



PREPARING WITNESSES AGAINST THE REPTILE CROSS-EXAMINATION AT DEPOSITION

© Kathleen A. Stosuy
Partner, Kramer, deBoer & Keane, LLP

In the May 2015 issue of our newsletter, Erik Laakkonen discussed our firm's victory at trial over a plaintiff's attorney who attempted to utilize the so-called Reptile Theory to prosecute his case. The basis of the Reptile Theory is that the alleged violation of a purported safety rule by the defendant creates a danger to people like those on the jury. Unwitting responses can inflame the jury and cause them to think that the defendant and their witnesses are callous about public safety.

The earliest, and perhaps best, way to defend proactively against this tactic is to prepare your witnesses for deposition so that the plaintiff's attorney cannot obtain the necessary admissions or concessions from the defense that would support the Reptile trial strategy. At deposition, the Reptile attorney will attempt to elicit certain concessions from the defendant and other witnesses regarding "safety" rules. Some of the common signs of the Reptile questions at deposition include:

- Questions focusing on information that is remotely relevant (e.g., the case is about a specific incident but plaintiff's focus is on broad notions of safety that seem relevant in only a vague and general sense).
- Questions that attempt to get the defendant to agree that the defendant must guarantee absolute safety (e.g., suggesting doctors must guarantee patient safety in that they must always choose the safest course of treatment).
- Questions concentrating on concepts of potential harm as opposed to actual harm.
- Questions relating to general standards concerning policies or procedures in which the plaintiff tries to get the witness to agree that such policies and procedures must be followed for safety purposes.
- Questions seeking agreement that failure to follow policies and procedures can cause injury.
- Questions seeking confirmation that if failure to follow policies and procedures results in injury, then those not following the procedures are responsible for the injury.
- Questions using words like good health, mobility, endanger, safety, policy, procedure, potential harm, community safety, and similar terms.

It is always imperative to recognize a Reptile line of deposition questions and prevent them from escalating. The questions are framed in such a general way that common sense, and the initial knee jerk reaction from a witness, is to agree. Examples of such questions include:

- Medical Malpractice Cases:
 - A doctor must not needlessly expose a patient to an unnecessary danger, correct?
 - A doctor must always choose the safest course of treatment for the patient, correct?
- Automobile/Trucking Cases:
 - There are specific rules of the road that everyone must follow, correct?
 - All drivers are required to pay attention at all times, correct?
 - If someone is not paying attention they can cause an accident, correct?
 - If someone is injured in an accident as a result of the other driver not paying attention, then the inattentive driver is at fault, correct?
- Product Liability Cases:
 - A product manufacturer must make products that are free from defects, correct?
 - If a manufacturer makes a product that has a defect and someone is injured because of that defect, then the manufacturer is responsible for the harm and losses caused, correct?

Who would not agree with the foregoing general safety rules? Safety rules are central to the Reptile process, with the idea to trap witnesses first into agreeing with general safety principles and danger avoidance/risk avoidance principles, then move into more specific safety rules, and finally pinning witnesses down on specific safety rules or danger avoidance concepts that were broken by this particular defendant. When done effectively, the Reptile strategy confuses witnesses and results in those detrimental admissions. Thorough witness preparation is the key to defend against Reptile questioning tactics.

First, identify the general safety rule (e.g., a doctor must never expose a patient to unnecessary danger). The Reptile theory involves plaintiff's counsel creating a safety rule, which counsel will argue the defendant violated, leading to the injury at hand. In order to attack the Reptile effect effectively, it is important to get a handle on what the safety rule is. Anti-Reptile themes should be developed that emphasize the standard of care and the legitimacy and fairness of standards of care in the context involved.

Next, prepare, prepare, prepare your witness! Defense witnesses are often lulled into believing that their best strategy is just to "listen to the question, answer the question, and don't volunteer anything unnecessary." Generally this is a good strategy to follow – unless you are up against the Reptile. Once you hear the buzzwords at deposition (safety, danger, harm – all in the general sense) you need to have your witness ready to go beyond the "yes" or "no" answer, offering explanations and caveats. This is where the extra preparation pays off.

The additional preparation in time spent with the witness helps to get him or her familiar with the general "safety" concepts that may come up at deposition, and prepares the witness with responses and explanations that extend past the "yes" or "no" answer. This may take numerous meetings and practice sessions to ensure that the witness understands what the Reptile tactics are, how to recognize the Reptile buzzwords, and how to answer those seemingly innocent general safety questions. Ensure that the witness is familiar with the defense buzzwords that will be used in the jury instructions at trial and to incorporate them into their response.

Here are some examples of what Reptile questions might be asked, and how your witness can respond effectively to defeat the Reptile plaintiff attorney:

- Q: During the period of time when you were receiving your professional training, were you taught some basic safety principles about caring for others' safety?
- A: During my training I was taught that the standard of care requires professionals to use the level of skill, knowledge, and care in analysis and implementation that other reasonably careful professionals would use in the same or similar circumstances.
- Q: Is a professional ever allowed to needlessly endanger someone else?
- A: Professionals are required by the standard of care to use the level of skill, knowledge, and care in analysis and implementation that other reasonably careful professionals would use in the same or similar circumstances. A professional is not necessarily negligent just because he or she chooses one standard accepted method of analysis and implementation and it turns out that another standard accepted method could have been used instead.
- Q: If a change in the course of action is going to be made that has increased risk, were you taught that there must be increased benefit to offset that risk?
- A: Yes, you want to do things that have more benefit than risk. However, a professional is not necessarily negligent just because he or she chooses one standard accepted method of analysis or implementation and it turns out that another standard accepted method would have been a better choice. A professional is only negligent when he or she was not as skillful, knowledgeable, or careful as other reasonable professionals would have been in similar circumstances.

Witness preparation for deposition is always important. However, it is even more crucial when facing the Reptile plaintiff's attorney. Witness depositions are the first line of defense in attempting to thwart the use of the Reptile Theory at trial.

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.