information can help you establish standards of care in any field. Jurors go on line to sort out the differences between experts, so you might as well use what’s there.

9. *Expose the defendant as a liar.* Any lie from the defendant or any of her hired opinion witnesses is a danger to the Reptile. This includes a lie of omission. Such a lie is intended for the defendant to get a pass – making the future more dangerous, as you’ll see below.

Even the suspicion of the defense lying threatens the Reptile. So develop those suspicions. For example, in deposition, find out what the defendant remembers and what he doesn’t. Often, the defendant has no record or memory of facts that would hurt him, but has great records and a perfect memory of facts that help him. That’s Reptilianly suspicious.

Look for every possible kind of dishonesty and lie of omission. Develop the keen eye of a good criminal prosecutor. Examine the matrix of the facts to see which ones don’t fit. Look for internal inconsistencies in someone’s story. Look for areas that the defendant is more defensive about than others. Look for pieces of information he withholds for no immediately apparent reason. Look for what he says that the geometry (of, say, the wreck) or the science or the math shows to be unlikely or impossible. Find out how the paid opinion witnesses have misused or been ignorant of the science (among the worst offenders in this regard: the bogus use of statistics, which you will have trouble spotting without

assistance),³⁵ and accident reconstruction engineers, who too often know very little about engineering.

Unless the witness will not be in trial, use trial and not deposition to reveal her dishonesty. In deposition, just gather the information you need. You don't want the witness to know before trial that you have them in a lie. If they know, they'll have time to dream up a way around it. And it's best to let jurors see the dishonesty unfold right in front of them – live and in person (though a video deposition is better than nothing). Just remember: except for particularly dramatic moments of impeachment, jurors barely listen to video depositions.

In a safety or survival-related situation, the Reptile finds it extremely dangerous when someone looks her in the eye, puts his hand on the Bible, swears to tell the truth – and then lies right in the Reptile's face. Whether the lie comes from a heart surgeon, an employer, a

taxi driver, an elderly church-going lady, a company rep, or anyone else, it's hypocrisy, a top-level Reptilian danger.

10. Show that the defendant did not do his job. This is almost everyone's standard of care: **Do your job.** When there is a safety factor involved, it is the Reptile's uncompromising demand: **Do your job!** So in depositions, find out all you can about the safety-related tasks that are part of the job. The job of a trucker includes taking proper breaks, checking equipment, learning the characteristics of the truck, etc. – in other words, the job is more than just driving. The job of the guy who hires truck drivers includes checking an applicant's driving history, etc. The job of a physician includes keeping up with the latest research. The jobs of drivers, companies, trucks, premises operators, and everyone else have many other safety-related tasks.

³⁵ Consult Forensic Epidemiologist Michael Freeman, Portland, Oregon.

When it comes to drivers, companies, doctors, employers, premises owners, and everyone else who could hurt us, the Reptile regards everyone as her employee whose job it is to keep her safe. It is part of everyone's job to cause/allow no unnecessary danger. It's not merely a rule – it is part of what the defendant was paid to do!

So find the ways in which the defendant did not do his job. When those things relate to safety, they are Reptile food.

Here are some partial lists, offered to show the range of job components to gather in deposition. You can turn many of the listings into rules.

Company's job is to anticipate how workers can get hurt.

Company's job is to go beyond OSHA standards when necessary for safety.

Company's job is to keep full records of injuries.

Company's job is to report the truth when someone gets hurt.

Company's job is to be responsible for safety.

Taxi driver's job is to get enough rest.

Taxi driver's job is to make sure the taxi is mechanically safe.

Taxi driver's job is to call for help right after a wreck.

Taxi driver's job is to look and see what's there to be seen.

Taxi driver's job is to keep the windshield clear.

Taxi driver's job is to be responsible for safety.

Doctor's job is to guide and direct care.

Doctor's job is to be chief of team.

Doctor's job is to work with other doctors to get the best result.

Doctor's job is to seek advice from other doctors.

Doctor's job is to make nurses secure in speaking up and going over the doctor's head when necessary.

Doctor's job is to keep up with applicable rules and protocols.

Doctor's job is to be responsible for safety.

Most job lists will be much longer.

Ask deponents what makes each of these job components important in safety terms. How long have these components been part of the job? What dangers ensue when they are not followed?

11. Establish that the plaintiff did her job. In depositions, establish the components of the plaintiff's "job" as patient, pedestrian, driver, employee, product user, whatever.

And remember that your job is to remember the basic axiom.

NINETEEN

“SMALL” CASES

There are no small cases. Only small lawyers.

To the Reptile, the smallest case is not small, because whatever harm the violation caused can cause massive harm next time. The difference between a minor injury and a fatality is just luck. And the law helps: the presence or absence of negligence is a function of the situation's *maximum potential* harm, not the lesser harm it caused in your case. After all, driving 100 mph is extremely negligent even when you don't hurt anyone. To the Reptile, the salient point is the menace of someone driving at 100 mph. The fact that you caused little or no harm does not make you less of a menace.

Small cases, as you will see, are the most important part of the big system of civil justice. When the Reptile is involved, those small cases can loom large. But if you let jurors guide themselves by “small” instead of “important,” they'll respond in kind. Result: The system fails you, your client, and the community.

Let's say that a driver violates the rule that he's always required to watch where he's going. So he causes a low-speed collision that breaks your client's leg. In well under a year your client's leg is healed. The pain is gone. Typical juror response: No big deal, “small case.” Be very afraid? Nah.

But let's say a criminal violates the rule against armed robbery. He shoots someone in the leg. Breaks a bone. In under a year the leg is healed. Pain is gone. Typical response: *Big!* Public menace! Imprison for years.

Same injuries. Equally unnecessary. Both from violating rules intended to protect us. Both violations could have caused more serious injury or even death. Yet juries regard each one on vastly different levels of seriousness.

Why? Because jurors feel that they make the community (and themselves) safer by throwing the shooter in jail, not only stopping him but cutting down on the number of other would-be shooters. But jurors don't automatically see that they can do the same thing with civil defendants. You have to show them.

The Reptile did not attend law school. She makes no distinction between civil and criminal cases. The Reptile wants to stop every violation that can cause harm. But until you enlist the Reptile – and by now in this book, you have a good idea how – that won't happen in civil cases.

The Reptile gives you an advantage in civil cases because safety-rule violations injure and kill far more people than crime. For example, there are 675 deaths a day in American hospitals from violations of patient-safety rules!³⁶ *More than ten times* the FBI's number of daily murders! So which is the greater public menace? From which does the community need greater protection? If the Reptile knew about this she'd be ... well, there is no word to describe her state.

Yet many wrongful death cases result in negligible verdicts, even from the same kinds of jurors who want murderers executed or put away for life. Yet your local murderer represents a tiny danger compared to your local hospital.

The ratio of criminally-caused injuries to safety-rule-violation injuries is similarly lopsided all the way down the entire range of seriousness. Jurors think a broken arm from a safety-rule violation

³⁶ *Fourth Annual Patient Safety in American Hospital Study*. HealthGrades, Inc. 2007.

is no big deal. But from a physical attack? Lock him up and throw away the key, even though crime is far less a menace than violating safety rules.

So straighten out your thinking and the jurors', and the Reptile will be involved in your "small" cases. Will she allow a fair amount of money rather than a token payment? Yes, if you show how a fair amount will protect her.

To the Reptile, when you focus on the *full* potential harm a safety-rule violation can cause, there are no small cases. When you focus on the juror's opportunity and duty to protect the community, there are no small cases. There are only fair verdicts. "Fair" means to understand the harm in the same serious way jurors do in a criminal case.

Raleigh's Don Beskind points out that clients often say, "But he might have killed me!" The lawyer responds, "But he didn't," and thinks no more about that possibility. So the client's Reptile is wide awake, while the lawyer's still sleeps. Result: Small case, because the lawyer never considers the enormity of the negligence.

Jurors will do what they can to keep their communities (i.e., themselves) safe when they think their efforts will work. A "small" case with a fair verdict is just one more way their efforts can work.

So focus on the fact that the justice system – a major force of safety – must work for everyone, not just for clients in big cases. As Moe Levine pointed out, slipping on a banana peel and falling, even when the injury is minor, is not merely about the injured client or the grocery store. It's about *everyone*. It's about the community. It's about *all* public facilities. It thrusts the jury onto what is really at stake: safety for everyone in the community.

Don't ever exaggerate the harm in your case. But do focus on the enormity of the negligence and on the juror's role.

There are no small jurors, either.

Some years ago Don Keenan led a delegation of American trial lawyers to Russia to conduct some of Russia's first modern jury trials. One case was tried in the conference room of a large industrial plant. On the jury were a plant foreman and a scientist; the others were just "lowly" manual laborers. They heard a "small" pedestrian knock-down case.

During deliberations, a big hulky guy in work clothes stands up. Tears in his eyes, he says, "This is the first time in my life I feel like my opinion matters. I get to say what's right. I get to say it where it counts. My vote means just as much as yours, Mr. Plant Manager. Just as much as yours, Mr. Scientist – even if you have an education and I don't."

He had focused not on the "smallness" of the injury or the case, but on the majesty of his role.

So if you think you do "small" cases, don't ever forget that Russian worker. He is most of your jurors, if you show them the way.

We see the same thing in the mock trials we do for case preparation. The research jurors feel that their opinions counted for something. They frequently thank us for putting them into such a position, and beg to come back again (which, sadly, the constraints of proper research do not allow).

The Jury is the gatekeeper.

Whether the lion killed and ate ten people or merely scratched someone's leg, it's still a lion and it's the jury's job to protect the community from lions. That's the Reptile at work. Only an insurance company and its hirelings ever call someone else's injury

“small.” As a society, Americans believe that every injury caused by a criminal or a safety-rule-breaker is major. That is seen in the fact that the jury is here listening to the trial.

Consider every case to be a “Constitution” case.

Every case derives its existence from the Seventh Amendment. The Seventh Amendment prescribes not a mediator or judge, but a jury doing the nation’s most important business – large case or small. The Founders knew that no injury is small, and that no safety violation is small.

Let’s say your client has \$8,000 in medical bills and \$3,500 in lost income, along with a sore neck for half a year. Do you want the jury to focus on those “small” losses? Or on the enormous importance that comes out of their providing a verdict that matches the harm on a scale that protects the public instead of the insurance company?

Consider part of a Keenan closing argument for so-called “small” cases:

Ladies and gentlemen, if I told you this was the most historic, monumental, serious case ever tried in this courthouse, I would not be telling the truth. This is an average case. The kind tried every day in courthouses throughout this country.

So why should we care? The injuries are not permanent. There was medical treatment. There was loss of quality of life for a time, but now it’s fine. There was real pain, but thank goodness Ryan recovered and everything is fine.

Maybe if the loss of work and loss of enjoyment of life had happened to an important person like the president, or the minister of a big church, or a sports star, we’d see it

differently. But I don't think so. We live in a country where everyone is important. Lincoln said it best when he said, "God must love the little person because he made so many of them."

Each case in this courthouse is not a single case. It's part of a bigger process called justice. And in fact, today's kind of injury and interruption in our lives happens far more often than the catastrophic brain damage, amputation, blindness, and wrongful death cases. So these everyday average cases are just as important to the people involved, to the community, and to our values. So it's just as important to do the right thing.

America stands alone in the world for its reverence for quality of life and pursuit of happiness. It's guaranteed in our Constitution. Our Constitution does not limit it only to cases where the quality of life and the pursuit of happiness at stake are huge or permanent. The Constitution guarantees that *no matter the size of the harm or how long or short it may last*, this courthouse stands as the place to make it right.

The goal of the defense is to persuade you that this case is no big deal. Well, this kind of no-big-deal case happens all the time to thousands of people in every community. To the community it is a very big deal. And you are the community.

What does it say about our justice system, what does it say about our reverence for quality of life, if a defense verdict or a low verdict for Ryan happens here? I believe with every fiber in my body that justice must be done in this building, in this room, on this day, in this case. A debt has been created and you must order the debt to be paid.

We all know that the strength of a mighty chain depends on the strength of its smallest link. While this case may be a small link, the survival of our justice system depends on what we do in it.

It's easy for a bystander to say that a person's pain is bearable, and no big deal. As the old proverb reminds us, "Someone else's pain is easy to carry." But you know what an interruption in quality of life is like. You know when there's an injury, you know the thoughts like, "Will I get better?" "Will I get worse?" "When will I get better?" "What if I don't?" To a big, uncaring world, someone else's pain and mental anguish are no big deal. But our system of justice demands it be compensated. And that it has to be compensated on this scale: what did it feel like *to him*? Not to someone who's not feeling it.

Of the 142 nations on earth, we in America can stand tall because we are the only country that treats every injury and every human being and every debt exactly the same. This courthouse was built to provide justice for every size injury and every loss in this community, no matter how small.

There's no armed guard at the courthouse door keeping people out because they weren't hurt badly enough. But if your verdict does not fully compensate the harm, then your verdict stands like an armed guard at the courthouse door, saying, "Such cases are not welcome! Don't file them! They are not important! We don't care!"

Several hundred years ago, a writer named John Donne, a great churchman and great patriot, wrote these words. He said, "*... ask not for whom the bell tolls. No man is an island. We are part of one continent. So ask not for whom the bell tolls. The bell tolls for you.*" What does that mean? That every verdict – this verdict – will touch you in some way in

your own life. And it will touch every person in the community. That is the role and the office and the power of a juror.

Remember the principle: What is *large* is the importance of the juror's justice and his community task. Injuries caused by a rules-violating civil defendant are just as much a danger to the community as injuries caused by rules-violating criminals. And the measure of danger is the maximum harm the violation can do. When the juror understands that, the verdict-reducing force of a tort-"reformed" Reptile gives way to the Reptilian community-guarding role and the opportunity of the jury.

The broken arm or leg cannot be "compensated" with a small amount, because it is not small harm – not if we imprison a criminal for years for causing it. When you bring the jury to this understanding – with or without the criminal analogy – you will leave the realm of small case.

Okay, you're not Don Keenan and think you can't talk like he did in the closing above? Or your judge won't let you talk so long for a "small" case? Or you feel awkward talking in such high terms? So what? Do it your way. Talk your way. And do it shorter. But if you don't think you should appeal to our higher natures in a trial of justice and safety, who else has a greater right and need to?

It is in these mislabeled "small" cases that the profession separates the men and women from the boys and the girls. As Gerry Spence tells jurors, we tell you: "The choice is yours."

TWENTY

STIPULATED CASES

“We did it and we don’t care.”

—Subtext of stipulated cases.

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.

This chapter is useful for all cases, but is particularly important when the judge minimizes your ability to talk about negligence.

Stipulation of negligence creates a special situation for a Reptilian approach, because it’s not as clear how to show the kind of rules violations that caused the harm. So here are some approaches:

1. The fact that a defendant has admitted negligence or been adjudged to be negligent is a foundation for a Reptilian approach.

You portray the defendant as a menace to the Reptile for trying to escape responsibility. People who try to escape responsibility are dangers to the Reptile. When they get away with it, they go on breaking safety rules because a jury has taught them that the consequences (to themselves) are minimal. Others who see them getting away with it will do the same thing.

In this framework, a verdict for less than the full and fair compensation is counter-Reptilian: giving a pass or a discount (“Harm is on sale today!” as consultant Debra Miller says) is dangerous.

2. Make sure you need to agree to the stipulation. For example, if it's in the form of an amended answer, you can oppose it.

3. Your client's suffering – her emotional agony – is increased by her knowing that she was hurt so badly just because some uncaring person or company violated easy safety rules they agree with. ("If only they had simply followed that easy rule!") That can get the rules (and the defendant's agreement with them) into evidence in a damages-only case. This evidence can come from your client's testimony, or from doctors and therapists. It focuses the Reptile on the case more than injuries alone can do, because the Reptile has a stake in rule-violation situations.

4. Your client's mental visual image of what happened exacerbates suffering. "Every time I shut my eyes I see that truck barreling through the red light and see it coming right for me!" This gets the violated rule into evidence because it is inextricable from damages. So does, "Even now, I think, how can anyone driving anything so much more dangerous than a car break even one of those driving rules he was breaking? And the thought that someone would do that makes me still scared to get into a car again."

5. The very person or company who knowingly violated safety rules is now – in permanent and public form – belittling and minimizing your client's injuries! That exacerbates suffering. It is a "screw you" attack that would make anyone feel the pain more keenly. It's like saying, "Oh, stop complaining; I know I ran you over but it can't hurt all that much." So the defendant is adding to the harm just to minimize or get away with what he did. If he succeeds, he and others will do it again – to someone else in the community. The Reptile lives in the community.

6. As our co-researcher Gary C. Johnson points out, it is enormously stressful for a client to be forced to go through a prolonged legal campaign and trial just to get the money she needs. This stress prolongs her physical and emotional healing, and keeps her from getting on with her life.

To attack plaintiffs, the defense routinely points out that litigation prolongs suffering. So instead of fighting that, incorporate it into the pain and suffering the defendant has forced on your client. Your client did not ask to be in the position of having to go through this. And again, when someone adds more harm in an attempt to get a free pass for hurting someone, the Reptile gets very involved.

As trial consultant Debra Miller points out, stipulation means “I admit I did it but you’ll have to haul me to court to get me to do anything about it.” More harm piled upon harm.

7. Once the defense claims that the injuries to your client are minor, and especially when the defense says “this kind of impact can’t hurt anybody that much,” or shows how small a dent the impact made in the bumper, the door may be open for you to show that the kind of wreck (or whatever the mishap) results in many injuries far more severe than your client’s.

Your stats can include both severity and frequency: “X# of people are thrown out of work annually in Oklahoma because of rear-end impacts less than 10 mph – including when their cars were barely dented – making these so-called minor wrecks a major public menace.” Of course you need a credible source for these statistics, and a way to get them in – possibly a public school driver’s ed teacher who has done the research in order to teach it to his students. He’s not testifying about your client’s injuries; he’s providing proof that the defense claim of minimal harm is contradicted by reality. In science, reality trumps opinion and theory. And as it becomes clear how dangerous low-speed wrecks really are, jurors will be more motivated to protect themselves by

making this admitted perpetrator meet his full responsibility: full compensation.

The Reptile gains no benefit from siding with a defense that's trying to fool jurors into thinking a community danger is safe.

8. Another useful expert who will work for a small fee is the local high-school physics teacher. She can show the jury the nature of the forces that could have gotten to your client. She need not say it was enough force to have created this particular injury, but she can show how the forces work. This helps you undermine the defense contention – including its IME's testimony – that your client's injuries are less than the client claims. And it shows the Reptile the danger of anyone whose driving made this happen. (If the defense did not want such information to come in, they should not have opened the door by minimizing your client's harm.)³⁷

9. When judges bar the full story of how and why the injury happened, many jurors prejudicially infer the unknowns. Those improper inferences can heavily influence damages decisions. Seat belt? Street drugs? Drinking? On medication? Telling jurors that the judge has decided the plaintiff was without fault does nothing to keep jurors from inferring plaintiff fault when the jurors do not know what actually happened.

Show the judge that some of the story is necessary to prevent prejudicial inferences. That information is always linked to Reptilian safety concerns.

³⁷ High school teachers of various kinds can be useful in many stipulated or non-stipulated cases that need but cannot afford expensive expert testimony. In fact, they can be more credible than the high-priced brand. This can help you prove all kinds of things: Exactly how does a mere 8-mph rear-end impact leave no dent but transmit its force all the way to the driver's neck? Why – in biological terms – are some breeds of dogs too dangerous to allow off a leash? Why and how do high-school kids foreseeably respond to overly-subtle safety warnings? Etc.

10. Reptiles fear legal maneuvers. So show jurors that there was no stipulation until the eve of trial – that it was only a damages-reducing ploy to fool jurors into thinking the defense is being up front and accepting responsibility. And the last-minute “confession” exacerbates the harm, because the long-term refusal to accept responsibility added to your client's suffering: the pain seemed worse when combined with the defense refusal to accept responsibility for causing it.

Start this process by asking the defense in your requests for admissions to accept responsibility; also ask whether the defendant is remorseful – not just because someone was hurt, but for being the one who hurt them by violating safety rules. Do the same in deposition. Then contrast their answers with the defense protestations in trial of "accepting responsibility." Show that the defendant had no new information at the time they finally stipulated, so they obviously delayed stipulation solely to discourage your client from pursuing the case or waiting for a fair verdict. Then, once they knew for certain you were pursuing the case, they shifted tactics to butter up a jury by admitting negligence. This is a harms-exacerbating attempt to escape responsibility, which the Reptile can be brought to see is a community danger. And it is an especially insidious kind of hypocrisy.

11. Keep a sharp eye out for other dirty tactics. For example, ask your client how she felt when she learned that guys hidden in vans and behind bushes were following her and her little kids. It felt scary, made her feel dirty, as if she were the one who had done something wrong. Now she worries about what videos these creeps took that they didn't turn over to the defense lawyer. Who knows what they're selling on-line? The issue here is not what the creeps actually did, but the fear instilled of what they may have done that no one can assure her was not done.

Hearing it explained this way, many jurors will consider this stalking. To your client, it certainly can feel that way.

And it is dangerous: any creep who wants safe access to vulnerable people can get a job working for this kind of defense. It's like child molesters being attracted to day-care jobs. "And we heard nothing from the defense about anything they did to make sure this was safe." To the Reptile, this is additional exposure to harm. It's a serious, dangerous, and extremely upsetting invasion of privacy.

And when you watch the videos, look carefully for anything that cops could not have looked at without a warrant.

12. A defense that publicly labels your client as a liar is a menace.

It destroys an important possession – a good name. To the Reptile, good name is an obvious safety asset – it is protective within any community. People allowed to do what this defense did without being forced to pay full and fair compensation will see that this name-destroying and filthy tactic works. Argue that full and fair compensation – nothing less – will 100% restore your client's good name. Anything less will leave some doubt in the community as to your client's honesty. (And see Rick Friedman's *Polarizing the Case* for ways to demolish these underhanded and dishonest defenses.)

13. Repentance. One of the Reptile's (and most religions') strongest requirements is repentance. Both know that human beings will screw up. Both know that the *only* way to balance the scales so that everyone – the screwer and the screwee – can get on with their lives is when the screwer truly repents. The Reptile allows no crocodile tears of repentance. Sincere repentance is a societal and spiritual act of great importance. Without it, the community is forever in the dangerous throes of a Hatfield-McCoy conflagration that eventually can burn everyone, and throughout history often has.

With repentance as a Reptilian demand, you can turn stipulation without full compensation into a worse deed than the initial violation.

Here is a way Don Keenan has used with good success:

Ladies and gentlemen, let's talk about the Biblical concept of repentance. What does it mean?

Repentance is threefold. It is not enough to say, "Golly, I did something wrong!" You all know that that's just the first step. We all know the other two:

The second step is to accept full responsibility.

The third step is to do *everything necessary* to make it right. Not part of it. All of it. You've got to do all you can to get the person you hurt back to the way they were. And when there's harm you can't fix, you've got to find a way to make it up to them. Not just part of it. All of it. That's the only way people can get on with their lives. That's the only way the community knows it need not live in fear of people getting away with just a "Whoops, sorry about that."

You need to take all three steps, the Bible tells us. Otherwise it's not responsibility but hypocrisy.

So yes, the defendants admitted what they did. They did not admit it until 11 days ago, but they admitted it. That finally ended two years of the family's anguish that the defendant wouldn't even admit what they did.

Why do you suppose they did not admit it for two years and suddenly did it last week? Because they knew you were coming here in judgment. They wanted you to judge them in the light of "repentance," even though they took just one step. So it was a trial tactic. A scheme. Otherwise they'd

have admitted it two years ago, when they had all the same information they had last week, when they finally said, “Whoops, we did it.”

The Bible tells us what repentance is. Repentance is not a “strategy.” Repentance provides closure. Admit it, accept responsibility, and make it right.

We’re here because they have neither accepted responsibility, nor have they made it right. So there is no repentance. And the family has no closure.

Maybe the worst is this: Until the scales are balanced, no community can rest. Every community needs justice.

So it falls to you, ladies and gentlemen, to take over. Because even though the defense is not yet entitled to repentance, the family is entitled to have it all made up to them. Not a token piece. The full part. The full amount. The amount that true repentance would offer, and that the community requires.³⁸

14. Harm upon harm. The defense damages case has only one goal. That goal is not to help the person they admit injuring, but to save themselves money. So they propose a low verdict and relegate her to a distant institution – thereby piling harm upon harm by splitting apart the family, taking the child away from her mother, piling yet another burden onto the family by forcing them to go on special visits to see the person they love despite the fact that this family has the right to be all together, etc.

³⁸ This is adapted from the full closing, which you can read in *Closing Arguments: Child Injury/Child Wrongful Death*. Vol. 2, p. 202.

If there will be care at home, the defense will say that eight hours of attendant care is enough – even though the “experts” making that defense claim are thereby violating the basic safety rule that says, “No one is ever allowed to needlessly endanger a patient.”

Doctors who violate that rule are a menace to the justice system’s role as community protector. If that’s how they actually practice medicine, then they are also a menace to the community. “Doctor, if this were your patient, would you suggest eight hours instead of 24?” If no, you win the issue. If yes, you can portray the doctor as a danger to the community, and thus dangerous to believe. You can get jurors to the point of wanting to yank that creep’s medical license.

TWENTY-ONE

MEDICAL NEGLIGENCE CASES AND THE REPTILE: SUPPLEMENT

Medical cases have been the epicenter of tort-“reform.” But once you enroll the Reptile, the epicenter becomes patient safety.

—Don Beskind

Whether or not you do medical cases, read this chapter. Much of it applies to other kinds of cases.

Most of the med mal Reptilian methods are described earlier throughout this book. This chapter repeats none of them, so do not rely on this chapter alone. Further, you cannot make good use of this chapter without knowing the rest of the book.

Rule-gathering.

Remember that errors and mistakes don’t motivate verdicts (especially med mal verdicts); patient-safety-rule violations do.

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.

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.

General Rules.

Look beyond the narrowly applicable rules. As important as those narrow rules are, general rules often win the case.

For example, in a fetal heart monitor case, the tiebreaker is not always a fetal heart monitor rule. In one case it was the general JCAHO rule requiring all policies – including fetal heart monitor policies – to be written clearly. On cross, the defense opinion witness, a leading expert, had to admit that the hospital’s written policy “did not make any sense.” He was then asked, “If you’re the leading expert and *you* don’t understand the policy, how could the nurses?” He answered, “They wouldn’t be able to understand it because it’s confusing.” The general rule requiring clarity broke the tie over the specifics.

Always expand your rules search in this way.

Is it in the records? Defense witnesses often testify that what they claim happened somehow never got written down. The tiebreaker? Many hospital policies say, “If you did not chart it, it did not happen.”

Deposition.

As with every case, use every rule in deposition. Make the defense not only agree with each rule; make them explain how dangerous a

violation of each rule would be. Get the defense to explain how violation of the same rules would be dangerous in other areas of medicine. In other words, get the defense to help spread the tentacles of danger.

For example, make the “experts” and the defendant explain how violating Differential Diagnosis rules is dangerous in this kind of case – and how it would be dangerous in other kinds of cases.

Start by asking if it is safer to violate these rules in this kind of medical situation than it would be in other medical situations. (We like either answer.) In this way, the narrow-interest fetal heart monitor case suddenly has a connection to every juror, not just those getting ready to have babies.

Danger of the Doctor.

New York’s Thomas A. Moore, an Inner Circle Advocate who holds the nation’s record number of med mal wins, advises that you show at least one of the following: 1) The doctor does not know the medicine, or 2) the doctor is lying, or 3) the doctor doesn’t care. Most often if you find one, one or two more will follow. Use them all. Each infuriates the Reptile, so let’s look at them:³⁹

1) Lack of knowledge.

In discovery, dig for everything the doctor does not know. In paper discovery, ask if the doctor agrees that lack of knowledge is dangerous. In deposition, have her explain why lack of knowledge is dangerous. Then examine – in detail – what she knows and what she does not. Her failure to know even a single important issue can become a deposition centerpiece. It makes her kind of medicine dangerous – and in trial, can deliver her to the Reptile.

³⁹ Non-medical cases are usually no different. Every defense can be in trouble with any kind of defendant who endangers the community by 1) not knowing what he should know, or 2) lying, or 3) not caring.

Your own experts or medical consultants will often guide you to finding things the defendant may not know.

2) Lying.

Depose the defendant doctor early, so you can nail down her story before she knows how others will testify. Her witnesses – including her “experts” – will often take positions later that conflict with what she has said.

This helps you, but it’s not yet Reptilian for every juror. This is because many jurors who buy into tort-“reform” allow doctors to lie to protect themselves from lawyers like you. So:

Lying = MENACE. So show that **a lying doctor is dangerous**. When he lies to get away with violating patient safety rules, it gives him and others a free pass to go on violating. That endangers everyone. Even jurors who think “I don’t blame a doctor for lying these days” will think again when you show the harm a lying doctor can do both in trial and in the clinic. In a clinic any patient who thinks his doctor is lying will get up and leave. And with good reason.

One of the most common of doctor lies: The doctor “doctors the records.” After the death or injury she goes back and adds or rewrites or deletes. She tries to squirm out of this by claiming it is her ethical duty to make sure the records are correct, so she had to make the correction. “I spend my time treating sick people, not writing notes.” But JCAHO requires that late entries “must indicate” that they are late entries. That means either the doctor did not know this important rule (= lack of required knowledge), or she knew it and chose to violate it because she did not want anyone to see it was a late entry (= lie).

Another common lie: Scrutinize that CV! Take nothing on it for granted. Did she really go to that school? Write that article? Teach that conference? Get that degree? The American Medical Association says, “It is dishonest, unprofessional and unethical to

attribute literature which the doctor did not write.” And at most hospitals, when applying for staff privileges the doctor must submit a notarized application – which in some states means under oath. Again, connect that to endangerment: Lying in that context is an attempt to undermine the American justice system for one’s own ends. If we allow it, we might as well take a wrecking ball to the courthouses because if people get caught lying under oath and are allowed to get away with it, the system would grind to a halt. So explain that, “Within the justice system, **there is no such thing as a small lie, because even the small lie does great harm.**” That’s why lawyers (including ex-Presidents) lose their law licenses, and high government officials can be convicted for lying. And don’t be afraid to cite Proverbs 12:19:

Truthful lips endure forever, but a lying tongue lasts only a moment.

Even if the lie is not under oath, it endangers public health: when doctors see that doctors can lie and get away with it, there is no safety check on the health profession. And lying doctors often end up in jobs they are unqualified for.

When you show that a physician – or anyone, for that matter – has lied in a way that endangers the community, you have focused on an important danger to the Reptile. She is not likely to ignore it.

3) Lack of caring.

Show that the doctor had safer choices, but did not care enough to make them. Uncaring doctors menace the Reptile. Anyone who holds our safety in their hands is a menace to the Reptile. This is more true for doctors than almost anyone else.

Fake empathy. A clear signal of lack of caring is fake empathy. “I’m so sorry this tragedy happened, I feel the family’s pain, I’ll never get over it” It’s not bad enough the doctor violated patient-safety rules and did the harm; now he’s being a hypocrite, a favorite

Reptilian meal. Show that despite the crocodile tears, the doctor never checked on his patient afterwards, nor followed up with the patient's family to see how the patient was doing, nor in a death case went to the funeral or even sent a note. This is less empathy than you get from a voice mail system.

The Reptile does not expect miracles. But she does expect a doctor to care enough and know enough to protect the patient by every available means.

Juror Anger at Decreasing Quality of Medical Care.

Our research showed that people everywhere have powerful feelings about the declining quality of medical care. When asked whether the quality of care has improved or fallen off over the last ten or 15 years, research participants across the country all complained of the steep decline. And they provided us with their own observations of signs of the decline. These observations constitute the "Bad-Med" list below.

Because so many people feel this way, you can use the "Bad-Med" list to meet jurors where they are, and show that the doctor or hospital in this case falls into the "Bad-Med" category.

The Bad-Med points are not standard-of-care violations, but they are every bit as important: They show, in the jurors' own terms, *why* the standard-of-care was violated. Just as *motive* makes criminal guilt easier for jurors to believe, so do the Bad-Med list connections to your case make it easier for you to prove negligence – especially when the negligence was due to a complex standard-of-care violation. Bad-Med items explain how, for instance, so many doctors could have been wrong, or how a board-certified doc could have done something so wrong.⁴⁰

⁴⁰ In every kind of case, you want to show motive: what explains why the defendant did what she did, or what motivated her to do it. See *David Ball on Damages*.

And remember: the Bad-Med points are already part of the truths the jurors come in with. As with Codes (See Chapter Seven), Bad-Med points help you meet the jurors where they are.

Further, each of the Bad-Med points relates directly or indirectly to patient danger, so they have the Reptile's ear.

Here are some of the Bad-Med points that almost all jurors come in already knowing:

Bad-Med Points:

The doctor makes me wait a long time to get an appointment.

There is too much bureaucracy involved in getting an appointment.

Once I'm in the waiting room, the doctor makes me wait too long.

The doctor talks to me as if I were just a number, not a person.

Between visits, the doctor pays no attention to my case. (This is a major point for cases in which the doctor did not follow up on tests or consults he ordered.)

The doctor does not review my record before she sees me. She says things that make it clear she remembers nothing from last time – even though my record is hanging on the door.

The doctor does not explain her findings and recommendations in layman's terms.

The doctor does not seek enough information either about my history or by getting consults with other doctors.

The doctor writes down incorrect information.

The doctor does not write everything down.

The doctor acts like she knows what's wrong with me even before I've finished explaining.

The doctor talks down to me.

Once in the room, the doctor does not spend enough time. She's too rushed to do everything she should.

The doctor barely listens.

The doctor says she's paid attention to something when she has not (= lying).

The doctor cuts off my questions.

The doctor does not take my questions seriously.

The doctor is in such a hurry that she does not even sit down.

The doctor acts like my questions are stupid or unimportant. That makes me afraid to ask more questions.

When I've looked something up in a book or on line, the doctor dismisses it.

The doctor does not have the kind of personality to interact with patients.

The doctor makes me feel that her next patient is more important than me.

The doctor is controlled by insurance companies and bureaucracies, not by patient care.

Doctors are run by gatekeepers, not by health care.

Too expensive.

Not enough doctors.

The doctor does not respect my time.

The doctor does not respect my choices.

The doctor does not respect my concerns.

The doctor does not respect me.

Sometimes I just get to see a student, not a doctor. When a doctor cares about a patient, the doctor sees that patient. (And sometimes they charge me as much for the student as for the doctor.)

In closing, you will explain:

Malpractice happens when these things are going on. In themselves, they are not malpractice, but they create fertile ground for it, and make it inevitable.

Then show how some of the Bad-Med items explain the negligence in this case.

It is hard to overstate the feelings our research jurors displayed about their Bad-Med complaints: sheer anger, deep disgust, and underneath, some real fear. They launched into detailed and angry stories of how they were mistreated.

“Jurors can do something about it!” We saw that almost everyone feels helpless to do anything about the way they are treated. So as angry as the participants were, the Reptile was not quite involved, because the Reptile works only on things that can be made better. But in the next stage, when we merely hinted at what people could do about it, our research rooms suddenly filled with Reptiles eager to use the tool the civil justice system provides: fair verdicts.

We saw this in very different places all over the country. While people vary enormously in many ways from venue to venue, when it comes to their disgust with their medical care and their willingness

to improve it once they see it is fixable, there was no geographical or sub-culture variation.

Seek out every example of the Bad-Med points in your case. They tell jurors why something went wrong in this case. This makes the case into more than just some unusual, complex medical thing that the jurors never heard of and can barely understand, and that happened to some total stranger in very different circumstances than the juror thinks he’ll ever be in. Instead, the case becomes about what jurors already feel is more and more common. “If the kind of treatment my doctors have been giving me can lead to how badly this plaintiff was hurt, they can hurt me and my kids, too! And now I see why the defendant did it: he didn’t care. Exactly what I’ve experienced.”

Legally, you need not show *why* the doctor was negligent. But when you do, jurors will more likely believe it actually happened. This is especially true when the explanation is based on the commonality of jurors’ strong feelings and personal observations about what’s wrong with the medical profession today (i.e., the Bad-Med list). So

when you show that the defendant doctor often did not take enough time, did not listen to patients, did not talk to other doctors, kept incomplete records – or any other combination from the Bad-Med list – the jury understands why the negligence happened. And they won't like it, because it's close to home. It's now about them, not just your client. The harm to your client then becomes an opportunity for the jurors to make themselves safer via a fair compensation verdict.

And the case is no longer about complicated medical issues. It's merely a repeat of all that jurors have experienced and resented. They come to see those Bad-Med items not just as annoyances but lethal dangers.

Bad-Med List in Defendant Deposition.

This is where you gather specifics that match the juror's Bad-Med complaints. Don't worry that the doctor will give "Good-Med" answers to some of the following questions. Even a few Bad-Med answers will suffice, though the more the better.

Who in your office does what?

How do you move patients in and out of the office?

Had you been in this kind of situation before?

What was that patient's immediate outcome?

Outcome six months later?

Did it worry you?

Did you want to know?

Did you do anything about that worry?

Did you think about it?

Do anything as a result?

Did you ever ask that patient?

Ever check with that patient's other doctors?

Did you ask anyone?

How did the outcome affect that patient's life?

Did you want to know?

You still don't know if it permanently injured that patient?
Ever apologize?

Ever follow up to see how the patient's family is doing?

Now get specific about the plaintiff's clinic visit:

What information was available?

What part of the information did you look at?

How long did that take?

What more information did you ask for?

What exams did you do?

How long did they take?

What tests did you run or order?

How long did they take?

Did you consult other doctors?

Did you consider consulting other doctors?

How much time did you spend talking with them?

How did you make sure they had received your written communications?

What did the other doctors say?

Did you review the nurse's notes?

Did you spend enough time on the physical exam?

Examine the record and time line.

Ask about each test he did not do:

Did you do test A?

Did you do test B?

How long would they have taken?

This shows the doctor did nothing that took more than minimal time.

Show there were safer approaches.

Ever tell the plaintiff there were safer ways than what you were doing?

Ever tell *any* patient there were?

How many patients did you see that day?

How many patients on an average day?

How many procedures that day?

How many consults that day?

How late did you work the night before?

How early did you start work that morning?

How many patients were waiting when you arrived?

Generally during malpractice cases, a patient that survives will not go back to that doctor.

So:

Do you know that your patient went for follow-up care with Dr. X?

Do you know why?

How many patients go from you to another doctor?

Does that concern you?

Does it tell you anything?

Why do you think she went to the other doctor?

Did you ever call to ask her why?

Did you ever call the doctor to find out why?

Did it concern you?

Did you ever ask for that doctor's records?

Did you ever review them?

During trial, jurors quickly learn the patient-safety rules. And jurors often go on line to sort out – rightly or wrongly – the differences between each side’s experts. And they quickly learn the medicine with little time or effort. So they expect the doctor to know it.

Example: Webmd.com is there for the doctor and everyone else to see. Suggested deposition questions on this topic:

Doctor, ever looked at WebMD?

Does WebMD help patients understand their condition?

If they understand their condition, can they make better choices about what’s available to them?

Do most patients know about WebMD?

Do you tell your patients to use WebMD?

If they did, they’d know more about their condition, right?

The more they know, the better?

So they can make the best choices?

Do you know what WebMD says about tools to diagnose _____?

WebMD walks you through a differential diagnosis for this kind of case?

There are web sites for most kinds of cases. They show that the defendants had access to all they needed to know for safety, and

that anyone can learn it quickly. Since the general public can easily get this information, only a dangerous physician (or whatever) would ignore it.

Other ways to show the defendant doctor's lack of knowledge:

Ask about lab values; the doctor almost never knows.

Ask questions from their medical specialty boards.

Ask about medical staff protocols and procedures of the hospital they work in.

Ask about specifics of the patient's history that are not in the chart.

Apply the same process in every kind of case where the Reptile would want the defendant to have adequate knowledge.

Voir Dire.

In trial, start the process, when possible, in voir dire. Here again are some sample Bad-Med list questions. Remember to follow up with "Tell me about that."

Some folks feel that their doctors don't always take enough time with them. Others say their doctors do take enough time. Which are you closer to?

Some folks feel that their doctors listen carefully enough. Others say their doctors don't. Which are you closer to?

Some folks feel their doctors don't always take their concerns seriously. Others say they do. Which are you closer to?

Some folks feel that when there's more than one doctor involved in their care, the doctors don't always communicate enough with each other. Others say they do. Which are you closer to?

Some folks feel that their doctors always give them enough information. Others say their doctors don't. Which are you closer to?

Opening.

Run through the case's Bad-Med list factors. They will touch those same points in the jurors' experiences. So from the start, the case will concern them directly. They will see how those Bad-Med points signify danger to themselves and their families. And they will

embrace the wonderful and unexpected opportunity to make things safer – by providing fair compensation. That's the quintessential Reptilian pathway.

TWENTY-TWO

POST-SCRIPT

If the forces aligned against us prevail, nothing can protect Americans from dangers the Founding Fathers never anticipated. But we can report that we no longer worry that those forces will prevail, either in the long run or in the next trial. Their bottomless trough of propaganda money is no match for the Reptile. We now see this in courtrooms across America in case after case.

New stuff? Hard stuff? So what? Reach down inside yourself to re-find that idealistic, caring, passionate and eternally young part of you that drove you to this side of the aisle in the first place. Come back up and join the team that will protect us all. This dream is no longer just a dream, because as the sole courtroom purveyors of safety, we have the Reptile as our ally.

Reptilian methods, approaches, Codes, and strategies are growing daily. Our general research continues. We learn more with every session. Our case-specific research shows us more and more about how to use the power of the Reptile. There is no longer such a thing as a playing field tilted against us.

All that tort-“reform” money down the drain!

So join us. Master this book. Use it. Hang close with us. Keep us posted on your progress.

And welcome. Welcome to the Revolution.

APPENDIX A

READING FOR REPTILES

None of the following are optional:

Closing Arguments: Child Injury/Child Wrongful Death. Vol 1, Vol 2. Don Keenan. A treasure trove of 24 + 18 closings by Inner Circle of Advocates members. Use this as a Reptilian workbook: read each argument and highlight every Reptilian point. (Balloon Press.)

The Culture Code. Clotaire Rapaille. The marketing master's take on how to work with the Reptilian Brain. (Broadway Books.)

David Ball on Damages. The essential companion volume to *Reptile*. (National Institute for Trial Advocacy.)

Exposing Deceptive Defense Doctors. Dorothy Sims. She almost called it *Sworn to Lie*, but her publisher chickened out. It provides tool after tool for undermining the great shame of the American justice system: physicians whose personal oath is to do no harm to their wallets. Sims's book is to these public- menace physicians as is the heel of your shoe to a roach. (James Publishing.)

Life-Size Reptiles. Hannah Wilson. Keep this on your office desk at all times so you will never forget to whom you are trying your case. And when your clients bring in their kids they'll love it! (Sterling.)

Moe Levine on Advocacy. Forward by Don Keenan. Moe Levine was one of the early masters who understood that the Reptile was our best trial ally. (TrialGuides.)

Polarizing the Case. Rick Friedman's powerful armament for fighting smarmy defense implications and charges that your client is malingering, lying, or exaggerating her injuries. (TrialGuides.)

Rules of the Road. Rick Friedman and Pat Malone. The landmark book that put one of advocacy's strongest tools into our hands. Not to master this book is not to deserve to try cases. (TrialGuides.)

Winning with Stories. Using the Narrative to Persuade in Trials, Speeches & Lectures. Jim M. Perdue. As you know if you've read this far, story is one of our most powerful ways to get the Reptile to listen. And if you listen to Perdue, you'll know how to master the telling of stories. (State Bar of Texas.)

Also of importance:

Blink. Malcolm Gladwell. Gladwell posits that we make some important decisions in two seconds or less. Guess who's driving! (Penguin Books.)

Facts Can't Speak for Themselves. Eric Oliver. Whenever you tell a story (and even when you don't), the listener adapts what you say into a story he can accommodate – and each listener is different. Given the importance of story to the Reptile, you need to know how this works. There are easier books to read, but few that will help you more. (National Institute for Trial Advocacy.)

God-Thinking. Sunwolf. Provides practical advocacy tools to take advantage of the newest discoveries in brain science as they relate to such fundamentals as belief in God, right and wrong, altruism and compassion, fair play and social justice, belief and disbelief. Available 6/09. (LexisNexis.)

How to Win Friends and Influence People. Dale Carnegie. Lessons for life and trial, and Reptilianly right on point. (Pocket Books.)

The Selfish Gene, 30th Anniversary Edition. Richard Dawkins. This is the Bible on how evolution works, though some may find “Bible” the wrong metaphor. (Oxford University Press.)

Who Will Speak for the Victim? Jim M. Perdue. Read this magnificent advocacy book with the Reptile foremost in mind! (State Bar of Texas.)

APPENDIX B -1

GOLDEN RULE LAW BY VENUE

STATE CASES:

1. ALABAMA: *Walker v. Asbestos Abatement Co.*, 639 So.2d 513 (1994).

The argument:

[Defense counsel]: . . .I want you to consider the importance of that last statement. He didn't even see what he hit. What if a child, for example, was standing on the edge of the road, was on the blacktop that night near where that air compressor was? That child is not wearing reflective ribbon. That child is not fronted by a barricade on front and back. That child doesn't have red barrels telling you you are about to come up on a construction site or a child playing site. What if that child had been standing on the blacktop, on the edge of the blacktop, even closer to the road than the shoulder, up on the blacktop? If that was your grandchild or your child –

[Plaintiff's counsel]: Objection.

The Court: I sustain.

[Defense counsel]: If that was someone's grandchild or someone's child, that child today would have been struck by this vehicle and he never would have seen the child. And he's telling you that he did everything fine and he drove his vehicle correctly in order for you to give him money. Think about that.

I don't have a chance to talk to you again. The way it is structured, they get to open. I talk and now they will go up and talk again and I can't respond any more. But, as I said to you at the outset, I don't think this case is about money damage. I want you to look at the fault involved and listen to the law on negligence and contributory negligence because that has been the law here in Alabama for a long, long time, a hundred and sixty-two years, for people like yourselves who decide the issues and follow the law. And think about that child not even on the shoulder but standing on the blacktop –

[Plaintiff's counsel]: I object to that. That is improper.

The Court: I will sustain.

Holding: Generally, “an appeal to the jury’s sympathy during closing argument by inviting the jurors to stand in the shoes of a litigant is considered improper.” (citing *Fountain v. Phillips*, 439 So. 2d 59 (Ala. 1983)). However, the Alabama Supreme Court has not been “overly restrictive in applying this rule.” Instead, the Alabama Supreme Court “has held that a ‘bare invitation’ for the jurors to put themselves in the place of a litigant, without an appeal to the jurors’ passions and feelings, is not considered to be improper.”

The Court also noted “where a party objects to improper argument, and the trial court sustains the objection, in order to later appeal on the basis of the improper argument it is necessary that the party request a curative instruction from the trial court.” “By seeking no curative instruction from the trial court after the court has sustained his objection to closing argument a party indicates satisfaction with the ruling; that party cannot later complain of the trial court's failure to do what it was not asked to do.”

The Alabama Supreme Court has, “recognized an exception ‘where the argument is so grossly improper and highly prejudicial that it could not have been cured by the trial court.’” There is “no ‘bright line’ rule concerning whether a remark made in closing argument is

to be considered so improper and prejudicial as to be ineradicable from the minds of the jurors. Each case must be decided in view of the unique circumstances involved and the atmosphere created in the trial. Obviously, the trial court is in a better position than this Court to observe these circumstances.” Accordingly, the trial court’s opinion on these matters “carries a presumption of correctness.”

2. ALASKA: *Beaumaster v. Crandall*, 576 P.2d 988, 994 (Alaska 1978).

The argument:

“If at that moment he does what appears to him to be the best thing to do and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although in the light of after events it should appear that a different course would have been better for safety. That’s not ordinary negligence, and that is Fay Crandall’s story to you in a nutshell. We cannot argue some of the factual evidence that has come into this case on distance, those things are arguable to the point of putting you in that position. You say, ‘I’m the driver of that car, I’m out for a leisurely drive with a friend of mine to Anchorage.’”

Holding: The Alaska Supreme Court has held that golden rule arguments are improper. Since the argument “implores the jurors to put themselves in the position of the defendants, and then to ask themselves what kind of outcome they would wish under the circumstances, most courts will reverse a judgment where there has been an objection and no attempt to correct the impression created by such an argument or where such an argument has been otherwise potentially harmful.”

Here, the Alaska Supreme Court held that “Counsel’s statement was an improper ‘golden rule’ argument,” and found that the “trial judge erred in not sustaining appellants’ objection.” However, had the

court not reversed the trial court's decision on other grounds, it stated that it "would not have found this to be reversible error." The court's decision turned on whether the argument prejudiced the jury. "The mere mention of putting themselves in defendant's place does not constitute reversible error, without a studied purpose to prejudice the jury."

In holding that the trial court's ruling did not constitute reversible error with respect to Defendant's golden rule argument, the court found that:

Defense counsel did not intend to improperly urge the jury to put itself in the place of the litigant and ignore its sworn duty to be impartial, as most improper golden rule arguments do. Rather, he was misstating the reasonable person standard to be applied in this case. He also did not urge the jury to disregard the evidence, an important factor in *Mallonee* for not finding prejudice. He had no studied intent to prejudice the jury. He did not continue with this line of argument after the objection was made. Nor was the argument incorporated into any of the instructions. The record reflects, furthermore, that the trial judge gave complete and careful instructions on ordinary care and the measurement of conduct by the standard of the reasonable and prudent person.

3. ARIZONA:

4. ARKANSAS: *Smith v. Pettit*, 778 S.W.2d 616, 618 (Ark. 1989).

The argument:

"When we talk about the strain/sprain syndrome and it seems strange to me that on the day of the accident the man says I really didn't think I was hurt. The next day he says I really didn't think I was hurt. The next day he says I didn't think I was hurt. He has gone to work two straight days and finally on the 27th he has decided he's

hurt. Ladies and gentlemen, some of you have sprained or strained your ankles; how bad did it hurt right then? These are all bones and muscles and ligaments; it's the same thing."

Holding: A golden rule argument suggests to jurors that they place themselves in the position of a party. Or, conversely, "How would you like to have \$ 15,000 taken out of your pocket?" The appellant contended the last two sentences of the argument constitute a golden rule argument. The Court held with reference to the specific statements that an argument which asks jurors to use their own experiences in every day life to decide when a sprain or a strain begins to hurt; it is not one which urges the jurors to deny recovery as they would wish if they were in the same position. Accordingly, it is not improper.

5. CALIFORNIA: *Browne v. Assured Aggregates Co.*, 2003 Cal. App. Unpub. LEXIS 9966, 2003 WL 22422426 (Cal. Ct. App. Oct. 24, 2003) (unpub'd op.) (quoting *Neumann v. Bishop*, 59 Cal. App. 3d 451, 484-485, 130 Cal. Rptr. 786 (1976)).

The argument:

"What is the loss of your dreams worth? Now, you might tend to poo poo that somewhat, but I don't want you to. I ask you not to. Because, you know, part of what makes up every one of us is our dreams, our hopes, our expectations. What we anticipate in life, what we look forward to, that's what keeps us plugging. Sometimes we couldn't get out of bed in the morning but for that. Because life is tough."

"And you know what? It's a great deal tougher if you're in Mark's position now than it is for any of the rest of us. Why? Because of what I discussed with Mr. Graham: When we are able bodied and we get out of bed in the morning with a spring in our step because we have got someplace to go to work, we have got something to look forward to, and we, we really feel productive, we're

accomplishing something, that's our self-worth, that's what makes us particular. When we lose that, we lose part of what makes us whole, part of what makes us human. You can't discount that in this case, losing your dreams, losing what you have to look forward to."

"You're a young man, you are 42 years old. You have got young kids. You've got a job you love. You trained for it. It's your niche in life, it's the perfect spot for you, because you are good at it, you know how to do it, your employer's happy with you."

Defendant did not object to this part of the opening argument. Describing Browne's future prospects, counsel asserted without objection that Browne faced further surgeries.

"Talk about having a burr under your saddle for the rest of life with that to look forward to. I wouldn't like it to be me."

Counsel asserted without objection that his argument was not evidence of general damages. It was up to the jury to determine damages.

"Pain is one of the things that we would do anything to avoid. We go to the dentist. He says, 'It will cost 65 bucks for this shot, but it wouldn't hurt.' Would any one of us think twice? Well, we don't, because we don't want pain."

In opening argument for assessing general noneconomic damages, counsel argued that Browne should receive \$1,000 per each day of his 87 days in the hospital. After his release from the hospital, he should be compensated at his hourly rate for his last job, \$22.50, for each hour of the 16 hours a day that he endures pain. "So that 22.50 an hour rate, should you choose to employ it, for 16 hours a day – I mean, frankly, would anybody take that job for 22.50?"

Defense counsel stated, "Objection. It's the golden rule argument. I object to that argument."

Plaintiff's counsel responded, "I'm not appealing to the jury, your Honor." The court stated: "Well, not directly anyways. [P] Overruled."

Defense counsel argued to the jury that Browne's wages had nothing to do with his pain and suffering. In closing argument, plaintiff's counsel responded without objection that "there has to be a measure of damages." Why not compare Browne's suffering to a job? "Again, if – if he had to take this job and put up with what he has to put up with, he wouldn't take it, not for that rate, not for anybody's rate. Nobody would do it."

Counsel stated without objection, "You know, it's easy to say a life's not ruined when it isn't yours that's ruined."

Counsel stated without objection: "You know, there is a feeling, well, what do I care? It didn't happen to me. I don't believe you feel that, and I don't believe as the conscience of the community you're going to let that happen, because it wouldn't be right."

Holding: The court set forth the "vice" of the "golden rule" argument:

"The appeal to a juror to exercise his subjective judgment rather than an impartial judgment predicated on the evidence cannot be condoned. It tends to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence. (Code Civ. Proc., § 604.) Moreover, it in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence. Finally, it may tend to induce each juror to consider a higher figure than he otherwise might to avoid being considered self-abasing." *Neumann v. Bishop*, 59 Cal. App. 3d 451, 484-485, 130 Cal. Rptr. 786 (1976)...

Quoting golden rule argument in *Neumann*, *supra*, the court noted the following examples of improper argument:

“This life of independence is gone. What it would be worth to you?” He continued “. . . if you concern yourself with this pain and you could have a moving joint in your body that was constantly moving and every time you moved your major muscle it wouldn’t move, what would you pay as an individual to free yourself from that pain, \$ 5 a day, \$ 10 a day? I wouldn’t take \$150 a day – \$250 a day – so let’s keep this in mind when you jurors sit down and discuss the plaintiff’s case.” “How would you like to sit in that chair for eight hours with a non-unionized femur for ten dollars a day? Would you do it?” . . . This reference passed without objection, as did a final appeal in which counsel stated, “Someone comes up to you with a handful of diamonds and says, ‘This is worth \$ 500,000.00.’ Would you take it and would being crippled for the rest of your life be worth it?”

“Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished.” In this case, Defendants objected once (and the court overruled) to plaintiff’s counsel making a golden rule argument “when counsel asked rhetorically whether anyone would take the job of Browne’s suffering for \$ 22.50 per hour. *Id.*

The appeals court affirmed the trial court’s denial of a defense motion for new trial, finding that counsel’s statements during argument were not likely to have affected the outcome. The court then quoted *Nishihama v. City and County of San Francisco*, 93 Cal.App.4th 298, 305 (2001):

The ultimate determination of this issue rests upon this court’s “view of the overall record, taking into account such factors, *inter alia*, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge’s control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.” *Simmons v. Southern Pac. Transportation Co.* 62 Cal. App. 3d 341, 351, 133 Cal. Rptr. 42

(1975), quoting *Sabella v. Southern Pac. Co.* 70 Cal.2d 311, 321, 74 Cal. Rptr. 534, 449 P.2d 750 (1969). And, because of the trial court's unique ability to determine whether a verdict resulted in whole or in part from the alleged misconduct, its decision to deny a motion for new trial should not be disturbed unless plainly wrong. *Houser v. Bozwell* 80 Cal. App. 2d 702, 707, 182 P.2d 314 (1947).

Finally, in summarizing the type of curative jury instructions given when counsel timely objects to a golden rule argument, the Browne court concluded,

Had defendants successfully objected to the statements of counsel, the trial court would have repeated instructions the jury had already received: "You must not be influenced by sympathy, prejudice or passion." (BAJI No. 1.00.) They were instructed in terms of BAJI 14.13 (see ante, at p. 7): "the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence." Also, "You may not include as damages any amount that you might add for the purpose of punishing or making an example of the defendant for the public good" (BAJI 14.61.)

6. COLORADO:

7. CONNECTICUT: *Murray v. Taylor*, 65 Conn. App. 300 (2001), appeal denied by 258 Conn. 928, 783 A.2d 1029 (2001); distinguished by *State v. Bell*, 283 Conn. 748, 931 A.2d 198 (2007).

The argument:

"Well, when people – and I know one of you actually went there with your children – I know this was told, that one of the jurors went there with their children, and I guess he probably didn't know

that if his child had gotten hurt, there was no insurance to take care of that situation.”

In his arguments about the damages award, Plaintiff’s counsel argued:

“Those are all part of the damages that come into the noneconomic damage, and I’m not going to stand here and suggest numbers to you. Actually, I could, but I don’t know. Somehow in my own mind, I don’t think it’s the right thing to do because I think it’s easier for you folks to sit together and say to yourselves, if this happened to me, what do I think is a fair and just amount of money for noneconomic damages for what the boy suffered?”

Holding: Defendant contended that the Plaintiff’s counsel improperly made a “golden rule argument” with regard to noneconomic damages that “encouraged the jury to decide the case on the basis of personal bias rather than on the evidence.” He argued that Plaintiff “improperly (1) asked the jurors to imagine that they had suffered the same injury as the plaintiff when placing a value on his noneconomic damages and (2) referred to a recent trip to the facility by a juror and his children.”

In Connecticut, a “golden rule argument” is one that urges jurors to put themselves in a particular party’s place . . . or into a particular party’s shoes. . . . Such arguments are improper because they encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. . . . They have also been equated to a request for sympathy.

“In *Nastri*, as here, the plaintiff’s counsel made a golden rule argument with respect to the jury’s calculation of noneconomic damages. To counteract its potentially prejudicial effect, the *Nastri* court specifically addressed the argument in its instructions to the jury and cautioned the jurors in strong terms not to let sympathy affect their decision. The court ultimately concluded that the

argument had not influenced the jurors because the noneconomic damages award was relatively low and the jury assessed 25 percent of the responsibility for damages to the plaintiff. The court stated that ‘whether or not the plaintiff’s counsel crossed the line into golden rule territory, the court concludes that the defendants suffered no injury as a result of his argument and were not deprived of their right to a fair trial.’”

The court concluded that, “although the plaintiff’s counsel may have ‘crossed the line into golden rule territory,’ Taylor did not make a timely objection and suffered no injury as a result of the argument.”

“Although the [trial] court did not specifically refer to the argument in instructing the jury, it cautioned the jury not to base its decision on sympathy or prejudice toward either party.” The appeals court held that the trial court did not abuse its discretion in failing to set aside the verdict on the ground that counsel made an improper golden rule argument.

8. DELAWARE: *McNally v. Eckman*, 466 A.2d 363, 371-73 (Del. 1983).

The argument:

“Suppose you had just one of the elements of these damages. How would you come to grips with it? And I said at the outset, I have to talk about some things that most of you don’t talk about even to your most intimate friends, perhaps your spouse, without some sense of self-consciousness. Bowels and bladders and wasted legs, things so terrible that all instinct is to close the mouth, to be unwilling to think about them, to turn away. All instinct is to minimize, to say, ‘It can’t be. I can’t grasp this.’”

“You must try. That’s what the job you have here is. Suppose the only claim was these accidents, lack of bowel control, slipping of a condom, the embarrassment of happening anytime for the next thirty years, as for the last year and eight months. Suppose that was

all you had to deal with. Would the claim be enormous? I think it would. Suppose the--all you had to do was the bladder and the bag strapped to the leg and the switch at night of the urine bag. Would the claim be enormous? To do it forever? I think it would. Suppose you had only to do with wasted, useless legs? What would you do? Suppose all those things."

"The pain went on and on. It's in the record, in the hospital, and that was excruciating. And if that alone were the basis for an award, the award would be immense, I suggest. Can you imagine ten weeks with a roll ten inches big holding your back up like that? Try it for ten minutes and it's excruciating."

The Delaware court ruled that these comments did not violate the "Golden Rule" because "plaintiff's counsel intended to ask the jury to focus on both the nature of the injuries here involved and on the claim for general damages as well as lost earnings."

9. FLORIDA: *Shaffer v. Ward*, 510 So.2d 602 (1987).

The argument:

"You all drive, you're on the road, you know how far you can see when you drive. You know the importance of brake lights and how that assists you. And you watch and see brake lights come on and you start braking. You also know if you have a sudden stop or unexpected stop in front of you, it puts you in a position where you maybe might hit the car in front of you. "

"I think everyone has had a close call because of what happened in front of them. And it wasn't a close call because you were negligent or not paying attention, it was a close call because the car in front of you unexpectedly [sic] stopped, stopped with no warning."

Holding: No objection was made by plaintiff's counsel to these comments. The trial court determined that the defendant's counsel's closing argument constituted a "Golden Rule" argument, warranting a new trial on all issues for the plaintiffs. In fact, the court found that the "Golden Rule" violation was a "fundamental error notwithstanding that the plaintiff's counsel made no objection at the time, as the same were not capable of cure by instruction and rebuke."

The Court of Appeals reversed the grant of a new trial, noting "the 'Golden Rule' argument urges the jury to place themselves in a party's position to allow recovery as they would want were they the party. To be impermissible, the argument must strike at that sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to receive in a similar situation. Such an argument is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias, rather than on the evidence."

"The unobjected-to comments made by defendant's counsel in this case were not in any way directed to damages. Rather, as indicated by counsel in his statements immediately prior to the comments cited by the trial court, they were an attempt to ask the jury to use their common, everyday experience in deciding the case. As such, the comments do not constitute a 'Golden Rule' argument and the trial court improperly granted a new trial on this basis. Additionally, even if we considered the comments improper, they certainly do not constitute fundamental error by being of such a character that 'neither rebuke nor retraction may entirely destroy their sinister influence.'"

10. GEORGIA: *Naimat v. Shelbyville Bottling Co.*, 240 Ga. App. 693. 524 S.E.2d 749 (1999).

The argument:

[DEFENSE COUNSEL]: I suggest to you . . . that what happened out there that day could happen -- by the grace of God did not happen to any of us, but could happen to any of us at any time, and any one of us could be in the spot that [defendant drivers] Mike and Ron are being blamed for, something that was totally beyond their control.

The holding: "The so-called 'Golden Rule' argument urges the jurors to place themselves in the position of [the] plaintiff or to allow such recovery as they would wish if in the same position. It is improper because it asks the jurors to consider the case, not objectively as fair and impartial jurors, but rather from the biased, subjective standpoint of a litigant. *Myrick v. Stephanos*, 220 Ga. App. 520, 523 (4) (472 S.E.2d 431). In this negligence action, the jury must determine whether any defendant breached a duty of care to exercise that degree of caution and foresight as is exercised by ordinarily prudent persons under the same or similar circumstances. O.C.G.A. § 51-1-2. 'Remarks not directed at damages are not impermissible [under the Golden Rule].' 75A Am.Jur.2d, Trial, § 650, p. 261 (1991). Thus, a defense argument that jurors all drove, that they all realized the possibility of hitting a car which unexpectedly stopped in front of them, and that everyone had had a close call due to an unexpected stop by another car [is] not an impermissible 'Golden Rule' argument since it [is] not directed to damages.

"In our view, the defense argument in this case similarly is not directed to any award of damages based on sympathy for the subjective view of one of the litigants. Rather, it lawfully directs the jury's attention to the question for decision under the proper objective standard established by O.C.G.A. § 51-1-2. The trial court correctly found no violation of the Golden Rule."

Jurors as the regulators of the community argument is permissible. *Weaver v. Ross*, 192 Ga. App. 568; 386 S.E.2d 43 (1989)

11. HAWAII: *Leong v. Honolulu Rapid Trans. Co.*, 52 Haw. 138, 472 P.2d 505 (1970).

In dicta, the court advised that the trial court employ the following rule on remand: “It was improper for plaintiff’s counsel in argument to ask the jury to put themselves in plaintiff’s place.” *Leong* at 144 (citing *Texas Coca Cola Bottling Co. v. Lovejoy*, 112 S.W.2d 203 (Tex. App. 1937)).

12. IDAHO: *Lopez v. Langer*, 114 Idaho 873, 761 P.2d 1225 (1988).

The argument:

“Frank did what was reasonable under the situation, what his attorney had told him to do. And I think that sometimes it is helpful if you put yourself in the same shoes as the party that’s doing something . . . Anyway, what would you have done in the same situation?”

Holding: “We hold that the ‘golden rule’ argument is only appropriate when used to ask the jury to assess the reasonableness of a party’s actions by relying upon their own common sense and life experiences. The ‘golden rule’ argument is never appropriate when used to influence the damage award. Our holding is in accord with the majority of courts which have decided this issue. “

“The ‘Golden rule’ argument is uniformly prohibited where it is used to inflame the jury and encourage an increased damage award. Typically, in such situations, the plaintiff’s attorney will ask the jury members to place themselves ‘in the shoes of the plaintiff’ by asking them to question themselves as to how much they would wish to be paid to endure the damage the plaintiff has suffered. Such argument ‘is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.’” *Ivy*, supra at 741.

“We will not quibble over semantic distinctions of whether only arguments related to damages are technically ‘golden rule’ arguments, or whether all arguments which ask the jury to place themselves ‘in the shoes of’ either plaintiff or defendant can be termed ‘golden rule’ arguments. It is sufficient to hold, as we do, that when such arguments are used to influence a jury’s award of damages, they will not be permitted. However, where such arguments merely appeal, in a moderate manner, to the jury’s common sense by asking them to ascertain the reasonableness of a defendant’s actions (or a plaintiff’s actions) in the context of the case, they will be permitted. Accordingly, the trial court did not err in failing to strike the ‘golden rule’ portion of the defense counsel’s closing argument and the closing argument did not contain reversible error.

13. ILLINOIS: *Leggett v. Kumar*, 212 Ill. App. 3d 255, 570 N.E.2d 1249 (1991).

The argument:

Plaintiff's attorney began his closing argument by stating that he had experienced "a real hard time * * * keeping [his] emotions under control" and that he "couldn't hardly handle [his] emotions with reference to" plaintiff. When he later stated that "it would be real hard for a man to put themselves [sic] in" plaintiff's shoes, defense counsel's objection was sustained. Plaintiff's attorney stated that, "[n]obody, not one of us, would ever trade any amount of money to change our lives the way Barbara's has been changed."

Later, he stated the following:

"There is [sic] some professionals that make \$300,000 in a given year, professional football players, look what they're making. Yeah, we don't make that kind of money. Look what a house is making.

Would any of us go through those experiences that [plaintiff has] gone through and trade them for a house?"

Defense counsel's objection was sustained. Plaintiff's attorney later argued:

"You have heard her testimony as to the daughters, the kind of house that they have had before this happened, a loving happy house; lots of activities that they did together."

Defendant's attorney did not object to this statement.

Later, plaintiff's attorney again asked the jury to place itself in plaintiff's shoes, and defendant's objection was sustained. At the conclusion of plaintiff's argument, defendant complained about such statements outside the jury's presence:

MR. STRELECKY [defense counsel]: * * * I don't want to move for a mistrial, but I don't know how we overcome that kind of error.

THE COURT: Well, I guess the answer is just simply to admonish the jurors that it is not proper for them to place themselves in the shoes of the plaintiff. That's what I'll do when they come back.

MR. STRELECKY: Fine.

When the jury returned, the court stated:

THE COURT: * * * It would not be proper for your [sic] to consider the personal opinions of Mr. Gooding or the request that you place yourselves in the shoes of the plaintiff. The rest of his argument was entirely proper, but on those items it would not be proper for you to consider that.

Defendant did not object to the court's statement.

Defendant next argues that plaintiff's attorney engaged in improper final argument which necessitates a new trial. Defendant correctly notes that it was improper for plaintiff's attorney to ask the jury to put itself into plaintiff's position. (Chakos v. Illinois State Toll Highway Authority (1988), 169 Ill. App. 3d 1018, 1029, 524 N.E.2d

615.) However, defendant's prompt objections to these remarks were sustained by the trial court, and, with defense counsel's agreement, the jury was instructed to disregard such improper statements. This is sufficient to have cured any prejudice arising from the improper argument. (*Webb v. Angell* (1987), 155 Ill. App. 3d 848, 852, 508 N.E.2d 508.) Defendant's suggestion that the trial court's curative comments were vitiated by his statement that "the rest of [plaintiff's counsel's] argument was entirely proper" is speculative and does not detract from the curative effect of the court's comments.

14. INDIANA:

15. IOWA: *Russell v. Chicago, Rock Island & Pacific RR*, 249 Iowa 664, 86 N.W.2d 843 (1957).

In this case, defendants urged the appellate court that the trial court "erred in overruling defendant's objection to the final argument of plaintiff's counsel to the jury which were [sic] in effect 'how much money would you jurors take to go through life injured as this man is,' said argument being unfair, improper, not a matter for consideration by the jury in assessing the damages and an appeal to passion and prejudice." The trial court held that " * * * plaintiff's counsel's argument was proper as jurors are permitted to use their own experiences in light of the evidence in considering and evaluating the evidence as to damages sustained by plaintiff * * *." The trial court overruled defendant's objections to plaintiff's counsel's statements, but then "concluded that [plaintiff's] argument was improper and the objections should have been sustained." The trial court granted the motion for the new trial.

"Direct appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries are condemned by the courts."

... The appellate court held: “It is evident that the argument of counsel in the case at bar was improper and the objections of defendant’s counsel should have been granted. The court was at least within its fair discretion in granting a new trial on this ground.” Id. at 672-73.

16. KANSAS: *Walters v. Hitchcock*, 237 Kan. 31, 697 P.2d 847 (1985).

The closing argument statements at issue were:

“Who would sell their esophagus for \$ 4 million? I would not sell mine.”

Defendant alleged that this statement invoked a prohibited “golden rule” argument. The court held:

“The remarks actually span two categories. The comment commencing ‘Who would sell . . . ’ is, we believe, a fair argument relative to claimed damages and is not a ‘golden rule’ argument. The comment that counsel would not sell his esophagus for that sum is testimonial in nature as it is a statement of counsel’s personal opinion. This is an improper argument. Does this improper comment constitute reversible error? We believe not. To constitute reversible error there must be a likelihood that the improper remarks changed the result of the trial. See *State v. Dill*, 3 Kan. App. 2d 67, 589 P.2d 634 (1979). We have examined the record and conclude that, in the totality of the circumstances, the improper comment constituted only harmless error.

Additionally, the court noted that “counsel made a timely objection to the remarks” and the trial judge sustained the objection. Furthermore, “Counsel did not request a jury admonition” and the judge did not give one. But the trial court did instruct the jury as follows:

"The evidence you should consider consists only of the testimony of the witnesses and the exhibits which the Court has received. . . . Closing arguments, which you are about to hear, are made by the attorneys to discuss the facts and circumstances in this case, and should be confined to the evidence and to reasonable inferences to be drawn therefrom. *Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded.*" (Emphasis supplied.)

17. KENTUCKY: *Stanley v. Ellegood*, 382 S.W.2d 572 (1964).

The argument:

"There is another thing that shows so plainly how little some people are interested in other people's worries, they come to twelve Henry County citizens and tell you, they are being so honest and nice to you, that man stood up before you and told you that splitting a man wide open like you gut a fish, taking out his spleen wasn't going to hurt him, he didn't need his spleen anyway. You really feel that way? Would you feel like you would want your child taken to the hospital and pumping blood in him?"

* * *

"You heard the testimony. For ten days he couldn't eat and his intestines swelled up and they stuck these tubes down his nose. He had to eat through his veins. What would you take for ten days of that? Just how much money?"

* * *

"You're not giving him anything, as a matter of fact, just putting him back where he would have been to that extent, for Twenty-five Thousand (\$25,000.00) Dollars, I wouldn't have had it done for that, and I don't believe you would."

* * *

"We really feel that we are entitled to have for this boy the full Twenty-five Thousand (\$25,000.00) Dollars and the doctors' and hospital bills. We are going to leave it to you. This boy and his mother leave it to you. You are their last chance. If he loses this Twenty-one Hundred (\$2100.00) Dollars, with a permanently injured leg, lacking a spleen, all the suffering he has gone through for nothing. We don't believe you will, and that you will treat him like you would want yourselves to be treated."

An objection to each of the remarks was overruled; hence the jury was not admonished to disregard them. A timely motion to discharge the jury likewise was overruled. The appeals court ultimately held that a Golden Rule argument, with no other error in the record, required reversal, stating:

"In *Southern-Harlan Coal Co. v. Gallaier*, 240 Ky. 106, 41 S.W.2d 661, 663, counsel's asking for such a verdict as the jurors would think right if they had a son who was 'badly crippled or killed by one of these cold-blooded, mercenary coal companies' was held manifestly improper. In *Murphy v. Cordle*, 303 Ky. 229, 197 S.W.2d 242, 243, it was held improper to call on the jurors 'to render such a verdict as they would be willing to take to have such marks upon their child through life or upon themselves through life,' and 'to make the rich taxi company pay.' These are the two cases most often cited in support of the position that in this jurisdiction the 'golden rule' type of argument is not permitted. It will be noted, however, that in each of them the impropriety was compounded by invidious allusions to the nature and financial condition of the defendant, a circumstance that was bound to have had a significant bearing on the question of prejudicial effect. Whether the court would have found the 'golden rule' argument prejudicial of itself is a matter of speculation.

"Granted that an argument was improper, the difficult question nearly always is whether the probability of real prejudice from it is sufficient to warrant a reversal, and in this respect each case must

be judged on its own unique facts. An isolated instance of improper argument, for example, will seldom be found prejudicial. Cf. *H. P. Selman & Company v. Goldstein*, Ky., 278 S.W.2d 713. But when it is repeated and reiterated in colorful variety by an accomplished orator its deadly effect cannot be ignored.

"In some cases the court has declined to find that improper remarks were prejudicial in view of the modest or conservative amount of the verdict. See *Louisville Water Co. v. Robinson*, 312 Ky. 786, 228 S.W.2d 444; *Wilson v. Dalton's Adm'r*, 311 Ky. 285, 223 S.W.2d 978; *Square Deal Cartage Co. v. Smith's Adm'r*, 307 Ky. 135, 210 S.W.2d 340; and *Droppelman v. Willingham*, 293 Ky. 614, 169 S.W.2d 811. In this case it is not suggested that the verdict was 'excessive.' Yet it was quite substantial in comparison with the verdicts in the examples just cited, and certainly we are unable to say that it negates the probability of prejudicial influence by the improper argument."

18. LOUISIANA: *Duerden v. PBR Offshore Marine Corp.*, 471 So.2d 1111 (1985).

The argument (by defense counsel):

"... Common sense tells you, ladies and gentlemen, that if a floor is wet and you just finished soaking it down you don't sit there and go back in there. You wait until it dries. And he didn't do that. And if that's not contributory negligence I don't know what is. I put the water there; I slip and fall in it. If somebody does that on your property, they put something slippery and they slip and fall in it, do you become automatically responsible just because they did something wrong? No. The court is going to look to . . ."

The Louisiana Supreme Court reviewed the Fifth Circuit's holding in *Burrage v. Harrell*, 537 F.2d 837 (5th Cir. 1976):

"Appellant asserts that the trial court erred in overruling her objection to appellee's alleged 'golden rule' closing argument.

Appellant's reliance on the 'golden rule' cases is misplaced: they deal with arguments in which the jury is exhorted to place itself in a party's shoes with respect to damages. See, e.g., *Skaggs v. J.H. Rose Truck Line, Inc.*, 435 F.2d 695 (5th Cir. 1970); *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705, 714(5th Cir. 1967). The rationale for prohibiting such an argument is that the jury's sympathy will be unfairly aroused, resulting in a disproportionate award of damages, e.g., *id.*; *Baron Tube Co. v. Transport Insurance Co.*, 365 F.2d 858, 862 (5th Cir. 1966)."

The court compared this case to the *Burrage* decision, finding that "the defense counsel's arguments were directed to the reasonableness of some action taken by the plaintiff rather than directed to the issue of damages." Accordingly, the court found "no prejudicial error in the defendants' use of a 'golden rule argument' in the context within which it was used."

19. MAINE

20. MARYLAND: *Leach v. Metzger*, 241 Md. 533, 217 A.2d 302, 304 (1966).

Plaintiffs' counsel "made his argument to the jury, which was not recorded." During the course of that argument the following recorded colloquy took place between the trial judge and appellants' counsel:

(Mr. Swerdloff) Counsel for the Plaintiffs has just stated to the jury that they must put themselves, basically, in the place of the Plaintiff and award damages as if it had been them involved in the accident. In fact, he said you must put yourselves in the place of these people, and I respectfully request –

(The Court) He said as though it was your wife.

(Mr. Swerdloff) I stand corrected. I submit that is an argument which is basically Golden Rule argument, is improper, outside of the scope of the evidence, and I respectfully request the Court for a mistrial.

(The Court) I deny that, but I shall admonish the jury that is not proper argument.

(Mr. Swerdloff) Thank you, sir.

(The Court) Members of the jury, an objection has been made, and properly so, to the argument that Mr. Klauber has just made that you are to consider the situation as though, in effect -- I think that is what he said -- as though it was your wife involved. That is not the test, and really that's not proper argument. I have told the jury the elements they may consider for the determination of this case, and I am sure they will follow that instruction. It isn't a question as though it's your wife, anybody else's wife, you or anybody else. It's a question of what is fair and reasonable and proper compensation, based on the evidence and the instructions you have received. * * *.

The holding: At issue on this appeal: did the trial court commit error in refusing the appellants' request for a mistrial because of the use by plaintiffs' counsel of a "golden rule" argument [Luke 6:31, "As ye would that men should do to you, do ye also to them likewise] to the jury when the trial judge immediately instructed the jury to disregard that argument and re-instructed the jury as to the correct measure of damages. "The vice inherent in such argument is that it invites the jurors to disregard their oaths and to become non-objective viewers of the evidence which has been presented to them, or to go outside that evidence to bring to bear on the issue of damages purely subjective considerations, and resultingly [sic] courts in many other jurisdictions have deemed such 'golden rule' arguments to be improper."

The court did not find that the trial court "committed reversible error in failing to grant a mistrial after the use of this improper

argument, because he promptly and unequivocally instructed the jurors to disregard the argument, and as well succinctly reminded them of his earlier instructions, to which no objection has been made. Having an opportunity to hear the attorney as well as to appraise the effect of his words on the jurors before him, the trial judge is of necessity empowered with wide discretion in deciding whether the prejudicial effect of counsel's remarks can be erased by corrective instructions or if a mistrial is required."

21. MASSACHUSETTS:

CRIMINAL CASE: *Commonwealth v. Finstein*, 426 Mass. 200; 687 N.E.2d 638 (1997).

22. MICHIGAN: *Brummit v. Chaney*, 18 Mich. App. 59, 170 N.W.2d 481 (1969).

Plaintiff attacked defendant's closing statement regarding "putting yourself in defendant's place." The court considered the criminal case of *People v. Laker*, 7 Mich. App. 425 (1967):

"[T]he prosecutor was trying to create a description of the scene of the crime when he said, ' * * * I would like you, for the moment, to put yourself in that hamburger stand * * *.' Defendant raised this objection on appeal, and Judge McGregor ruled as follows: "The appellant claims that it was prejudicial error to allow this argument, as it improperly put the jury in the place of the complaining witness.

"The argument is that, in effect, the jurors were asked to become detectives, a practice condemned by the Supreme Court in *People v. O'Brien*, 96 Mich. 630 (1893). In this case, however, the prosecuting attorney did not ask the jury to perform any function other than that which the law designated to it. The credibility and weight to be given the testimony of a witness is within the province of the jury. *People v. Hancock*, 326 Mich. 471 (1950); *People v. Fleish*, 306 Mich. 8 (1943). What the prosecutor asked the jury to do was not to be

detectives, but rather can be likened to asking them to use their common sense in performing their functions, which is not condemned. *People v. Ringsted*, 90 Mich. 371 (1892). Accordingly, we find no reversible error on this point. 7 Mich. App. 425, 428.”

In finding that the statements did not constitute reversible error, the court ruled, “The mere mention of putting themselves in defendant’s place does not constitute reversible error, without a studied purpose to prejudice the jury. Such purpose is not evident in the case at bar.” *Id.* at 66. The case turned on whether (a) there was a “studied purpose to prejudice the jury” and (b) whether opposing counsel made a timely objection to the remark and requested a curative jury instruction.

23. MINNESOTA: *Mueller v. Sigmond*, 486 N.W.2d 841, 844 (Minn. Ct. App. 1992).

The argument:

“Think, for example, what an injury like this would mean to Michael Jordan * * * or yourself * * * or anyone else that you know, how it would take them out of the game of life that they’re in.”

Defendant “objected, approached the bench, and requested a curative instruction.” *Id.* at 845. The trial judge denied the request for a curative instruction, reasoning that his instruction on the issue of damages was sufficient. Defendant contended, on appeal, that “the trial court erred in failing to issue a curative instruction for an improper comment during final argument.”

Holding: “Tempting jurors to place themselves in the position of plaintiff, the so-called ‘golden rule’ argument, is improper because it may subvert the jurors’ objectivity.” (citing, e.g., *Omlid v. Lee*, 391 N.W.2d 62, 65 (Minn. App. 1986) (not proper to ask jury for what amount they would sell their sense of smell or sight)). The court further reviewed: “When an objection is made and the trial court

issues a curative instruction, a new trial is unnecessary unless the misconduct is ‘extremely prejudicial.’” A trial judge has discretion on whether to issue a “cautionary instruction” and the appellate court will not reverse this decision “unless the misconduct is ‘so prejudicial that it would be a miscarriage of justice to permit the result to stand.’”

24. MISSISSIPPI: *Danner v. Mid-State Paving Co.*, 252 Miss. 776, 173 So.2d 608, 614 (1965).

The argument:

“I want you to treat Mrs. Danner and her children as you would want your wife and children treated if this would happen to you. Follow the Golden Rule. Do unto others as you would have them do unto you.”

Appellee’s counsel promptly objected to this argument, requesting the trial court to “admonish counsel not to so charge the jury,” The circuit court sustained the appellees’ motion for a new trial.

The Mississippi Supreme Court summarized the “golden rule”:

“Turning to the so-called Golden Rule, which is found in the scriptures at Matthew 7:12, Luke 6:31, courts of this country have uniformly held that human beings are unreliable judges of their own affairs; that it is expecting too much of a man to weigh his own case fairly and impartially, since most humans want their own cases to be decided in their favor. It follows, therefore, to advise jurors to decide a case as they would want it decided if they or their loved ones were the litigants is to establish a false standard for the basis of judgments.”

The court held that “it is improper to permit an attorney to tell the jury to put themselves in the shoes of one of the parties or to apply the Golden Rule. Attorneys should not tell the jury, in effect, that

the law authorizes it to depart from neutrality and to make its determination from the point of view of bias or personal interest. We hold it was error not to sustain the objection.” In *Copiah Dairies, Inc. v. Addkison*, the Mississippi Supreme Court made it clear that counselors’ arguing a “Golden Rule” summation appeal was reversible error. This court noted that, “[i]f it [were] not reversible error we would not have taken the time nor space to point out to the litigants and the Bar of Mississippi that we condemned the use of the Golden Rule standard by the jury in reaching a decision. The majority rule in this country [condemns] the use of the Golden Rule standard in a summation to the jury as a basis for determining the rights of litigants.”

25. MISSOURI: *Warren Davis Props. v. United Fire & Cas. Co.*, 111 S.W.3d 515 (Mo. Ct. App. 2003).

The argument:

Plaintiff’s counsel: So I would ask you to please consider this evidence, consider what an insurance company ought to do, consider what you would want your insurance company to do, whether you would want them to work with you -

Defense counsel: I’m going to object. Golden rule argument there. I’d ask for a mistrial.

Trial Court: That’s overruled.

Holding: “A ‘golden rule’ argument, which we do not distinguish from ‘improper personalization,’ occurs when counsel personalizes the case to the jurors by asking them to place themselves in the position of a party to the action.”

Counsel did not “ask for a limiting or curative instruction, deciding instead to only ask for a mistrial.” “In analysis of similar circumstances in criminal trials, [the court has] noted that a limiting instruction for the jury to disregard the improper argument or

evidence is sufficient to avoid prejudice and cure any error.” Further, “[w]here a defendant does not ask for an instruction, [but only requests a mistrial], we consider the failure to grant a mistrial an abuse of discretion only if the comments were so prejudicial that their effect could not have been removed by direction to the jury.” The court decided to “apply the above rule to comparable situations in civil cases, and adopt it here.”

26. MONTANA:

27. NEBRASKA: *Paro v. Farm & Ranch Fertilizer, Inc.*, 243 Neb. 390, 499 N.W.2d 535 (1993).

The argument:

“The instructions that you just heard the judge tell you means that my man has to be negligent, Rick has to be negligent, and to be negligent he must do something that a reasonable person wouldn't do. And what are the facts? Put yourself in his place. ”

Mr. Waite: Objection, Your Honor, that is a golden rule argument. That is improper.

The Court: Overruled.

Mr. Wolf: Thank you, Your Honor.

“What does he do, he comes over the hill, he sees this vehicle coming and I think you have to use some common sense. . . . I think he did what a reasonable person would do and I think he did what any of you would do if you were faced with the same situation That is what he did, he tried to avoid the accident, he did the best he could and he hit him, but the point of it is the person that put it all there was Mr. Johnson, and I will tell you another thing, he has gone through that intersection hundreds of times, he knows it's

dangerous and what is his reason to you why he rolls through there? To minimize his exposure. Well, if you follow that rationale, then he would be a lot better off just going through there at a hundred miles an hour and he wouldn't even be in the inter-section as long. But I hate to see you or one of your family members just coming down that hill at the wrong time –

Mr. Waite: Objection, Your Honor.

The Court: Overruled.

The holding: “While an invitation to jurors to put themselves in the place of a party is improper argument, it is not a ground for a reversal unless the jury was prejudicially affected by the remark.” Furthermore, “[t]he latitude allowed attorneys in argument during the trial of a case lies within the discretion of the trial court.”

The court held:

In the present case, although the remarks made by the plaintiff’s attorney were improper, they appear to be interwoven with the reasonable person standard applied to the determination of the issues in this case and under the circumstances in this case resulted in no prejudicial effect. Accordingly, the trial court did not abuse its discretion in overruling the defendants’ objections and request for a mistrial based upon the remarks made by the plaintiff’s attorney.

28. NEVADA: *Lioce v. Cohen*, 174 P.3d 970 (2008)

The argument:

Defense counsel “asked the jury to consider whether, if the jurors’ children were injured at a slumber party, they would merely consider that an accident or see it as an opportunity to sue.” Counsel “impliedly asked the jurors to consider what remedies the jurors would pursue for the accident and inferred that the jurors

would not consider litigation.”

Defendant argued that “the Langs waived their challenge by failing to object to this comment.” *Id.* The court held that, “because of the persistent nature of [defense counsel’s] misconduct, the Langs’ objections to [defense counsel’s] other improper arguments sufficiently preserved this issue for appeal.”

Defendant further contended that the statement was “not a golden rule argument because the comment did not place jurors in either [party’s] position,” but rather articulated “a hypothetical situation involving an accident that occurred absent any negligence.” *Id.* The appellate court disagreed:

During his closing argument, Emerson plainly stated to the jurors, “You send your son or daughter” to a friend’s house, where he or she was injured, and questioned, “[D]oes that mean you just go out and sue[?]” (Emphasis added.) He invited the jurors to make a decision as if they and their children were involved in his hypothetical situation – a situation that somewhat paralleled the scenario of the Langs’ daughter’s injuries. This question indicated that the jury could make a decision based on the personal hypothetical designed to trivialize the daughter’s injuries instead of deciding the case on negligence law and the evidence that the Langs and Knippenberg presented. Thus, [defense counsel]’s comment amounted to an impermissible golden rule argument.

After deciding that defense counsel’s arguments (“golden rule” arguments in addition to other improper arguments) amounted to “misconduct,” the court determined whether or not the trial court abused its discretion in deciding the motions for new trial. Finding that the district court “employed incorrect standards when deciding whether the Langs’ motion for a new trial should be granted,” the appellate court vacated its order and remanded for application of the correct standards regarding whether counsel’s misconduct required a new trial.

In this case, the Nevada Supreme Court applied the “golden rule” argument prohibition to both liability and damages. “An attorney may not make a golden rule argument, which is an argument asking jurors to place themselves in the position of one of the parties.” “Golden rule arguments are improper because they infect the jury’s objectivity.”

29. NEW HAMPSHIRE: *Walton v. City of Manchester*, 140 N.H. 403, 666 A.2d 978 (1995).

The New Hampshire Supreme Court discussed, but declined to address, “the propriety of ‘golden rule’ argument” in this case. To date, no published case addresses the propriety of golden rule arguments in New Hampshire.

In this case, plaintiff alleged that defendant’s closing argument constituted an impermissible “golden rule” argument, and that the trial court should have granted defendant’s motion for a new trial. “The decision to grant or deny a party’s motion for a new trial is within the trial court’s discretion, and we will not reverse the trial court’s ruling absent an abuse of that discretion.”

“A ‘golden rule’ argument is made when counsel urges jurors to put themselves in a particular party’s place, *Klein v. Herring*, 347 So. 2d 681, 682 (Fla. Dist. Ct. App. 1977), or into a particular party’s shoes. Courts generally condemn these arguments because they encourage the jury ‘to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.’”

In declining to address the “golden rule” allegation, the court held that “[t]he argument complained of did not ask the jurors to put themselves in the shoes of any party; rather, the argument asked members of the jury to consider the effect of a plaintiff’s verdict on a nonparty, Danielson, on themselves, and on volunteerism in general.”

Notwithstanding its conclusion that this argument did not constitute a golden rule argument, the court held that such argument, “without correction by the trial court, mandates a reversal.”

“We do not expect advocacy to be devoid of passion. But jurors must ultimately base their judgment on the evidence presented and the natural inferences therefrom. Thus, there must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice. *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978). During closing argument, counsel ‘may not appeal to passion, prejudice or sympathy in a way not supported by the evidence.’ 5 R. Wiebusch, *New Hampshire Practice, Civil Practice and Procedure* § 1537, at 276-77 n.29 (1984).

30. NEW JERSEY: *Henker v. Preybylowski*, 216 N.J. Super. 513, 524 A.2d 455 (1987).

The argument:

“Remember the wisdom tooth, a little canker sore in your mouth. You can’t get rid of it. You may take Tylenol. Or take a fractured tooth, finger, a cut, a burn. What is that pain worth for one hour? You’ve gone to doctors and dentists. An anesthesiologist, you know how much he charges just to limit or prevent pain during the course of an operation. You know how much a dentist charges to give a shot of Novocain so you don’t feel pain for ten, fifteen minutes. How much is that pain worth for one hour? When you get that hour, think about the thousands of hours that Ken Henker has suffered pain just the last three years The jury is going to tell how much is owed him for that pain, thousands of hours in the past and thousands of hours in the future.”

The court held that the “‘golden rule’ argument, i.e., asking jurors to award damages in the amount that they would want for their own pain and suffering, [was] still prohibited.”

“First, there are suggestions that the members of the jury consider the few extra dollars they would be willing to spend to avoid the pain of a tooth extraction and to think what it means to suffer on a daily basis. This is a subtle appeal to the ‘golden rule,’ i.e., that the members of the jury consider what one day of pain and suffering or, conversely its avoidance, would be worth to them. . . .”

Regarding the proper remedy for a golden rule violation, the court ruled:

“Permitting plaintiffs’ attorney to persist in making unwarranted prejudicial appeals to the jury was probably plain error tainting the entire verdict and thereby entitling defendant to a new trial regardless of whether the verdict was so grossly excessive as to demonstrate prejudice. See *Haid v. Loderstedt*, 45 N.J. Super. 547, 551 (App.Div.1957) (plain error to permit defense attorney falsely to imply to jury that defendant uninsured). But even if the error had not been plain and the verdict not so grossly excessive, the result would be the same because the demonstrable effect of these tactics was the verdict’s conceded excessiveness. Where a shockingly high verdict is not so grossly excessive as to demonstrate prejudice, but during the trial the jury was exposed to influences having a clear capacity to infect the verdict with prejudice, partiality or passion, the verdict is entirely tainted and cannot be salvaged in part through the use of a remittitur.”

31. NEW MEXICO:

32. NEW YORK: *Marcoux v. Farm Serv. & Supplies, Inc.*, 290 F. Supp. 2d 457, 463 (S.D.N.Y. 2003)

The well established "Golden Rule," also known as the "bag of gold" rule, prohibits counsel from telling the jurors, either directly or by implication, that they should put themselves in plaintiff's place and

render such a verdict as they would wish to receive were they in plaintiff's position. Its application is limited to damages only. "Golden Rule" arguments are prohibited because they "encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence."

According to the United States District Court for the Southern District of New York, remarks by counsel do not violate the "Golden Rule" prohibition where they invite the jury to focus on the gravity of plaintiff's injuries, but do not tell the jurors directly or implicitly that they should award plaintiff the sum of damages that they themselves would desire if they found themselves "in the plaintiff's shoes."

The effect of any improprieties committed by counsel during a trial must be assessed within the totality of the circumstances of the case, by evaluating the following factors:

In assessing the effect of improper conduct by counsel, a court must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g., whether it is a close case), and the verdict itself.

33. NORTH CAROLINA: *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 542 S.E.2d 346 (2001).

The argument:

"What would you require us to pay you? Would you take \$100 a day for it to live with that the rest of your life?"

The court overruled defendant's objection to this argument.

The holding: In personal injury cases “a closing argument in which the jury is asked to put itself in the position of the injured party is improper.” The Court noted:

“The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damages to which he is entitled, in reasonable consideration of the suffering necessarily endured. The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed.”

34. NORTH DAKOTA: *Glatt v. Bank of Kirkwood Plaza*, 383 N.W.2d 473 (N.D. 1986).

The argument:

“Just put yourself in the position of the parties, and I think that if you do that -- if you put yourself in Jim and Ruben's shoes -- their project is off and running in good shape, they want to enter into the second phase, they get a commitment, and the commitment is in writing.

* * * * *

"Place yourself in Ruben and Jim's shoes when told by Lamb, it's over, on August 11th

* * * * *

"And I will say to the members of the jury, if you were in this position and you knew that your business -- one of the major businesses that you are involved in, East Plaza, is about to be lost to the tune of that kind of money, I submit to you that you would also travel the length and breadth of this country attempting to right the wrong that had been visited upon you by a local bank.”

There was no objection or request for a cautionary instruction prior to the jury's retiring for deliberations. There was a motion for a mistrial on the ground of improper argument. The trial judge denied the motion, at which point a "cautionary instruction" was requested regarding the "golden rule" argument. The judge similarly denied this motion. On appeal, the Bank asserted that, "absent a cautionary instruction or withdrawal by counsel, the 'Golden Rule' arguments constitute[d] reversible error."

The court held:

"While 'Golden Rule' arguments should generally be avoided (see Annot., Prejudicial effect of counsel's argument, in civil cases, urging jurors to place themselves in the position of litigant or to allow such recovery as they would wish if in the same position, 70 A.L.R.2d 935), we find no reversible error. Error may not be predicated on an argument of counsel unless there was a timely objection and a ruling by the trial court. *Klein v. Harper*, 186 N.W.2d 426 (N.D. 1971). To take advantage of irregularities during trial, one 'must do so at the time they occur, to the end that the court may take appropriate action if possible to remedy any prejudice that may have resulted.' *Braun v. Riskedahl*, 150 N.W.2d 577, 583 (N.D. 1967). See also *Larson v. Meyer*, 135 N.W.2d 145 (N.D. 1965). The trial court's refusal to grant a motion for mistrial or to give a cautionary instruction upon an untimely objection through a motion for mistrial and request for a cautionary instruction made only after a jury has retired for deliberations is not reversible error."

35. OHIO: *Schroeder v. Parker*, 1998 Ohio App. LEXIS 5919 (Ohio Ct. App. Dec. 10, 1998).

The argument:

MS. GARDNER: As you deliberate I ask each and every one of you to put yourself in that young man's seat. That could be any one of you who happens to hit one of Dr. Dickson's patients on the road. Quite accidentally I might add.

(There was no objection to this argument.)

Counsel next argued:

MS. GARDNER: * * * I ask your verdict to be consistent with the evidence, with the weight of the evidence. And, again, I ask you to put yourself in the position of the defendant and --

MR. BOYD: Objection.

THE COURT: Put yourself where?

MS. GARDNER: In the defendant's position, Judge.

THE COURT: Overruled.

MR. BOYD: Overruled?

THE COURT: Overruled. Finish the statement. Let's hear it.

MS. GARDNER: That I ask you as a jury to give no less than you would expect of a jury who is here in your case.

The holding: A "golden rule" argument exists where counsel appeals to the jury to abandon their position of impartiality by placing themselves in the place of one of the parties. *Boop v. The Baltimore & Ohio Railroad Co.*, 118 Ohio App. 171, 174, 193 N.E.2d 714 (1963). Generally, a "golden rule" argument is improper. However, a "golden rule" comment during closing argument is not per se prejudicial so as to warrant a new trial.

“It is axiomatic that great latitude is afforded counsel in the presentation of closing argument to the jury.” Moreover, the trial court has discretion to determine whether a party has exceeded the “permissible bounds of closing argument.” Absent an “abuse of discretion,” the appellate court will not reverse the trial court’s determination. “Only if the circumstances are of such reprehensible and heinous nature as to constitute prejudice will this court reverse a judgment.”

“In this portion of closing argument, appellee’s counsel is merely asking jurors to weigh the evidence as carefully as they would like it to be weighed if they were a party in the lawsuit. We find that this comment was not prejudicial. Therefore, we find that the trial court did not abuse its discretion in allowing this comment.”

36. OKLAHOMA: *Lance v. Smith*, 1957 OK 5, 306 P.2d 298 (1957).

In the closing arguments, counsel for the plaintiff requested that the jury apply the “golden rule,” at which point the trial court “admonished” the jury as follows:

That they would be controlled only by the evidence that would come from the witness stand and the conclusion drawn by them and nothing further.

The Oklahoma Supreme Court citing the case of *Mid-Continent Petroleum Corp. v. Jamison*, 197 Okl. 387, 171 P.2d 976, where it set forth the following statement of the law.

Objections to argument by counsel for plaintiff to jury disclosed no reversible error in view of instruction that jurors were judges of whether the testimony was as stated in argument by counsel.

It further cited the case of *Hazelrigg Trucking Co. v. Duvall*, Okl., 261 P.2d 204, 205, where it held:

“Improper argument by counsel for plaintiff, while not to be condoned, does not call for reversal of verdict for plaintiff where it reasonably appears from whole record that jury was not influenced thereby and apparently followed directions of court not to consider such improper argument.”

Applying the Jamison and Duvall holdings, the court found that “the hospital and medical bills of the plaintiff were \$1,041.65, that she “underwent an operation which deprived her of further motherhood,” that she “suffered pain and anguish,” and that “argument of counsel in no way influenced the jury in its verdict of \$5,000.”

37. OREGON:

38. PENNSYLVANIA: *Millen v. Miller*, 224 Pa. Super. 569, 308 A.2d 115, 117 (1973).

Defense counsel argued “that the jury should put itself ‘in the same shoes as the defendant,’ and ask what it would have done under the circumstances.” Plaintiff’s counsel immediately objected to this argument as “improper, prejudicial, and unsupported by either the facts of the case or the law.” The trial judge did not instruct the jury “as to any impropriety in defense counsel’s arguments.”

The court found that defense counsel’s aforementioned argument constituted an improper “golden rule” argument. “The ‘golden rule’ argument involves an appeal to the jury to place itself in the shoes of one of the parties and ask themselves what each of them would have done under the circumstances of the case.”

The court ruled:

“It is universal law that the standard of care in negligence cases is that of a reasonable man. The courts have uniformly reversed cases where a subjective standard was suggested to a jury. *Stanley v. Ellegood*, 382 S.W. 2d 572 (Ky., 1964); *Yerrick v. East Ohio Gas Co.*, 198 N.E. 2d 472 (Ohio App., 1964); *Copeland v. Johnson*, 63 Ill. App. 2d 361, 211 N.E. 2d 387 (1965). In *Copeland*, supra, at 367, 211 N.E. 2d at 390, the Court held: ‘It is error for a plaintiff’s counsel to ask a jury to put itself in the position of a plaintiff . . . it is just as erroneous for a defense counsel to ask the jurors to place themselves in the position of a defendant.’”

The court noted that an “indispensable element to finding such comment to have constituted reversible error is the requirement that opposing counsel make a prompt and specific objection on such grounds to give the trial court the opportunity to caution the jury to disregard the comments.” The court rejected appellee’s contention that, although the trial court did not issue a jury instruction specifically about the improper argument, “the error . . . was cured by a comprehensive and adequate charge to the jury both on its duty to apply a reasonable man standard and as to its function in testing the credibility of witnesses.” The court held:

“Plaintiff’s counsel objected to counsel’s closing argument immediately after the comments were made. The objections were specifically directed at the nature of the error. The prejudicial comments once implanted in the minds of the jurors could be removed only by immediate cautionary instructions to the jury. We do not believe that a charge of the court, absent specific cautionary instructions regarding error committed during the course of the trial, can adequately call the jury’s attention to such error. For the same reason, our Supreme Court has held that the trial court must instruct the jury that an improper argument be disregarded. *Gibbons v. Penna. R.R. Co.*, 291 Pa. 141, 139 A. 743 (1927).”

39. RHODE ISLAND: *Duffy v. Town of West Warwick*, 2007 R.I. Super. LEXIS 172 (Nov. 30, 2007)

This case involved an appeal by a terminated police officer of an administrative board's decision to a Rhode Island Superior Court, herein serving as an appellate court. In this case, counsel argued that the Town of West Warwick might be "subject to personal liability if Duffy [were] not terminated." The court found that this statement "appears to be a variation of the so-called 'golden rule' argument. "The court held that '[s]uch an argument is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.'"

The Duffy court continued:

"Regarding the variation in the instant case, the suggestion of personal liability for failing to follow a particular recommendation also encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. Depending on the precise context, the argument may rise to the level of unfairness where a party may not receive a fair trial. And, finally, if the trial is not fair, the due process rights of that party are implicated. "

"The court evaluated the statement to determine whether it was "so inflammatory as to prevent the Board's calm and dispassionate examination of the evidence." Id. at *38 (citing Padula, 551 A.2d at 691). Distinguishing Padula as a criminal case, the Rhode Island appellate court held that "the policy behind the rationale appears to be similar to the 'golden rule' line of cases wherein the fact finder is encouraged to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence."

The Court held:

"[We feel] it is important to focus on the 'rather than' language of the 'golden rule' rationale. The Court cannot say, after reading the

entire transcript of the March 1, 2007 closing arguments, and after considering the context of the entire record in this case, that the prosecutor [for the Town of West Warwick] was suggesting the Board decide the case on the basis of personal interest rather than on the evidence. The Court finds that the instance is more akin to overzealousness on the part of the prosecutor.”

The court noted that the fact-finding judge may have given “a curative instruction to remedy any harm caused by the improper comment. . . . The attendant facts and circumstances of each case must be carefully evaluated; whether the trial justice exercised proper discretion is an assessment that does not lend itself to any fixed formula.”

40. SOUTH CAROLINA: *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006) – CRIMINAL CASE.

While this case involves a criminal matter – rather than a civil matter – it is the only line of cases published in South Carolina concerning the golden rule. Accordingly, the argument would be made, by extension, to civil cases, and one cannot draw any conclusion from this case concerning how the golden rule argument prohibition would be applied to civil cases in South Carolina.

In his closing argument, the solicitor asked the jury,

“Who speaks for Teresa Reese? In this system of justice that we have in this type of case, who speaks for Teresa Reese? That is the question that has been asked since April the 29th . . . of this year, since the day she died. From the time that Willie Earl Reese was arrested, the time that he initially appeared in court, through the Grand Jury proceedings, when he was placed on the trial docket, when his case was called on Monday, when you jurors with your fellow jurors assembled downstairs before Judge Manning, during the process of you being selected for this case, from opening statements of Ms. Campbell and Mr. Swerling through the

presentation of the testimony and the submission of evidence, through the closing remarks of Ms. Campbell and Mr. Swerling and as I stand before you, Madam Forelady and Ladies and Gentlemen, the question is: Who speaks for Teresa Reese? And I submit to you that question can be answered and will be answered today.”

After he argued that the evidence indicated that Reese was guilty of murder, the solicitor again asked, “Who speaks for Teresa Reese?” to which Reese objected. The trial judge overruled the objection, however, “stating he would hear counsel on the motion later.” The solicitor then continued, “So now I ask you, now that all the evidence is in upon my argument, who speaks for Teresa Reese? You do, Madam Forelady and Ladies and Gentlemen of the Jury. . . . You do. You speak for her. . . You can speak for her with your verdict. . . . And so you, the State submits, will speak for her with your verdict, with your verdict.” Again, the trial judge overruled objection to the argument.

Reese preserved on the record a motion regarding Solicitor’s argument, contending that “the argument asking the jury to speak for Teresa exceeded the bounds of permissible argument, personalized the issue to the jury, and injected inflammation and passion into the trial.” Reese moved for a mistrial, but the trial judge denied the motion. Thereafter, Reese requested that the trial judge issue a curative instruction about the solicitor’s argument, but the judge denied Reese’s request.

The South Carolina Supreme Court reviewed the applicable law concerning solicitor arguments in criminal trials and then turned to “golden rule” arguments. The court held that “[j]urors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially. A Golden Rule argument asking the jurors to place themselves in the victim’s shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.”

41. SOUTH DAKOTA: *Schoon v. Looby*, 2003 SD 123, 670 N.W.2d 885, 889 (2003).

While this case does not specifically involve counsel's statement to the jury to "place itself in the shoes of the party," it involves a similar argument, namely, the "community conscience" appeal to the jury. In this case, counsel for the defendant argued in closing:

Defense Counsel: . . . And not only that, Sioux Valley, a non-profit corporation that's owned by all of us. Let's show their balance sheet and—

Plaintiff's Counsel: I object to that, Your Honor. Sioux Valley Hospital is not a publicly owned corporation. That is inappropriate, inaccurate and it is an outrageous statement. It's a private corporation.

Court: Well, it's argument. I'll allow Defense Counsel to make his argument.

The South Dakota court held that "[c]ounsel has wide latitude to comment on the facts; however, counsel must confine the comments to a 'reasonable scope of the evidence and to issues presented by the evidence.'" The court further ruled that: "Not only was this [argument] a misstatement of fact but it also was an attempt to persuade by improper means. The false implication to the jury could only be interpreted as an attempt to convince the jurors that if Sioux Valley had to pay, the jurors as 'owners' would in some way have to pay."

Comments of this nature have been found prejudicial in similar cases. In *Kloppenburger v. Kloppenburger*, comments by plaintiff's counsel that the defendant was insured and that the real party in interest was the insurance company prompted a new trial. 66 SD 174, 280 NW 209, (SD 1938).

Prejudice was found in a condemnation case in which the state's lawyer misstated the measure of damages and told the jury that

their verdict would set the price for "what the State of South Dakota is going to pay for land north of Spearfish clear to the Wyoming line." *State Highway Commission v. Beets*, 88 S.D. 536, 224 N.W.2d 567, 568 (SD 1974). In a criminal case, the prosecutor's community conscience argument invited reversal because he argued that the jurors should convict the defendant of driving while intoxicated because they could be the next fatality of a drunk driver. *State v. Blaine*, 427 N.W.2d 113, 115 (SD 1988).

Id., 670 N.W.2d at 889. Here, the court found, "who would have to pay for [] damages – whether defendant, defendant's insurance company or members of the public needing medical services – was not proper comment to the jury." *Id.* (citing SDCL 19-12-13, citing, also, *LDL Cattle Co. v. Guetter*, 1996 SD 22, 544 N.W.2d 523, 529 (SD 1996)). Accordingly, the court ruled that the trial court should have sustained plaintiff's objection.

42. TENNESSEE: *Roberts v. Federal Express Corp.*, 1996 Tenn. App. LEXIS 159 (Mar. 14, 1996).

The argument by Plaintiff's counsel:

"The humiliation, the embarrassment. Yeah, go on down to the jail sometime if you don't have anything to do and get strip searched. Have your body cavities searched. That's a good Sunday afternoon activity.

"How much do I pay you if I said, look, come on, you will like it. How much would you take just for that?"

"... Now, what if I just made a deal with you. I say to you now, here is my deal: You can tell me however much you want me to pay you and I will pay you that amount of money. But this is what you got to do. You got to let me bring charges against you for grand larceny.

“... Malice? Malice? I suggest to you they didn't have any expectation that this man would be convicted. They didn't have any expectation. It's sort of like punishment. Throw him out there and put him in the system and let it grind him up a little bit. And we will teach him a lesson. And we will teach all the other employees there a lesson, too.

“So--the real thing. If they will do this to Richard Roberts, who is very popular there, been one of the longest employees at that place, and the message goes out, if they will do that to Richard Roberts, and I am just the handler, a part time employee, what in the world will they do with me? Grind him up a little bit.”

The Tennessee appellate court found that these comments constituted improper “golden rule” statements in his closing arguments for the liability phase of the case. The court held that the arguments “served to inflame and bias the jury, ultimately affecting the fairness of the trial,” and were “curable only by granting a new trial.” The arguments at issue, which the court found improper, were statements to the jury “suggesting that they place themselves in the shoes of the Plaintiff, Richard Roberts.” The court held that “such arguments were substantial and an improper solicitation to the jury for application of the Golden Rule to the Plaintiffs,” and conditionally granted defendant’s motion for mistrial, as well as ordered a new trial based on such improper argument. “These Golden Rule arguments, so-called, are inflammatory, as they are intended to be, and inevitably will destroy the verdict.”

43. TEXAS: *World Wide Tire v. Brown*, 644 S.W.2d 144, 145-46 (Tex. Ct. App. 1982).

The argument:

“We are instructed that we should do unto others as we would have them do unto us. What would you be satisfied with if you had to come down here with an injury such as this, what would you be satisfied with if you had the same problems that Mr. Brown has, what would you be satisfied with in the way of money damages awarded to you by a jury.

“If you can come out and say that if I would have gone through the same experience a completely innocent victim, if I would have had the same pain and suffering in the past, mental anguish in the past, if I know that I would have the same physical pain –

DEFENSE COUNSEL: This is improper argument and I object.

THE COURT: Overrule your objection.

PLAINTIFF'S COUNSEL: Just think about those things, you all get back there and discuss this, will you?”

The holding: The court stated that it was “not improper for an attorney, in his closing argument, to argue the ‘Golden Rule,’ i.e. do unto others as you would have them do unto you, because that alone merely asks the jury to follow the Golden Rule and would require the jury to look with equal solicitude to the rights of both plaintiff and defendant.” However, the court held that counsel’s argument “went well beyond proper jury argument in that it amounted to a direct appeal to the jury to consider the case from an improper viewpoint, because its effect was to ask the members of the jury to put themselves into the plaintiff’s shoes and to give the plaintiff what they would want if they were injured, rather than what the evidence showed plaintiff was entitled to receive as compensation.”

The court reviewed the controlling *Fambrough* case, which held that “a very similar jury argument to be improper on the same basis and distinguished prior cases upon which plaintiff relies, by making a distinction between cases merely reciting the Golden Rule to the

jury and those asking the jury to put themselves in the plaintiff's shoes."

This court evaluated counsel's golden rule argument as the court did in *Dallas Ry. & Terminal Co. v. Smith*, 42 S.W.2d 794, 795 (Tex. Civ. App. – Waco 1931, no writ):

"The above argument was an appeal to the prejudice of the jury and calculated to induce the jury to abandon their position as fair and impartial jurors and to assume the position of a partisan or claimant in the case. The jury was told to give the plaintiffs, not what would reasonably compensate her for the injuries sustained, as directed in the court's charge, but what they would want or think they were entitled to if they were the plaintiffs in the case. This was an appeal to the jury to apply an improper measure of damages contrary to that given in the charge. Such argument was unwarranted and calculated to prejudice the rights of the appellants."

The court found it relevant that "the trial judge overruled defense counsel's objection to the improper argument." It stated

"Like the court in *Fambrough*, supra, we are of the opinion that the argument was not of such a nature that its harmful effect could not have been removed, had the trial court sustained the objection thereto offered at the time the argument was made, and properly instructed the jury not to consider it. Moreover, we think that when defense counsel made his objection to the argument in the presence of the jury, at the proper time, and the objection was promptly overruled in the presence of the jury, the jury must have been drawn to the conclusion that the argument made was proper."

It next discussed the "harmless error rule," citing *Fire Ins. Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979), as the leading case:

"Although [the Reese] case did not deal with a 'Golden Rule' argument such as the one in the present case, it consolidated the harmless error rule into seven elements which are as follows: "In the case of improper jury argument, complainant must prove a

number of things. He has the burden to prove (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge. 3 McDonald, Texas Civil Practice § 13.17.2 (1970). There are only rare instances of incurable harm from improper argument. The complainant has the further burden to prove (5) that the argument by its nature, degree and extent constituted reversible harmful error. How long the argument continued, whether it was repeated or abandoned and whether there was cumulative error are proper inquiries. All of the evidence must be closely examined to determine (6) the argument's probable effect on a material finding. (7) Importantly, a reversal must come from an evaluation of the whole case, which begins with the voir dire and ends with the closing argument. The record may show that the cause is weak, strong, or very close. From all of these factors the complainant must show that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence. *Aultman v. Dallas Ry. & Term. Co.*, 152 Tex. 509, 260 S.W.2d 596 (1953). Rules 434, 503, TEX. R. CIV. P."

The court "closely examined all of the evidence to determine the probable effect the argument had on the material findings of the case." The court based its reversal on its evaluation of the whole case:

44. UTAH: *Green v. Louder*, 2001 UT 62, 29 P.3d 638 (2001).

The argument by defense counsel:

"Look how close those cars are to having a head on collision and then ask yourself if you would do the same thing.

“Before you impose standards on Lloyd Louder higher than you pose [sic] on yourself, you must realize that he is only held to be the reasonable person, not the perfect person.

“How many of you, the standard of the reasonable person, would stay that close to a head on collision with a car coming in your own lane without trying to get somewhere else.

“[A] verdict that Louder was even partially at fault for this accident is to say in your heart, well I have never been seconds from an imminent head on collision.”

The holding: The Utah Supreme Court adopted the definition of “golden rule argument” set forth in Black’s Law Dictionary (7th ed. 1999), defining it as a “jury argument in which a lawyer asks the jurors to reach a verdict by imagining themselves or someone they care about in the place of the injured plaintiff or crime victim.” “The determination of whether remarks made during closing argument improperly influenced the verdict is within the sound discretion of the trial court.” “Therefore, when improper closing arguments are given, reversal is only warranted if this court concludes that absent the improper argument, there was a reasonable likelihood of a more favorable outcome for the plaintiff.” Id. at 648 (citing *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989)).

“[T]he use of golden rule arguments is improper only ‘with respect to damages.’” Id. at 648, quoting *Shultz v. Rice*, 809 F.2d 643, 651-52 (10th Cir. 1986) (citing *Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir. 1976)). In this case, defense counsel’s statements were not directed to the issue of damages. “In addition, the use of golden rule arguments ‘is not improper when urged on the issue of ultimate liability.’”

45. VERMONT: *Duchaine v. Ray*, 110 Vt. 313, 6 A.2d 28 (1939).

The argument:

The Vermont Supreme Court paraphrased its understanding of plaintiff's argument as: "Put yourself in the place of this plaintiff, and assess damages on that theory," to which defense counsel objected. The record does not indicate that "anything further was said by the court or by counsel regarding the matter." Thereafter, plaintiff's counsel "in substance" argued, "Put your daughter in the place of this girl and what would you give her?" Again, defense counsel objected and the trial court sustained the objection. Parties concede that plaintiff's counsel withdrew this remark before the jury, and "in the court's charge the jury were instructed to discard from their minds whatever had been said by counsel in argument and withdrawn"

The Vermont Supreme Court concluded that counsel's withdrawal of his second improper golden rule remark and the court's instruction did not refer to counsel's first improper remark, i.e., that the jury put itself in the place of the plaintiff and "assess damages on that theory." The court deemed that statement "highly improper and a lamentable departure from the rule which required counsel to confine his argument to the evidence in the case and to the inferences properly to be drawn therefrom, and to avoid appealing to the prejudice of the jury." The court continued that the trial court should have reprimanded counsel, required him to withdraw the remark, and instructed the jury to disregard it. "The action of the court in allowing the exception was, in effect, [an erroneous] ruling that the argument was proper."

To determine whether the error required reversal, it inquired whether the error was prejudicial. It stated that, "under our present practice, error works a reversal only when the record satisfies the Court that the rights of the excepting party have been injuriously affected thereby. . . . In determining whether the remark was prejudicial in the matter of damages we consider whether the verdict of \$ 2,250 indicates such prejudice." *Id.* at 322. The court found:

“The improper remark suggested a false standard for the measurement of damages, but it is addressed only to the matter of damages, and we are not satisfied that it resulted injuriously to the defendant on the question of liability, particularly as the record shows, as we have seen, that the jury was warranted in finding the plaintiff not guilty of contributory negligence, and the finding of negligence on the part of the defendant appears, by the record, to be amply supported by the evidence.”

Based on its review of the evidence and testimony before the trial court, the Vermont Supreme Court held that the evidence “bearing on damages . . . does not satisfy us that the verdict was excessive or that the error with respect to the improper argument has injuriously affected the rights of the defendant.”

46. VIRGINIA: *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 266 Va. 188, 585 S.E.2d 557 (2003).

The argument:

“Suppose your husband were choking to death and he couldn't open his mouth? Do you want an aide trying to get your husband's throat clear or would you like to have a nurse . . . while you're at work?”

The defendant objected, and the circuit court stated: “I think it is not appropriate to ask the jurors to put themselves in the place of the party.”

Plaintiff “apologized, but immediately he argued to the jury: ‘But if you were responsible for someone, who would you want there?’ The defendant objected, and the circuit court again responded: ‘The jurors shouldn't be asked to be put in the place of the parties.’”

The holding: The Virginia Supreme Court has “repeatedly held that counsel may not, in closing argument, invoke the so-called ‘Golden Rule. . . . The function of the jury is to decide according to the

evidence, not according to how its members might wish to be treated.” In discussing the particularly improper use of golden rule arguments with respect to the amount of damages, the Virginia Supreme Court held that,

“[E]ven though the circuit court properly sustained most of the objections, plaintiff’s counsel continued to invoke the ‘Golden Rule’ during closing argument. This argument was highly prejudicial because plaintiff repeatedly asked the jury, despite the circuit court’s admonitions, to assess his damages in relation to how the jurors would want to be compensated personally had they been injured and sustained the same injuries that plaintiff had sustained. And, even though plaintiff’s counsel acknowledged to the circuit court that his use of the ‘Golden Rule’ was improper, he continued to engage in this prejudicial argument. Moreover, plaintiff’s repeated use of the ‘Golden Rule’ was also highly prejudicial because this argument was designed to influence the jury’s decision whether to base its verdict upon plaintiff’s proposed life care plan that cost \$17,091,000 instead of defendant’s life care plan for plaintiff that cost \$4,123,193.50.”

Next, the court addressed whether it was appropriate to award a new trial on all issues. “Generally, when a litigant makes a prejudicial closing argument to a jury in a non-bifurcated trial, the appropriate remedy is to award a new trial on all issues. In this case, however, the evidence overwhelmingly supports a finding of liability. Thus, we hold that the prejudice caused by the improper jury argument, which involved the conflicting evidence about plaintiff’s future medical care, could not have affected the jury’s findings of negligence. Therefore, a new trial on all issues is not appropriate. Because this case will be remanded for a new trial on damages, we must consider certain issues that probably will arise upon remand.” *Id.*

47. WASHINGTON: *Adkins v. Aluminum Co. of America (ALCOA)*, 110 Wn.2d 128, 750 P.2d 1257 (1988).

The argument (by defense counsel):

“Any percentage of fault returned against Alcoa -- any percentage at all -- entitles plaintiff to some verdict. We think it is only fair that no percentage be returned against ALCOA. To base any verdict against us on our corporate status, on sympathy, or even on compromise, would violate your pledge when taking this assignment, and be an unfair verdict.

“I’ve got to (1) give you one more argument about this. I’ve questioned whether I should even say it. But one overriding fact that has concerned me throughout this case is ALCOA: the fact that it is a large corporation. Can a corporation get a fair trial? And you have all told me that they can, and that you will treat them as if you were the landowner, and that this was a roofer going on your roof and doing a job, whether it be a roofer or a plumber, or other special skilled contractor, who should know what he’s doing.

“If it was your roof, and if this was your attic vent and fan, you would not expect to be liable for injury to a roofer that you hired, who was injured in doing something he should know better not to do. We ask only that you give ALCOA that same consideration.”
The holding: The Washington Supreme Court applied the golden rule argument prohibition to both liability and damages.

“[A]n argument in a civil case is improper [when it] appeals to the jurors to place themselves in the position of a litigant and to decide the case based upon what they would then want under the circumstances. Where an argument is designed to affect the outcome of the case, either upon the question of liability or damages, a plaintiff’s potential recovery or a defendant’s potential success in defending is involved. Whether a plaintiff recovers at all, and the amount of a plaintiff’s recovery, if any, or whether a defendant prevails, are questions the jury must resolve solely on the evidence and the law, and not on the basis of appeals to sympathy, passion or prejudice.”

The court found the final portion of Defendant's argument to constitute an improper golden rule appeal to the jurors to place themselves in the Defendant's position and to decide the case "based on what they themselves would want under the circumstances." The court made note that, "[i]ndeed, defense counsel considered not giving the argument, but gave it anyway. Counsel knew that at the very least the argument was questionable." Further, the court noted that counsel "made the improper statements at the very end of his closing argument, just before a recess, thus taking advantage of the 'last heard longest remembered' principle."

Finally, the court determined whether counsel's improper golden rule remarks constituted reversal of the jury's verdict. "[W]e agree with the majority of courts which hold that where a golden rule argument has been made, reversal is not automatic."

The court noted cases where court's did not afford reversal based on the circumstances presented, "for example, where opposing counsel failed to object and seek a curative instruction, where the trial court sufficiently instructed the jury to disregard the improper argument, where counsel withdrew the argument, where the argument was a justifiable response to opposing counsel's remarks, where the verdict was not excessive, and where the appellate court concluded from the record as a whole that any prejudicial effect was insufficient to require reversal."

In determine whether or not to reverse the jury's verdict, the court reviewed the situations where reversal is mandated. "[R]eversal is required only where the error was prejudicial." "Error is prejudicial if it affects, or presumptively affects, the outcome of the trial." "The effect of a 'golden rule' argument on the jury is difficult to ascertain. It is the nature of the argument itself which establishes its impropriety: the jury is invited to decide the outcome of the case based on sympathy, prejudice or bias, rather than on the evidence and the law."

The court stated that, “[i]n most cases . . . including this one, the prejudicial effect of such an argument can be removed by the trial court sustaining a proper and timely objection and then promptly instructing the jury to disregard the improper argument.”

48. WEST VIRGINIA: *Keathley v. Chesapeake & O. Ry.*, 85 W. Va. 173, 102 S.E. 244 (W. Va. 1919).

The argument:

“You gentlemen of the jury, put yourselves in the place of the plaintiff, in estimating damages; take into consideration what amount, under such circumstances, would compensate you if you were a young man in the bloom of health, with your wife, about to start on the sea of life.”

The holding: The West Virginia Supreme Court found that, “[m]anifestly this language was improper, but when spoken the only motion by opposing counsel was to direct a verdict for defendant. There was no request to the court to direct the jury to disregard the remarks of counsel, or subsequent instruction requested to counteract any prejudice to defendant, if any, according to approved practice.” The court continued, “As the objectionable matter of the argument related to the quantum of the damages, and as the verdict was not objected to on that ground, we see no substantial error in the rulings of the court thereon, on the motion for a verdict based on that ground.”

49. WISCONSIN 1: *Larson v. Hanson*, 242 N.W. 184, 186 (Wis. 1932)

The argument

“‘There is not a man of you that would trade his left hip for \$30,000.’”

Defendant objected to the statement, and the trial court “immediately instructed the jury to disregard it.”

The holding: The Wisconsin Supreme Court held that this golden rule line of argument “clearly constituted improper argument.” In upholding the trial court’s granting of a new trial on the basis of an excessive damages award deemed to stem from the improper argument, the Wisconsin Supreme Court further ruled that,

“As in the case of the damages, it is not necessary to decide whether, had the trial court approved the verdict, this court would have set aside the verdict because of the improper argument to the jury. Even if this court might have held in such a situation that the immediate instruction of the trial court to disregard the statements avoided the necessity of a reversal, we think there was ground for the trial court to come to the conclusion that his warning to the jury to disregard the statements had not been effective to counteract their prejudicial effect, in view of the extremely high damages that were awarded. We think it clear that the record discloses grounds upon which the trial court could justifiably come to the conclusion that justice had not been done. It follows that there was no error in granting a new trial.”

50. WYOMING: *Logan v. Pacific Intermountain Express Company*, 400 P.2d 488, (Wyo 1965).

In a motor vehicle collision case, defense counsel during closing “in discussing the actions taken by the driver of the truck when the Weimer car going east ‘fish-tailed’ across the highway into the westbound lane in front of P.I.E.’s truck, inquired of the jury, ‘What would you do’ under such circumstances?”

The Wyoming Supreme Court held the argument was improper; however, the failure of counsel to make contemporaneous objection to the argument waived the error. In discussing the nature of the argument made, the Court observed: "Plaintiffs complain that such argument was prejudicial because it gave to the jury an improper conception of the standard of care upon which it had been instructed by the court. When it is considered that the jury was instructed on the basic proposition that the standard was that of a reasonable man of ordinary prudence under all of the circumstances, it may appear to the uninitiated that the objection was rather superficial. Nevertheless, plaintiffs' complaint is not without some merit. The mischief of such an argument is that it tends to influence jurors to depart from their role of impartiality and step into the shoes of a litigant. As a general rule such a practice is condemned and, depending upon the circumstances, may or may not be prejudicial."

A year later, in Henman v. Klinger, 409 P.2d 631 (Wyo. 1966), the Wyoming Supreme Court extended the holding in Logan to prohibit use of a unit argument in arguing damages to the jury. The argument made in the case was:

"The fact is, this man was hurt and hurt horribly and he was in excruciating pain and most of the time it was indescribable pain, and he was in the hospital for seventy days, and I wouldn't ask you to say, but, well, what would you take in money for seventy days in the hospital in this kind of pain? You take your seventy days in the hospital,

I don't know what you would take for it, but I am going to say in this case the evidence is of such a nature that you could award \$200.00 a day for that seventy days, * * *"

Holding the argument improper, the Wyoming Court stated:

"One obvious impropriety in the argument is the question put to members of the jury, 'What would you take in money for seventy

days in the hospital in this kind of pain?’ In the law such technique has become known as resort to the ‘Golden Rule,’ a practice we cautioned against in Logan v. Pacific Intermountain Express Company, Wyo., 400 P.2d 488, 494.

“How can the jury function be aided by an argument which necessarily is premised on assumptions of fact having no evidentiary basis and tempered only by the candor of counsel advancing such an argument? Without intimating that a jury will resort to a ‘blind guess’ rather than to apply to the evidence the combined ‘knowledge, observation and experience’ of its members as instructed, what is there that makes the ‘blind guess’ of counsel any more alluring or helpful to the true administration of justice? Nothing that we can discover. Viewed realistically, we are disposed to regard the technique as nothing more than a device to clothe with an aura of reasonableness the often fantastic claims made for such an element of damage and hence a technique tending primarily to mislead the jury. And neither do we believe that the misleading effect of such argument can be cured by the use of a similar argument by opposing counsel.”

APPENDIX B -2

COMMUNITY SAFETY BOUNDARIES

The issue of public and community safety is difficult to research since, unlike research on the Golden Rule, there are no “key words.” Therefore we have provided the following suggestions:

Argument can be fashioned around an appeal to jurors as representing the collective conscience or regulators of community standards.

But it is important to research carefully the law of the particular as there are important local variations in what is permissible. For example, as noted in the Golden Rule material, the Georgia Court of Appeals in *Weaver v. Ross*, 192 Ga. App. 568; 386 S.E.2d 43 (1989), a medical malpractice wrongful death case, stated “we are not persuaded that appellees' closing argument, addressing the jury as ‘the regulators of this community,’ and stating that the jury verdict ‘will go a long way in determining how will treat their patients,’ was tantamount to an argument that the verdict should be used to punish the defendant.”

Conversely, in *Blue Grass Shows, Inc. v. Collins*, 614 So. 2d 626 (Fla. 1st DCA 1993) counsel made the following closing in a personal injury case:

“I'll leave you with two thoughts. The fair is coming back to Jacksonville, bringing the amusement back. You folks, as you sit here in Duval County, Florida, you become the conscience of the community. It is you who will tell the fair what kind of standard and what kind of protection you want for the citizens of this town by your verdict; that you aren't going to tolerate this type of thing

where they invite people to use their amusements and don't safeguard them properly and hurt the people in Jacksonville, Florida. You are the conscience of the community.”

The Court of Appeals stated there were “legions of cases condemning arguments similar to the one made by appellees and, beyond question, this line of argument was improper.” The Court viewed an appeal to the conscience of the community as an appeal to set aside the rule of law and reach a result on an “us versus them” basis.

Thus it is clear that you must know where your state draws the line in determining the scope of permissible argument in this area. Some common areas where you may find support for the permissibility of referencing community standards as a part of the jurors’ role in deciding your case include the following:

U.S. Supreme Court jurisprudence in deciding issues of obscenity, as well as Federal statutes consistently reference contemporary community standards as being the criteria for making a determination of whether any particular work is obscene. See e.g. *Roth v. United States*, 354 U.S. 476; 77 S. Ct. 1304; 1 L. Ed. 2d 1498 (1957), *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564; 122 S. Ct. 1700; 152 L. Ed. 2d 771 (2002).

The United States Supreme Court has also recognized that local jurors are stakeholders in civil disputes to which they are not parties in a line of *forum non conveniens* cases, starting with *Gulf Oil Corp v. Gilbert*, 330 U.S. 501; 67 S. Ct. 839; 91 L. Ed. 1055 (1947) stating, “In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.”

Many state forum non conveniens statutes borrow from the Gulf Oil Corp v. Gilbert local interest factors and expressly make a weighing of local interests in the case a factor in determining the appropriateness of a plaintiff's choice of venue. (See e.g. O.C.G.A. §9-10-31.1(6) "Existence of local interests in deciding the case locally"). Presumably if local interests are an appropriate factor in determining whether the case stays put in a particular venue, then a reference to the jury's stake and role in deciding the case can be argued to be appropriate.

Venue statutes in and of themselves generally require that an action be brought in a county of residence of one of the parties or the county in which the incident at issue took place. It follows from such a legislative requirement that the state's public policy implicitly recognizes that members of the community are deemed to be interested parties in the determination of those controversies. If the case involves claims of professional negligence and the jurisdiction evaluates such claims by reference to a local rather than a national standard of care, the existence of a local standard again implicates the role of and an appeal to the role of jurors as setting the standard.

These are but a few of the areas that may be reviewed in preparing to support the propriety of an argument that asks jurors to assume a role as protectors of their community. You will find other examples in your own locality.