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The "Reverse Reptile"

Turning the Tables on Plaintiff's Counsel



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"Q. You would agree that safety must be the company's top priority?

A. Yes.

Q. Because safety is your company's top priority, employees who are being unsafe cannot be tolerated?

A. Of course, yes.

Q. If you are unsafe and someone is hurt, then the company is to blame?

A. Yes."

Sleep eludes the defense lawyer with an impending trial and a key witness who has fallen victim to the Reptile safety rule attack in deposition. The damage is now done¹ and the defense counsel faces an uphill battle in front of any jury. The call to the client after a deposition in which a defendant is Reptiled usually ends the same way: "I get how simple this is for the plaintiffs. In fact, I am sick of hearing about it. Is there anything that we can use to fight back?"

The answer is a resounding "Yes!" It is called the Reverse Reptile. If played correctly, defense counsel can lock the plaintiff, a co-defendant, and/or their experts into unfavorable testimony which will appear hypocritical to any audience. Such damaging testimony can torpedo a plaintiff attorney's efforts early in the case, and the defense can acquire significant bargaining leverage (assuming defense witnesses perform well themselves).

¹ There are methods that can be utilized to blunt the reptile attack at trial, such as witness preparation and aggressive motions in limine, but when the safety rule questions and answers are presented clearly at the deposition it is incredibly hard for a judge to see the impropriety.

The purpose of this paper is to provide an outline of techniques and skills required for defense counsel to successfully complete a Reverse Reptile attack on plaintiff or co-defendant witnesses. More specifically, the authors of this paper will: 1) describe the types of cases appropriate for the Reverse Reptile strategy, 2) provide a tutorial on how to develop effective safety rule questions and when to use them, and 3) explain witnesses' psychological responses to safety rule questions and how to take advantage of witnesses' unconscious cognitive errors.

What makes the Reptile approach so damaging is how simple and straightforward it is. The plaintiff can utilize it to "define" the critical jury instruction terms that will determine if the case is won or lost. A safety rule violation is a concept that a plaintiff juror can latch on to and sway the defense jurors during deliberations, even in the most clear-cut defense cases. Plaintiff jurors who are convinced that a company has violated safety rules and therefore has created a danger to the community feel empowered to award high damages against the corporation as a means of protecting the community from harm. Importantly, the opposite is also true: the defense can also show that the plaintiff or a co-defendant has violated a safety rule. Defense jurors who are convinced of safety rule violations committed by the plaintiff or by a co-defendant have the ammunition they need to argue against the most strident of plaintiff jurors.



When to Deploy the Reverse Reptile

The Reverse Reptile strategy typically requires a matter with comparative fault. The Reverse Reptile can be deployed when the facts allow you to place the majority of the blame on the plaintiff, the co-defendant, or the empty chair. This is not to say that the Reverse Reptile cannot be effectively used in matters of contentious litigation. The strategy lends itself well to cases such as medical malpractice, products liability, trucking, premises, and construction matters. The safety rule violations of the plaintiff, co-defendant, or empty chair often involve:

- Non-compliance with medical instructions,
- Misuse of a product,
- Reckless or careless behavior or decision-making, or
- Non-adherence to company policies or procedures.

In other situations, Reverse Reptiling a plaintiff, their family, or their expert could be very unwise. This is not a strategy that can be used effectively against a plaintiff who has little to no fault in the liability of a case. Additionally, the defense should avoid using the Reverse Reptile strategy against a plaintiff in matters involving:

- Injuries or death from known surgical complications,
- Birth injuries, or
- Injuries to children or adolescents.



Development and Sequencing of Safety Rule Questions

Whether it be plaintiff or defense counsel, an effective Reptile attack requires painstaking effort to both construct and order the questions in a manner which fully capitalizes on the natural biases and flaws of the witness's brain (Kanasky 2014, Derail). Plaintiff attorneys spend thousands of dollars for advanced training to learn these skills in an effort to outmaneuver defense counsel who have not undergone such training.

To accomplish a Reverse Reptile attack, defense counsel needs to begin by presenting the plaintiff, co-defendant(s), and/or their experts with a series of general safety and/or danger rule questions. However, while blanket safety rules are important (e.g. "Safety is your number one priority, right?"), to effectively use the Reverse Reptile technique, case specific rules must be created that tie into the overarching comparative fault theme.

Safe workers must do X, Y, and Z and coincidentally the plaintiff (or co-defendant) violated X, Y and Z on the day of the incident. Establish with the witness what safety means, establish what hazards exist, and then use the simple, straightforward rules to show how the plaintiff (or co-defendant) was not safe and how they ignored the hazard.

As the sequence of questioning proceeds:

- The target witness will instinctually agree to the safety and/ or danger rule questions because

it supports their highly-reinforced belief that safety is always paramount and that danger should always be avoided;

- The target witness will continue to agree to additional safety and/or danger rule questions that link safety and/or danger to specific conduct, as it aligns with their previous agreement to the general safety and/or danger rules;
- The target witness will unknowingly and inadvertently entrench themselves deeply into an absolute, inflexible stance that omits circumstances;
- Defense counsel then presents case facts to the target witness that create internal discomfort, as these facts do not align with the previous safety and/or danger rule agreements;
- Defense counsel then illuminates that the safety and/or danger rules, which have been repeatedly agreed to under oath, have been violated and that harm has been done as a result;
- The target witness then regrettably admits to culpability and fault, as the perception of hypocrisy has been deeply instilled.
- The target witness further admits that if the plaintiff (or co-defendant) would have followed the safety and/or danger rules, the injuries would certainly have been prevented.

The four devastating psychological weapons that cause the sequence above are known as: Confirmation Bias, Anchoring Bias, Cognitive Dissonance, and the Hypocrisy Paradigm (see Kanasky, 2014 for a more detailed description of each psychological tactic). It has been shown that the average witness stands no chance against these potent psychological weapons when they are used effectively.

Importantly, when developing questions in an effort to lead the witness into admissions that safety rules have been broken, the sequencing of the questions is key. As shown in the table below, general safety/danger rule questions are asked first to take advantage of the witness's cognitive schema regarding safety. The general rules are followed by more specific safety/danger rules, then case facts, and finally questions about fault or causation. When using the Reverse Reptile, asking multiple general safety/danger rules may not be as useful as they could potentially apply to your client as well. Thus, the majority of rules developed often need to be specific safety/danger rules.

For example, in Table 1 below, testimony from a Reverse Reptile deposition of a co-defendant's expert is presented. The matter involved an injury that occurred during the unloading of a truck. The injured plaintiff was the truck driver who participated in both the loading and unloading of the truck. Two co-defendants, the crane operator who loaded the truck and the crane operator who unloaded the truck, were pointing fingers at each other and the plaintiff. The defense attorney utilizing the Reverse Reptile represented the individual who loaded the truck.

The safety rulebook developed by the defense attorney using the Reverse Reptile established the many levels of fault that the unloading co-defendant crane operator had while supporting the actions taken by the loading defendant crane operator. As shown below, general safety rule questions set the stage for the multiple specific safety rule questions that followed. The expert agreed to each of these

specific rules and then became uncomfortable when forced to admit that the specific rules were broken by the crane operator unloading the truck in this case. Finally, the expert regretfully agreed that the injury would not have occurred had the crane operator unloading the truck followed the safety rules.

The actual testimony is shown below in bold. There were additional questions asked between some of the questions shown below, but the sequence of the questions has not been changed. Each question type is identified as is the psychological weapon utilized.

Table 1. Reverse Reptiling of Co-Defendant's (Crane Operator's) Expert

QUESTION TYPE	QUESTION	RESPONSE	PSYCHOLOGICAL WEAPON
General Safety Question	You would agree that a safe crane operator is a careful crane operator?	Yes.	Confirmation Bias of Cognitive Schema
Specific Safety Question	And that safe crane operators are aware at all times while they are operating the crane?	Yes.	Anchoring Bias to General Safety Agreement
General Safety Question	And you would agree that a safe crane operator is a trained and qualified crane operator?	Yes.	Confirmation Bias of Cognitive Schema
Specific Safety Question	You would agree that a safe crane operator develops a safe lift plan?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	And a safe lift plan will take the individual load configuration into account before beginning the lift?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	Would you agree that a safe crane operator knows what he is lifting before he lifts it?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	And he knows what the load is before he lifts it?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	Would you agree that a safe crane operator inspects the load before beginning a lift?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	Do you believe that part of the inspection is visualizing the load before and during the actual lift to make sure it stays balanced?	Yes.	Anchoring Bias to General Safety Agreement

Case Fact Question	Mr. Smith was not trained to inspect the subject load prior to unloading, correct?	I don't believe he was.	Cognitive Dissonance
Case Fact Question	Mr. Smith did not know what was on the load prior to unloading, correct?	Correct.	Cognitive Dissonance
Hypocrisy Question (Causation)	Mr. Jones never gets hurt if Mr. Smith takes his time?	Yes.	Regretful Agreement

Ultimately, in this case, the Reverse Reptile was used against the co-defendant's expert to such effect that a motion in limine was filed attempting to bar the questions asked (it was denied) and then, at trial, the expert was withdrawn due to the detrimental nature of his admissions.



Obtaining Clean Deposition Answers

As shown above, the majority of the expert's responses were "Yes" as he agreed unequivocally with safety rule after safety rule posed by defense counsel. To be effective, just like when a plaintiff employs the tactic, the questions must be plain language, simple and easy to understand with a correspondingly simple answer such as 'yes,' 'I agree,' or 'true.' If one cannot get these clean answers on the first try, you must be willing to ask the question again (and again, if necessary).

Too often defense depositions are fishing expeditions in banal minutiae that fail to set up the key cross examination issues during trial. A trial lawyer may get the general gist of a helpful admission but making sure that the witness is unable to wriggle

out of it is another thing entirely. Put another way, the deposing attorney never stops to think how they are going to secure the key admission which can be used to beat the witness over the head with at trial. In depositions like these, the nugget of key testimony is surrounded by qualification and surplus words that decrease the strength of the would-be impeachment.

An example of the buried admission from an expert's deposition testimony:

Q. Do you agree that Mr. Smith was not properly trained to operate the crane on the day of the accident?

A. He knew how to operate the crane, yes. He was taught how to operate the crane, did he miss some steps, did he do some things wrong? Sure.

While the witness gives a little credence to your question, he still gets in enough qualification that setting up the impeachment at trial will be more difficult than it needs to be. This cannot be the way the defense Reptile is deployed. One needs the clean, clear and simple admissions that allow for brutal cross examinations. That means when there

is a buried admission, the deposing lawyer must follow up immediately with:

Q. You agree that Mr. Smith got some major things wrong?

A. Yes.

This is how one must approach depositions to properly utilize this strategy. Unfortunately, too many attorneys do not envision how the key questions play at trial. To Reverse Reptile (or to simply take an effective deposition), the questioner must work to obtain simple and clean admissions.

Covert vs. Overt Questioning: Letting the Reptile Loose

There is no concrete methodology regarding when to start establishing the safety rulebook with a fact witness or an opposing expert. It should go without saying the experience and preparedness of the witness must be factored into the strategy. With fact witnesses, safety rule questioning pairs well with inquiries about personal knowledge, experience and training.

For instance:

Q. You worked for Smith construction from 1995-2006 ... Yes.

Q. Smith Construction trained you before and during your employment... Yes.

Q. Because of your training, you know that safety must be your top priority... Of course.

Q. You would agree that if you are not being safe,

then you are not doing your job properly... True.
Q. Doing your job you never want to needlessly endanger yourself or those working around you...
Yes.

If the witness is an expert, you can ask these questions during the background, going through prior testimony or attempt to establish the safety rules vis a vis the facts of the case. This last method can be the most difficult as an experienced expert will likely be able to identify your strategy after two or three rules.

Case studies

The research and testing of the reverse reptile² is ongoing. So far, the strategy has resulted in providing the defense with a better bargaining position. This strategy costs nothing and it can only aid in the trial preparation process. What is illustrated below are examples from different types of litigation showing how one can adopt a plaintiff tactic to obtain positive testimony that better positions one's case for resolution or trial.

Construction Worksite

Below is testimony from a premises liability action in which a tradesman fell and suffered severe injuries. In this case, the plaintiff was carrying an excessive amount of material down a ramp. He lost his balance and fell, resulting in injuries that were claimed to have prevented him from continuing to

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work as a tradesman. The defense focused on the plaintiff's training, knowledge of falls, the employer and worksite safety plans and the safety devices available to him. The case, venued in a worker friendly jurisdiction, settled on the eve of trial for an employer friendly number.

The safety rules were established during questioning regarding the plaintiff's expert's prior testimony history. Each case that the expert had worked on allowed for additional safety rules to be established. The rules then applied to the facts of this case conclusively show how the plaintiff was contributorily negligent.

The following is from the Plaintiff's worksite safety expert's deposition:

Q. And would you agree that a tradesman must never needlessly endanger himself or his coworkers while he's doing his task?

A. Right, never needlessly endanger himself.

Q. And he should never needlessly endanger his coworkers?

A. [H]e should avoid endangering anybody, yes.

Q. You would agree that the plaintiff on this job site had a duty to inspect his work area for potential hazards?

A. Yes.

Q. You would agree that if you are aware of a hazard and you encounter it, you're exposing yourself to danger?

A. Somewhat, yes. Sure.

Q. You'd agree that the more dangerous the task is, the more careful the tradesman must be?

A. Yes.

Q. And the tradesman must pay attention to the area that he's working in and around?

A. I agree.

Q. And you agree a tradesman should never knowingly put himself in a dangerous situation?

A. I agree, although, he does have a job to do and he has to get his work done.

Q. You can't put the job over your well-being. Do you agree with that?

A. I mean, he knew it was wet. I don't know that he knew he was going to get injured.

Q. He knew he could slip, though?

A. He knew it was a possibility. He'd seen slips, and there was complaints that people were slipping.

Q. And he knowingly decided to continue to work in that condition?

A. Yes.

Each safety rule speaks to the actions of the plaintiff in light of the defendant's case against him. Had this matter not settled, a trial demonstrative with rule after rule that the plaintiff violated would have been used from opening through closing. This approach also allows for a "co-opting" of the plaintiff's expert which can neutralize the impact of his testimony.

Transportation

Trucking cases are common for utilization of the Reptile theory and the same is true for the defense application of it. In the following example, the safety rules were adopted to attack a plaintiff that impacted a disabled truck at night. The defense focused on the actions of the plaintiff driver and

his awareness of his surroundings. The Reptile rules establishing what a “safe” driver would do were successful when paired with the accident reconstructionist to show that the plaintiff was legally responsible for his own injuries.

Q Would you consider that darkness is a hazard for a driver?

A Sure.

Q And a driver needs to be more careful when they’re driving in the dark?

A The driver needs to slow down because he can’t see. Typically, if he’s running too fast, he can’t see far enough in his headlights.

Q Does a safe driver want to overdrive his headlights?

A No. We see it happen on a regular basis, but, no, you shouldn’t.

Q When driving at night, the driver needs to be most aware of the space that he’s driving into at night.

A Sure.

Q You’d agree that, as a rule, a driver must be aware at all times?

A Yes.

Q Okay. And you’d agree with me that, again, that a safe driver is going to stop within the area that is illuminated by his headlights?

A I would agree that he should, yes.

Q You’d agree a safe driver must keep his vehicle under control at all times?

A He should, yes.

Q And you would agree that safety is important in preventing accidents?

A Yes.

Q And people should be aware of their surroundings?

A Yes. We’ve covered that.

Q Going too fast for conditions, that’s a hazard?

A Yes.

Q Construction zones can be a hazard?

A Yes.

Q Darkness is a hazard?

A Certainly.

These questions show that a safe driver needs to be aware at all times [the plaintiff was not], be able to stop in the area illuminated by the headlights [the plaintiff did not], and keep his vehicle under control at all times [the plaintiff did not]. The questions also established the “hazards” that the plaintiff ignored by violating the safety rules: (1) darkness, (2) going too fast, and (3) his surroundings. All of these enhance the closing arguments when the defense lawyer requests that a jury send the plaintiff out the door with nothing.



Conclusion

As illustrated in the examples provided above, the Reverse Reptile can be an effective tool that is used to support the comparative fault of the plaintiff, a co-defendant or a non-party. The safety rules applicable to a plaintiff’s own actions can also be applied to the plaintiff’s contributory fault. Thus, the additional time spent planning and preparing deposition questions is minimal compared to the advantage that it can provide the defense.

Importantly, though, relying on the Reverse Reptile strategy in deposing the plaintiff (or co-defendant)

witnesses alone will not be sufficient to combat a plaintiff attorney skilled in the Reptile strategy. Safety rule questioning is one tool among many in a multi-pronged approach to a strong defense. The defense attorney will also need to: 1) ensure that his/her own witnesses are able to cognitively and emotionally withstand safety rule questioning during deposition and at trial (see Kanasky, 2014 and Kanasky et al., 2018), 2) carefully plan voir dire questioning as well as opening and closing statements to reduce the impact of the plaintiff's "rules" and emphasize those supporting the defense, and 3) file motions in limine as appropriate. This proactive and cumulative approach gives the defense added ammunition when fighting questionable liability claims and allows the defense to argue that personal responsibility still matters. Ultimately, the use of the Reverse Reptile provides defense attorneys greater leverage in defending, resolving and trying cases.

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About the Authors



Paul Motz is a trial lawyer with over a decade of experience litigating cases in the worst defense jurisdictions in the nation. Since joining Patton & Ryan, his practice is focused on defending individuals, professionals and corporations in catastrophic loss and professional negligence claims.

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Dr. Loberg earned her master's degree from Mississippi State University in 2003 and her doctoral degree from the University of South Florida in 2010. She has provided CLEs to attorneys regarding ways to defeat the plaintiff Reptile theory, effective use of jury supplemental questionnaires, the ability of mock trial research to inform settlement decisions, and neuropsychological approaches in witness training.



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