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Defense Techniques for Combating Plaintiff's Reptile Strategy

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A. Introduction

Have you seen the T-Rex "Sue" in the main foyer at the Field Museum of Natural History in Chicago? At the Defense Research Institute (DRI) Annual Meeting this past October, the Thursday night reception was held there. A different T-Rex has been on display over the past few weeks at the Des Moines Science Center. Based on recent developments in courtrooms around the country, including Iowa, these exhibitions are appropriate.

A troublesome development in the litigation arena is the appearance of green-skinned, slimy and cold-blooded lizards, also known as "Reptiles." These plaintiffs use tactics developed by successful personal injury attorneys David Ball and Don Keenan, who authored

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WHAT'S INSIDE

IDCA President's Letter

Kevin Reynolds
IDCA President

The Value of IDCA

We are all busy lawyers. We could belong to a whole host of legal and professional organizations. We would probably belong to more if we had the time and the money. But why the Iowa Defense Counsel Association? What is the advantage, where is the value?

Let me cite two examples of situations that occurred in my practice recently. Shortly before Christmas, a partner of mine was defending a serious personal injury case. The Plaintiff in that matter had just identified expert witnesses. One of the experts is a fairly well-known, well-traveled professional testifier who specializes in both economics and "life care plans." He offers "one stop shopping," if you will. Unfortunately, my partner had not ever deposed this expert before, or if he had, it had been years ago. There was a definite need for "intel" on this expert, whose testimony might be critically important in the case.

Now, my partner knew that I have been active in the Defense Research Institute (DRI) since the late 1980s. Based on this knowledge he asked: "Could you ask some of your DRI buddies and see if they have run into this expert? Do they have any of his reports in other cases? Do they have any deposition transcripts?"

My response? "I can do a lot better than that. Since this person is based in Iowa, I can send out an inquiry on the Iowa Defense Counsel Association's listserv and I'm sure I can get some information for you."

I sent out the inquiry first thing in the morning on a Friday. That same morning, I attended the ISBA Federal Practice Seminar. One of my defense colleagues and long-time IDCA member saw me at the back of the room, and without any preliminaries, asked: "How much stuff do you want?" I chuckled. He responded: "No, seriously, how much stuff do you want? I have a voluminous, complete file on this "expert." I tell you what, I will have my office send you a list of the stuff we have on this guy (reports, c.v.s, deposition transcripts, motions, court rulings limiting his opinions, etc.), you can look over that list and tell me what you want and I will send it to you."

Another IDCA friend reported back: "By Monday, your mailbox is going to be full!" Needless to say that prediction came true. Immediately tons of information came flowing in and I had to enlist the help of a legal assistant to gather and organize all of the information received!

The Iowa Defense Counsel Association's listserv is probably one of IDCA's most under-utilized resources. The plaintiff's bar has been networking for decades; it's about time that defense lawyers got over their "fear" of giving away their closely-held secrets and working with their colleagues to effectively defend our clients. If you are a member of IDCA, here is how you use it. (IDCA member log-in required to view this restricted page.)

If you haven't tried it, please do so, you will be amazed at the positive responses you will generate! And, as a side benefit, you will make contact with friends and colleagues that you haven't heard from in a while.

By now, you have renewed your $275 dues in IDCA. Do a cost-benefit analysis. Honestly, how much is it worth to you or your client, or for you to be of helpful and expert assistance to your client, to be able to access the type of information described above simply by being a member of the IDCA? Is it worth $275 to have this kind of access to information literally at your fingertips? Or is it, in fact, worth many multiples of that? What other organization specially committed to the defense of civil litigation in Iowa can compete with this type of access to information, that can help you win your next lawsuit?

And this is just one example; many others abound. IDCA's ability to write amicus briefs on important legal issues confronted by our members and clients. The opportunity to meet and confer with other defense lawyers, insurance industry claims people, technical experts and vendors at the Annual Meeting and Seminar. Quarterly receipt of IDCA's flagship publication, Defense Update, the opportunity for young or new defense lawyers to become active in the organization by joining acommittee, speaking at seminar or webinar, writing an article for Defense Update or serving on the Board or attending a deposition bootcamp. And the list goes on.

With your indulgence, I will cite one other real-life example of the value of the IDCA. The IDCA Board of Directors had a

quarterly board meeting on Dec. 8, 2017. At that meeting, during a general discussion about how we might increase organization membership, a board member from the insurance industry brought our attention to the fact that the American Law Institute (ALI) was currently drafting a "Restatement of the Law of Liability Insurance." A published version of this work is set to be released in 2018. Speaking for myself, I had never heard about this before, even though part of my practice involves insurance law. After this mention, I Googled it. I found out that yes, the ALI was coming out with a new Restatement of the Law on Insurance, and yes, significant changes in the law were a part of this work.

Further investigation revealed that in many cases, the Restatement takes positions that are not consistent with existing law as interpreted by U. S. courts. Some of these changes are fundamental, and none of them are supported by current law. For example, in Section 12, the Restatement sets out new rules concerning the liability of the insurer for defense counsel's conduct in defending the policyholder. Section 12 would provide that "[A] n insurer exercising the right to defend a legal action is subject to liability for the negligence or other breach of professional obligation of defense counsel and related service providers if the insurer negligently selects or supervises defense counsel." This Section would create new direct liability on the part of the insurer to the insured for the acts of defense counsel, and would do so in the absence of appropriate support in the case law for applying direct liability in this setting. In fact, the Restatement draft itself acknowledges that "[t]here is little case law on this topic."

As it that were not bad enough, the proposed Restatement includes an unprecedented endorsement of one-way attorney fee shifting that departs from the "American rule" that each party is responsible for his or her own attorney's fees. The project, in multiple contexts, recommends that an insurer that loses a dispute with a policyholder would have to pay the policyholder's attorney's fees, but if the insurer prevailed, it would have to pay its own attorneys' fees. The defense bar believes that it is wholly inappropriate to address the very controversial issue of one-way attorney fee shifting in the context of a Restatement on the topic of liability insurance, where attorney fee shifting is not inherently a substantive insurance law issue.

The Board of Editors of Defense Update is in the process of recruiting an author(s) who can write a more fulsome article on the forthcoming Restatement and the issues of concern to liability insurance companies and defense counsel. I would not have been aware of these developments had I not been a member of IDCA.

Is it worth $275 (a number that represents a measly one or two billable hours of work for most attorneys in Iowa) a year to be aware of such things? To pose the question is to answer it. Membership and active participation in the Iowa Defense Counsel Association marks an Iowa defense lawyer as someone who is committed to the practice of law. We all strive to educate ourselves and do a better job for our clients. I truly believe that the IDCA can and does play a critical role in that effort.

Kevin Reynolds

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a book on the subject. *See* "Reptile: the 2009 Manual of the Plaintiff's Revolution" (hereinafter *"Reptile"*). Simply stated, the "Reptile" approach uses an emotional, "forget-the-law and don't-bother-me-with-the-facts" approach to manipulate a lay person jury into returning an enormously huge verdict for Plaintiff. It seeks jury nullification of the facts and law. In many cases some truly astronomical jury verdicts have been seen, even in the Hawkeye State, heretofore that great bastion of conservatism.

This article is not going to analyze the pseudo-psychological underpinnings of the Reptile theory. Whatever science (or *junk science*) supports it, its apparent effectiveness cannot be overestimated. Instead, this article will try to identify plaintiff's specific techniques and offer practice pointers on how defense lawyers can "fight fire with fire" and meet this challenge head-on.

Real-life scenarios will be presented, with possible defense responses. We do not claim to have the right answers; heck, we aren't even sure we have the right questions. But we do have significant scar tissue well-earned from trying several jury cases against aggressive and effective adversaries. We have given this issue some careful thought. As much as anything, we would like to start and carry forward a defense discussion of this important and timely topic.

B. The Petition or Complaint

Some may think that the "Reptile strategy" is a technique used at trial, but in most cases it starts well before then. Plaintiffs may show their hand as Reptiles early in the pleading stage. Be on the lookout for red flag terms such as: "safety," "needlessly endanger," "safety rules," "danger," "unnecessary risk," "safest available choice," "the No. 1 consideration is 'safety,'" "responsibility," "required" and "not allowed." If the plaintiff overtly pleads these terms, they may be referenced in your pretrial motion in *limine* as proof of where the plaintiff intends to go in their trial presentation.

As soon as your client assigns you the matter for defense, get some "intel" on Plaintiff's counsel. Are they a known Reptile adherent? Are they an active member of ATLA (now AAJ) or the IAJ? (The authors have always been suspicious of any organization that has the term "justice" in its title, or any law firm that has the scales of justice in its letterhead.) Are they associated with "Trial Lawyers 4 Public Justice?" What is their track record? Find out as soon as you can to prepare and design your defense from the inception.

Once you know who your adversary is, as a member you can use the Iowa Defense Counsel Association (IDCA) list serve to see if there are other defense counsel who have tried cases against them. In the authors' view, this service is horrendously underutilized. Here are the instructions for making a posting in the list serve:

1. Open your email program.
2. In the To: field, type members@mailinglist.iowadefensecounsel.org *(Only subscribers can send to the list.)*
3. In the body of your email, include your name and contact information.

This will likely be fruitful. Motions in *limine*, court rulings, depositions and trial transcripts may be available, which will remove all doubt about their likely tactics and strategies. In short, do your homework and use the services of IDCA to the fullest extent.

C. Answer

How often have you seen a defendant answer a lawsuit with a general denial, and nothing more? Laying low and not affording the plaintiff any indication of your defense has its followers, and is not totally illogical. But in many cases affirmative defenses apply and if they are reasonably pertinent, they should be alleged. At the very least, alleging potentially applicable affirmative defenses in the Answer will save you the trouble of amending the pleadings later, or worse yet, forgetting about affirmative defenses that might apply to the case. Also, pleaded affirmative defenses will serve as a roadmap as you prepare the defense, navigate discovery, prepare your trial notebook and draft your outline of trial testimony and jury instructions.

If there is truly scurrilous or scandalous matter alleged in the Petition, a narrowly tailored Motion to Strike might be appropriate and successful. *See* Iowa R. Civ. P. 1.434; Fed. R. Civ. P. 12(f).

If a Reptile plaintiff alleges inapplicable "community standards" or "safety rules" you should plead "failure to state a claim upon which any relief can be granted." *See* Iowa R. Civ. P. 1.421(1)(f); Fed. R. Civ. P. 12(b)(6). Whether you decide to file a pre-answer motion on this is a strategy call, and probably depends on whether you think the court will allow the plaintiff a chance to amend. If the plaintiff has alleged an incorrect standard, then there can be no viable legal claim based on a violation of that "standard." This will serve to remind you of legal objections that should made when defending depositions, and will serve as a checklist for your pretrial motions in *limine* and proposed jury instructions.

D. Written discovery

1. DISCOVERY RESPONSES

We have written on the subject of proper discovery responses and objections. *See* "Proper Objections to Written Discovery," Reynolds and Hermsen, Defense Update, Spring 2017, Vol. XIX, No. 2. Crafting of discovery responses is not the focus of this article. But all discovery responses (especially interrogatory answers, which are verified by the party) should be carefully drafted to avoid any "blackboard-worthy" statements that might provide fodder for a hyper-aggressive plaintiff's counsel. Verified discovery responses may be admissible into evidence, if they meet the requirements of the applicable evidentiary rule. *See, e.g.,* Rule 5.613, Witness's prior statement; 5.804(b)(3), Statement against interest; Fed. R. Evid. 801(d)(2), Admission by party opponent..

2. SERVING DISCOVERY

In propounding written discovery to plaintiff, the defense should consider taking a purposeful approach. Many plaintiffs set forth allegations in their pleadings that cannot be true and cannot be proven under virtually any state of facts. Rather than filing a motion to strike or recast the petition, which, if successful, will merely offer the plaintiff the chance to amend (and thusly, clean things up), attack those allegations with a rifle-shot approach. Written discovery from the defense should focus on the factual basis for the allegations. A useful format could be something like this:

INTERROGATORY NO. 1: In Paragraph 10 of the Petition at Law, Plaintiff alleges that Defendant "failed to exercise ordinary and reasonable care." Please state with specificity and particularity as follows:

a. identify all facts that support your allegation;

b identify all documents or tangible items of evidence that support your allegation;

c. identify all persons with knowledge of the above-stated facts; and

d. identify all persons who may testify at the trial of this matter as to the existence of such facts.

As an alternative strategy, you may want to wait until plaintiff's deposition to "spring" this type of question on them. In deposition plaintiff's counsel will not be in a position to intercede and draft the answer for the client.

By way of example, one of our least favorite interrogatories is: "[P]lease state how the accident happened." In our view it is preferable to ask this question in the deposition setting, where plaintiff's counsel can't interrupt and essentially tell the witness what to say. When asked in an interrogatory, you can bet that the answer to this question will be drafted, edited, and edited again by counsel, until the answer bears utterly no relationship to reality.

Defense counsel seem to have a natural tendency to focus on liability and causation defenses, but the damages element should not be forgotten as well. In every case where a plaintiff seeks money damages, defense counsel should propound a *Gordon v. Noel*-type interrogatory. If you haven't read *Gordon* for a while, it might behoove you to re-read it. That case is quite helpful to defendants, especially in cases involving claims for murky and undefined "emotional distress" or "mental anguish."

Iowa Rule of Civil Procedure 1.503(4) requires parties to supplement discovery in a "timely" manner when the request "bears materially upon a claim or defense asserted by any party to the action." In *Gordon v. Noel,* the Iowa Supreme Court stated, "[A] party defending a claim is clearly entitled upon appropriate pretrial request to be informed of the amount of the claim." 356 N.W.2d 559, 564 (Iowa 1984). The Court held that a trial court abused its discretion by "refusing to compel [the plaintiff] to state the amount of his claim for pain and suffering" in response to a timely discovery request from the defendant. Id. The Court expanded on this rule in *Lawson v. Kurtzhals,* when it held that the district court has the inherent authority to exclude a plaintiff's damage claim when the plaintiff fails to quantify his damages in response to an interrogatory requesting that he "detail the losses he incurred and the damages he was seeking." 792 N.W.2d 252, 254, 258 (Iowa 2010). *See also Stycket ex. Rel. Stycket v. Vanorsdel,* No. 99-1447, 2000 WL 1289016 (Iowa Ct. App. Sep. 13, 2000) (affirming district court's decision to exclude the plaintiffs from presenting damage claims they failed to itemize in response to an interrogatory); *Wade v. Grunden*, No. 06-1948, 2007 WL 4322226 (Iowa Ct. App. Dec. 12, 2007) (affirming district court's ruling granting motion in limine to exclude damages not itemized in response to an interrogatory); *T.D. II v. Des Moines Independent Community School Dist.,* No. 14-2166, 2016 WL 351516 (Iowa Ct. App. Jan. 27, 2016) (rejecting the argument that the defendant "should have requested supplementation of [the plaintiff's] discovery answer before trial instead of 'waiting in the weeds' to exclude the evidence," because "the duty to supplement discovery rests with the answering party, not with the requesting party.").

Defense counsel's ability to exclude damages that the plaintiff does not itemize in response to a *Gordon v. Noel* interrogatory can be a key tool for combating the Reptile strategy. A plaintiff employing the Reptile strategy does not want the jury focusing on the specific facts in the case at hand, such as the exact breakdown of the plaintiff's damages (e.g., past lost earnings, future lost earnings, future pain and suffering). Instead, the Reptile plaintiff

prefers a more obtuse discussion of "safety" and the jury's role as the "voice of the community," with the ultimate goal being a large verdict based on fear rather than facts. Anything factual or legal is the natural enemy of the Reptilian plaintiff. Forcing the plaintiff to itemize her damages in a written and precise manner may help remind the jury that the case is not about fear or community safety; instead, it's about calculating the plaintiff's damages, *if any*, in the specific case at hand. The ability to exclude damage claims that a careless plaintiff's attorney fails to itemize is an important additional benefit to propounding a *Gordon v. Noel* interrogatory.

Finally, as a matter of litigation strategy, consider whether it may be better to "lay in the weeds" and move for summary judgment on the entire case (or for partial summary judgment on certain claims), if the *Gordon v. Noel* interrogatory is left unanswered. This may be preferable to filing a motion to compel discovery, which may do nothing more than provide a "helpful reminder" to the plaintiff that they have missed something. If the motion to compel is granted, the plaintiff will have more time to fashion some kind of response to the damages interrogatory. On the other hand, if trial is approaching and plaintiff has not specified what their damages are, the court might grant summary judgment, dismissing the entire case.

E. Depositions

1. PLAINTIFF'S DEPOSITION

Plaintiff's deposition may well be *the key turning point* in the litigation of a civil case. The unique opportunity presented by taking the plaintiff's deposition is that defense counsel can engage directly with the plaintiff, with little to no interference from cold-blooded opposing counsel. Not so with written discovery. Younger or lesser experienced defense lawyers seem to have a love affair with interrogatories, requests for production of documents, and requests for admissions. But written discovery is often met with a mind-numbing litany of objections and legalese that no lay person jury (or judge) could ever hope to understand. For this reason alone the taking of Plaintiff's deposition is a fundamentally important aspect of defending any civil case. With thorough preparation, defense counsel can effectively "turn the tables" on the plaintiff and employ "reptile like" (or perhaps better described, *more purposeful and aggressive*) strategies to defend the case, and set the overall tone for the litigation.

The authors have witnessed depositions (or read transcripts) where a defense counsel has done a yeoman's job of asking all of the standard, basic information questions such as "who, what, when, where, why and how." It is certainly important to cover the waterfront and to discover all of the basic facts. While asking open-ended questions can be a good strategy to elicit basic information, it puts no pressure on the plaintiff and does not generate statements or themes that can be referenced at trial.

In taking Plaintiff's deposition, questions like the following should be considered:

Q. What facts or information do you have that my client did anything wrong that caused this accident?

PRACTICE POINTER: We have seen this question asked in the form of: "What *evidence* do you have that my client did anything wrong that caused this accident?" The authors prefer not to use the legal term "evidence," as it may be objectionable. How does the lay person witness know what "evidence" is? Also, use of the terms "facts or information" will be more understandable to the jury if the question and answer is later read to the jury at trial.

Q. (In a slip and fall case): What is the last thing you remember seeing before you fell? PRACTICE POINTER: This is more subtle than asking straight-out "When you fell, where were you looking?" One of the authors had a case where the plaintiff tripped over steps in a darkened ballroom. When asked this question in deposition, the plaintiff, an elderly woman, admitted that she was looking clear across the room at a friend who was trying to get her attention. After the deposition, Plaintiff's attorney, an experienced trial lawyer, told defense counsel: "That is one of the best questions I have ever heard in a slip and fall case." The case settled shortly after the deposition.

Other deposition questions might include the following:

Q. When is the last time you saw a doctor for any injury sustained in this accident?

Q. Has any doctor told you that you sustained a permanent injury in this accident?

Q. You have testified that Dr. Jones said you had a permanent injury. Did he document that anywhere? Is that statement made anywhere in your medical records? I have your medical records here, can you show me where he says that?

Q. Are you currently on any prescription medicines for any injury you claim was caused by this accident?

Q. What activities did you do before the accident, which you can no longer do?

Q. What specific documents do you have that show that my client did anything wrong that caused this accident?

Q. Have you talked with any engineer or expert that told you that my client did anything wrong that caused this accident?

Q. Did you read the owner's manual? When? Can you tell me what it says?

Q. (to a Plaintiff's expert in a products case): Have you designed any product that has been mass produced and commercially sold?

Q. (to a Plaintiff's expert): Has any attorney filed a Daubert motion against you? What was the outcome?

Q. Has any court or judge limited or barred your testimony in any case for any reason?

PRACTICE POINTER: Before hiring any testifying expert witness, these questions should be posed to your own expert, to make sure there are no problems of this type "lurking" which could later cause you big problems.

Q. (to a Plaintiff's warnings expert in a products case): Have you designed any warnings or instructions for any product that has been mass produced and commercially sold?

Q. You have proposed certain warnings for this product. Have you ever tested those warnings or instructions in any scientific manner? Why not?

Q. If you were to test those warnings, what methodology would you use? Why? Have you ever used that methodology before? Please give all details.

Another strategy that should be considered is asking the "tough" questions right out of the blocks and early-on in the deposition, such as: "Tell me how the accident happened?" Often defense counsel spends the first hour or so going into the witness' background, education and work history. These questions are easily answered and allow the witness to get comfortable with the deposition process. But there is no "rule" that says that all of the softball questions must be asked first; they can always be asked after the "tougher" questions are addressed, early on in the deposition and before the witness has had a chance to "warm up." Again, we merely offer this up as something to consider.

For a plaintiff's deposition in a serious injury case, consideration should be given to videotaping the deposition. The rules permit this, and in state court express permission or formal notice is not technically required beforehand, so long as a shorthand reporter is present. In our experience defendants often overlook video as a possibility. *See* Iowa R. Civ. P. 1.701(4)("[L]eave of court is not required to record testimony by non-stenographic means if the deposition is also to be recorded stenographically."). But prior notice of video is required in federal court. *See* Fed. R. Civ. P. 30(b)(3)(B)("[W]ith prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice.")

It seems as though plaintiffs use this strategy more than defendants do. Why that is, we are not sure. Most people are not accustomed to being videotaped, and this strategy has its benefits. Some think that it forces a witness to "sit up a little straighter" in their chair. If your client, claims person or adjuster cannot attend the deposition, it could provide them with some important information as to how the plaintiff appears and what kind of appearance they will likely make as a witness at trial.

One of the authors recently attended a deposition where a plaintiff claimed that he had memory loss as a result of a particular medical treatment that he was complaining about in his suit. Notwithstanding this claim, at deposition he was able to recite, in exacting detail and without any difficulty, his multiple medical treatments, physicians and medications over the course of the past two decades. He could "wax eloquent" for several minutes in response to the most basic of questions. Videotaping his deposition was a good strategy in that particular case.

Another technique is to use videotape to your own advantage when preparing your own witnesses to testify. One of the authors had a case several years ago, defending a hospital and two of its nurses in a medical malpractice case. Despite diligent effort, the nurses just could not become comfortable with the facts of the case, or with the prospect of testifying.They actually made quite terrible witnesses. It was not so much what they were saying, but how they were saying it, and how shaky and unsure they appeared. We tried to explain to them what the problem was, and we made multiple efforts to improve their appearance, all to no avail. In a last-ditch attempt, defense counsel put the witnesses on videotape. Defense counsel played "devil's advocate" and did a full-blown, Reptile cross-examination attack from Plaintiff's counsel. After seeing the video of their testimony, "the light came on" and the nurses finally realized how bad they looked. After several hours more hard work, the nurses were eventually presented for deposition by Plaintiff. They ultimately testified at trial and in the end, they made excellent witnesses!

2. DEPOSITIONS OF THE DEFENDANT AND DEFENSE WITNESSES

The depositions of the defendant and defense witnesses is a critical stage in any lawsuit. This is especially true if a Reptile is (or may be) lurking. The authors of "Reptile" acknowledge this: "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. . ." *Reptile,* p. 209. If defense counsel has not properly prepared their witnesses, disaster is just around the corner. Any Reptile will start to employ the strategy, at the very latest, at defendant's or the 30(b)(6)(corporate designee's) deposition. *See* "Defending the 30(b)(6) Deposition From the Reptile Attorney, *For the Defense,* DRI, Dec. 2017, p. 59.

The primary strategy employed by Reptiles is to set up an artificially high, but totally bogus and misleading "standard" that will thereafter govern the liability determination in the case, even though it is a standard not recognized by the law. The plaintiff will attempt to set up a new "safety standard" or "safety rules" which will thereafter be used as the new *and heightened* liability standard. Then, a series of questions will be posed to lead the unwitting witness "down the primrose path" to ultimately support a conclusion that the "standard" has been violated by defendant. If this is accomplished, the case is basically over: the defense has just admitted that it failed to follow the safety rule that it, itself, has agreed applies to the case. To combat this, it is defense counsel's job to be intimately familiar with, know and understand the relevant legal standard that applies to defendant's conduct and to keep the liability determination on track.

It cannot be stressed enough that adequate time must be spent and *invested* in complete and thorough witness preparation. Meeting with the witness for 15 or 30 minutes before the deposition won't cut it; just going through the "rules of road" is courting disaster. Tendering an unprepared witness for deposition is tantamount to legal malpractice for a defense lawyer. You must substantively prepare the witness and you must prepare the witness for the potential of a Reptile attack. The authors have had cases where they have met with corporate technical witnesses *for several days* in order to do adequate preparation. You may have to convince your client that this investment is required and will pay dividends in the end. In sum, at every turn the defense should strive to be a lot better prepared than the Plaintiff.

Preparing the witness for the potential of a Reptile attack should be a key part of the deposition preparation. Questions that start with the phrase: "[W]ould you agree with me that . . . " or "[D]o you think it's fair that . . ." are obvious red flags. Train yourself and train your witnesses to be on the lookout for these questions. You and your clients should see and hear "red lights, sirens, bells, horns and whistle" when these phrases are used

Another aspect of the Reptile strategy is the use of hypothetical questions in deposition. Most lay witnesses have trouble answering hypothetical questions. In the typical case you will see exceedingly broad hypotheticals with undefined terms being asked of corporate representatives, expert witnesses and even fact witnesses and parties. This is a subtle point and it is easy to forget, but because lay witness testimony must always be based upon a witness' perceptions, any hypothetical question posed to a fact witness or corporate representative should be met with an immediate objection. This concept is not new; many jurisdictions have held that hypothetical questions, while proper for experts, are not proper for lay witnesses. "The ability to answer a hypothetical question is the essential difference between expert and lay witnesses. *See United States v. Urena,* 659 F.3d 903, 908 (9th Cir. 2011)(quoting *United States v. Henderson,* 409 F.3d 1293, 1300 (11th Cir. 2005). Under most circumstances, even a corporate 30(b)(6) witness is still a lay (as opposed to expert) witness. Thus, if a hypothetical is posed to either a lay witness or corporate representative, at a minimum an immediate objection should be made, and depending upon the circumstances and the egregious nature of the question, consideration should be given to instructing the witness not to answer.

Here are some common "Reptile" questions at deposition in a negligence case, and some suggested responses:

EXAMPLE NO. 1:

QUESTION: "Would you agree with me that a defendant should not needlessly risk harm to a member of the public?"

TERRIBLE ANSWER: "Yes."

SUGGESTED LEGAL OBJECTION: "Object to the form ; not the proper standard; irrelevant; Rule 403; misleading."

SUGGESTED RESPONSE: "I'm not sure what you mean. But I agree that we should act within reason, and that we should be reasonable in what we do."

PRACTICE POINTER 1: The question implies that a defendant must do anything and everything necessary to prevent harm. This is not the law, it is not the relevant legal standard, and this standard is completely misleading. If the witness lazily answers "yes" to this question, or if defense counsel has not taken care in deposition preparation, the Defendant has essentially made itself the "insurer" of Plaintiff's safety. At that point it is "checkmate" for plaintiff. The suggested response is much better (not to mention, 100% accurate) because it makes it clear that under the law, the defendant's duty is to exercise *ordinary and reasonable care,* nothing more and nothing less.

PRACTICE POINTER 2: As a part of the deposition preparation, the law's standard of "reasonableness" should be emphasized. When the witness is asked about standards, a good "safe harbor" to virtually any question would be the concept of reasonableness. For example, "I don't know what you mean by "safe as possible," that is probably not possible, but I believe

we make the product as safe as we can within reason, and that our product is reasonably safe." The lay person jury will be familiar with what is "reasonable" and the plaintiff's attorney will be hard-pressed to debate the subject with the witness.

EXAMPLE NO. 2:

QUESTION: "Safety is the most important concern, isn't it?"

TERRIBLE ANSWER: "Yes."

SUGGESTED LEGAL OBJECTION: "Object to form; not the proper legal standard; irrelevant; rule 403; misleading; vague."

SUGGESTED RESPONSE: "Can you be more precise?" or "In what regard?"

PRACTICE POINTER: This response may seem evasive. The important point is for the defense witness must resist the urge to say "yes" to unqualified, limitless and undefined statements by plaintiff's counsel. If a company safety officer or nurse answers this question with an unqualified "yes," there is the potential that the jurors will interpret the response to mean that safety is the "only" or "number one" concern, which is literally not the case. If safety were the number one or only concern, all motor vehicles would be designed like tanks; there are a multiplicity of other considerations, such as utility or usefulness, style and other factors.

EXAMPLE NO. 3:

QUESTION: "On a scale of one to ten, where would you list safety as a concern for a manufacturer?"

TERRIBLE ANSWER: "Oh, I would list safety as number 1."

SUGGESTED LEGAL OBJECTION: "Object as to form. The witness may answer."

SUGGESTED RESPONSE: "That's a difficult question. Safety is important, but so are other things. For example, utility: does the machine do the job it is supposed to? A machine may be the safest piece of equipment in the world, but if it doesn't do the job, or doesn't work, it is worthless. Also, style or design is important: if the machine is ugly in comparison to competitor's machines, no one will buy it. But we don't short-change safety for utility or style. We try to make our products to be reasonably safe.

For every Defendant's deposition, the witness should be prepped for the possibility of a videotaped deposition, just in case it happens without notice. In state court, prior formal notice is not required. The "evil sought to be avoided" here is a situation where your client is surprised and thrown off guard that a video camera has shown up at deposition, and you did not cover this in the prep session.

F. Pretrial Motions in Limine

The Reptile strategy should be addressed by properly specific and legally supportable Motions in *Limine* before trial. *See* Iowa R. Evid. 5.104(a); Fed. R. Evid. 104(a); see also "Strategies for More Effective Motions in *Limine*, For the *Defense,* DRI, December 2017, p. 63. There are many cases where these motions have been granted. In nearly every case where they have been denied, *lack of specificity* has been the likely culprit. Even if the motion is denied, at least you have educated the trial judge and he or she is now aware of the issue. Don't give up just because the motion is denied overruled before trial. Under Iowa law, even if a motion in *limine* is overruled prior to trial, the court is free to reconsider its prior ruling during trial. *See, e.g., In re Johnson,* 2002 WL 31309172 (Iowa Ct. App. 2002)(unreported). This is because such a ruling is not "law of the case," nor is it the adjudication of a law point; instead, it is merely a ruling on the admissibility of evidence. *Id.* So it is important to understand: don't give up! The court could very well change its mind, especially when the proffered evidence is put into the case in the context of the other evidence and arguments presented.

In addition, just because other courts or judges have not sustained your motion in limine, does not mean that the judge or court in the case at bar will rule in the same way. Any practitioner who has been practicing law for more than a few years has been pleasantly surprised by a court's ruling.

A motion in *limine* should be filed well in advance of trial so that the trial judge has time to conduct a separate hearing, if necessary, on the issues addressed. If filed too late, the motions may be heard (if at all) on the morning of trial, the potential jurors are "waiting in the wings," the consideration may be rushed, and the likelihood of any good rulings for defendant will be reduced.

Generally speaking, we would advise that any motion in *limine* in a case against a Reptile should focus its argument on the substantive or procedural legal error inherent in allowing the plaintiff to make certain, improper and unfairly prejudicial appeals to the jury. We would counsel against filing a more general motion to "exclude Plaintiff's counsel's Reptile tactics," for example. There are many cases where such generalized motions have been overruled. In fact, you may not even want to use the "Reptile" terminology. First, the judge may not be familiar with the "Reptile strategy." If this is true, then how do you "educate" the judge on this strategy? Call witnesses? Put on evidence? We think it is much more fruitful, and likely to be successful, to instead make your argument based on current law that defines what and what is not proper argument to a lay person jury.

Where applicable, pretrial motions in *limine* should be filed on the following issues:

1. ANY SPECIFIC TESTIMONY OR EVIDENCE THAT WAS PRODUCED IN PRETRIAL DISCOVERY THAT IS IMPROPER AND INADMISSIBLE.

An example of this would be a situation where plaintiff's counsel, in deposition, asked the defendant "[W]ould you agree with me that manufacturers should not needlessly injure consumers?" In a deposition, of course, an objection can be stated, but the testimony proceeds and the answer is recorded subject to the objection. *See* Iowa Rule of Civil Procedure 1.708(1)(b)("Evidence objected to shall be taken subject to the objection."). If the discovery record contains such questions, then the defense should file a motion in *limine* to keep this question and answer out of evidence at the trial. Otherwise, opposing counsel may try to use this improper question as impeachment or as an admission of the defendant.

Regarding pretrial motions in *limine*, it is critically important to be *specific* in making your argument, and in identifying the evidence or testimony that is improper. If your argument is general, it will likely be overruled. For example, *Botey v. Green,* 12-CV-1520 (M. D. Pa.), involved a trucking accident. Liability was hotly contested. The defense argued that the plaintiff actually struck the side of the defendant's tractor-trailer as its driver was making a left turn. The defendant filed a pretrial motion in *limine,* seeking to preclude improper reptile theory tactics. In its in *limine* ruling, the court held that the defendant's motion was premature because no reptile theory questions had yet been heard. Thus, the motion was denied without prejudice to object at trial. Eventually a defense verdict was entered at trial and a judgment was filed on June 22, 2017.

On September 1, 2017, the Supreme Court of Appeals of West Virginia affirmed a circuit court's pretrial and trial evidence rulings, limiting questions using Reptile tactics. *See Brown v. Berkeley Family Medicine,* No. 16-0572, 2017 WL 3821807 (W. Va. Sep. 1, 2017). This was the import of the court's ruling, although interestingly enough, the court *did not* use "reptile" terminology. In *Brown,* the patient was evaluated by a physician's assistant. The PA made a diagnosis and ordered treatment, but the patient's condition deteriorated and she later died. The case was tried and although the jury found that the defendant deviated from the accepted standard of care, "such deviation did not proximately cause or contribute to the decedent's death." Plaintiff's post-trial motions were denied and they appealed.

On appeal, Plaintiffs challenged the trial court's exclusion of questions applying "Reptile" tactics, although the court did not use those terms. The defense had filed a pretrial motion "to prohibit petitioner from arguing that jurors had the power to improve the personal and community safety of jury members by reaching a verdict that would reduce or eliminate allegedly dangerous or unsafe conduct." The defense contended that this kind of argument encouraged jurors to depart from impartiality. The trial court denied the pretrial motion, but allowed the defense to raise the issue on timely objection during trial. From the opening statement on, the Plaintiff launched a reptile attack and the defense objected.

In opening statement, petitioner's counsel likened the standard of care to be adhered to by medical professionals as a "rule." The defense objected. The trial court ruled that the standard of care must be described to the jury, by both parties, simply as the standard of care, and not a rule. In addition, in response to another objection made by the defense, plaintiff's counsel was cautioned by the court to refrain from using the word "danger" or "dangerous" to describe the decedent's medical condition.

On appeal in *Brown,* the supreme court found no abuse of discretion in the trial court's order that placed "limits on petitioner's ability to present her case by arbitrarily selecting words and phrases petitioner's counsel could not use, such as 'rule,' 'danger,' and 'dangerous,'" stating that "we find the circuit court did not err in prohibiting petitioner from using certain terms that were potentially confusing and misleading to jurors. Petitioner was not prejudiced and manifest injustice did not result from the circuit court's ruling. Petitioner was afforded the opportunity to present her arguments and her case in a fair and impartial manner, free from arguably confusing or misleading references." A trial court's ruling on such matters will most likely be reviewed on appeal on an "abuse of discretion" standard, which is quite deferential to the trial court's judgment. This is yet another reason why handling a Reptile plaintiff at trial in the correct manner is so critical.

While the West Virginia court in *Brown* did not use the term "Reptile" in evaluating the evidence, it expressly recognized the impropriety of referring to the standard of care as a "rule." Also, the court recognized that it would be confusing and misleading to the jurors. Indeed, the opinion shows that a focus on the particular language used, rather than the "Reptile" label, is an effective way to demonstrate to the court the impropriety of the type of questions used. Finally, *Brown* is a memorandum opinion, and under West Virginia law, memorandum decisions are not precedential.

Another potential objection to be made to the Reptile strategy is "improper and inadmissible character evidence." Generally speaking, any argument designed to inflame a jury against a party is prohibited. This is especially true when a plaintiff is trying to use the Reptile approach, because inflammatory remarks constitute nothing more than an attack on the character of the defendant. *See, e.g., Las Palmas Assoc. v. Las Palmas Ctr. Assoc.,* 1 Cal.Rptr.2d 301, 315 (Cal. Ct. App. 1991)(explaining that "personal attacks on

opposing parties. . . whether outright or by insinuation, constitute misconduct" and that such "behavior only serves to inflame the passion and prejudice of the jury, distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial."). This objection should be a part of any pretrial motion in *limine,* and should also be made at trial.

Other "Reptile" court decisions include the following:

"Defendant's motion to prohibit any Golden Rule argument and/or Reptile Theory questions and argument is GRANTED." *Pracht v. Saga Freight Logistics, LLC*, No. 3:13-CV-529-RJC-DCK, 2015 WL 6622877 at *1 (W.D. N.C. Oct. 30, 2015).

The *Pracht* case is a good decision from Colorado that is anti-Reptile. The court's order stated as follows: "The Plaintiffs and their counsel are hereby barred from arguing or soliciting testimony based on the REPTILE theory including, but not limited to, making arguments or soliciting evidence concerning "community safety or protection," "public safety or protection," "safety rules," "sending a message," "needlessly endangering patients," or "being guardian of the community." *Hopper v. Ruta,* 2013 Colo. Dist. LEXIS 249, *1 (Colo. Dist. Ct. 2013). *Pracht* is a rather unusual example of a pretrial motion that called the Reptile tactics by name and was successful. Perhaps more importantly, however, is the fact that the defense specifically identified the nature of the arguments that were improper, and why they were improper. This was critical to the court's decision.

Several courts have held that appeals to juror self-interest during the trial of a case are not proper. *See Robards v. State of Texas,* 285 S.W.2d 247, 249 (Tex. App. – Austin 1955, writ ref'd n.r.e.); *City of Wichita Falls v. Jones,* 456 S.W.2d 148, 155-6 (Tex. App. Fort Worth, 1970, no writ); and *Waddell v. Charter Oak Fire Insurance Company,* 473 S.W.2d 660, 9661-2 (Tex. App. – Fort Worth 1971, no writ).

The court denied a motion to exclude Reptile tactics where the defendants "have again not identified the specific evidence that is sought to be excluded;" however, the court noted that "any attempt by either party to appeal to the prejudice or sympathy of the jury will not be condoned." *Hensley v. Methodist Healthcare Hosps.,* No. 13-2436-STA-CGC, 2015 WL 5076982, at *5 (W.D. Tenn. Aug. 27, 2015).

> PRACTICE POINTER: When it comes to motions in *limine,* your prospects for success are directly proportional to how *specific* your motion is. Any general motion to "prevent use of the Reptile strategy and tactics" is likely doomed to failure. The trial judge will not even know what a "Reptile" is in this context, and even if they did, they would have no basis to prevent its usage in the courtroom, absent a demonstration of actual evidence that is improper or inadmissible. An insufficiently specific motion will likely be met with an oral ruling: "Let's hear the testimony and evidence, see what the context is, and if you have an objection at that time, make it. Defendant's motion is denied without prejudice." How many times have you seen such a ruling on a general motion in *limine*? But the truth is, in many cases this is a proper ruling.

Granting motion to "preclude any attempt by plaintiff's counsel to utilize Reptile Strategy." *Glover v. State,* No. 10-2-35124-8, 2015 WL 7355966 (Wash. Super. Ct. September 9, 2015).

Granting "motion in *limine* regarding use of Reptile Theory Tactics, Golden Rule references, or other "safety rules." *Palmer v. Virginia Orthopaedic, P.C.,* No. CI14000665-00, 2015 WL 5311575 (Va. Cir. Ct. June 19, 2015).

Motion to exclude Reptile tactics denied, but "parties may not violate the 'Golden Rule' and have agreed to this." *Berryhill v. Daly, MD,* No. STCV1102180SA, 2015 WL 5167586 (Ga. State Ct. May 8, 2015).

Motion to exclude Reptile denied after finding that "a general rule prohibiting Plaintiff from referring to rules or standards is not workable in that it could preclude Plaintiff from arguing at all about the standard of care and is denied. As stated above, the Court will, however, prohibit direct appeals that violate the Golden Rule." *Scheirman v. Picerno,* No. 2012CV2561, 2015 WL 4993845 (Colo. Dist. Ct. April 16, 2015).

2. THE "GOLDEN RULE" ARGUMENT.

It is improper to argue the "Golden Rule," e.g., "[H]ow much pain would you ladies and gentlemen take for $2.00 an hour?" *Cardamon v. Iowa Lutheran Hospital,* 128 N.W.2d 226 (Iowa 1964). The "Golden Rule" argument asks the jurors to put themselves into plaintiff's place, and to consider and decide the case from that perspective. It is clearly not permitted in Iowa. *See Conn v. Alfstad,* 801 N.W.2d 33 (Iowa Ct. App. 2011).

> 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.

Russell v. Chi., Rock Island & Pac. R.R. Co., 249 Iowa 664, 672, 86 N.W.2d 843, 848 (1957). One rationale for the Golden Rule doctrine is to discourage improper arguments that play on jurors' emotions and sympathies. *See Burrage v. Harrell,* 537 F.2d 837, 839 (5th Cir. 1976).

Conn should be required reading for any defense attorney practicing in Iowa who may confront the Reptile strategy. *Conn* is an important case in Iowa, not only with respect to the improper nature of the Golden Rule argument, but on other issues that may arise as a part of the Reptile strategy. The *Conn* case is also noteworthy because it was the *defendant,* not the plaintiff, who engaged in misconduct in arguing the case to the jury in summation. "Advocating for jurors to put themselves into the shoes of a party is improper whether it is done by plaintiff's counsel or defense counsel." *See Edwards v. City of Phila.,* 860 F.2d 568, 574 n. 6 (3rd Cir. 1988)(rejecting the position that the golden-rule argument is only improper when used by plaintiff with respect to damages and not when used by defense with respect to liability). As a result, the trial court in *Conn* ordered a new trial on plaintiff's post-trial motions, and this ruling was affirmed on appeal. The bases for error found in *Conn* are just as applicable to plaintiffs as they are defendants.

The primary holdings in *Conn* that are relevant to fighting the Reptile strategy include the following "rules:"

1. Counsel's argument that what plaintiff was asking for would be a "life changing sum" is an improper personal comment on the evidence.

   PRACTICE POINTER: First, many arguments used as part of the Reptile strategy constitute an impermissible personal comment on the evidence by plaintiff's counsel. Second, from this holding a defendant can fashion a parallel argument against the plaintiff. For example, any argument by plaintiff's counsel that a jury verdict "would make their life better" or words to that effect should not be permitted as a "personal comment on the evidence."

2. Counsel's analogy to hitting the jackpot at a casino was improper personal comment on the evidence.

   PRACTICE POINTER: Since it is improper for a defendant to make this argument, then by analogy, it should be improper for a plaintiff to argue, for example, that $30,000 or some allegedly "conservative" sum is not "full justice" for plaintiff's injury. The "full justice" argument is one that is currently very popular among Reptiles, but it amounts to an improper personal comment on the evidence.

3. Counsel's suggestion to the jurors that "the public was watching them" was improper argument.

   PRACTICE POINTER: Many Reptiles urge the jury to decide the case as the "conscience of the community." In reality, this is a somewhat veiled attempt to decide the case in accordance with the "court of public opinion." This is blatantly improper because it asks the jury to decide the case not based on the facts or the law but on other factors wholly outside the courtroom and not a part of the evidence presented at trial. An analogy can sometimes be helpful. Most of us have seen the critically acclaimed movie *"To Kill a Mockingbird,"* starring Gregory Peck. Would it have been proper, given the facts of that case, for the prosecutor to argue that the public in general was expecting a guilty verdict and that the jurors should take that into consideration when deliberating on their verdict? Of course not. For exactly the same reason, a plaintiff in a civil case should never be allowed to argue that the jury acts as the "conscience of the community." This is a blatant appeal to the jurors to decide the case based on something other than the evidence and the law.

Although it was defense counsel in *Conn* who ran afoul of the rules, *Conn* can be used against plaintiffs who would make similar arguments that would also be improper.

Plaintiff may argue that the Golden Rule argument is only prohibited when that technique is used when arguing damages and does not apply to liability arguments. However, this position is specious. *Conn* cites a case with approval that can be used to counter this argument: *Edwards v. City of Phila.,* 860 F.2d 568, 574 n. 6 (3d Cir. 1988)(rejecting the position that the Golden Rule argument is only improper when used by plaintiff with respect to damages and not when used by the defense with respect to liability). The defense can argue "the goose and gander rule:" what's sauce for the goose is sauce for the gander. If a defendant cannot use the Golden Rule when arguing liability, then neither can the plaintiff. Turnabout is fair play!

Cases in a clear majority of other jurisdictions have excluded the Golden Rule argument. *Turner v. Salem and U.S.A. Logistics, Inc.,* 14-CV-289-DCK (W. D. N.C.) involved a trucking accident that resulted in a wrongful death claim. Before trial the defendant filed a short and concise motion in limine, seeking to exclude arguments amounting to the proscribed "Golden Rule" argument, or reptile arguments. In its ruling, the court prohibited the Golden Rule argument and "discouraged" the reptile theory arguments, stating that it would handle objections in court as needed if reptile theory arguments were raised. Plaintiff continued the reptile attack throughout trial, and the court favorably ruled for the defense. The case ultimately resulted in a defense verdict.

It is also important to understand that the improper Golden Rule argument does not always come into evidence as a clear "do unto others as you would have them do unto you" appeal. Instead, the Golden Rule is most often disguised in a more subtle approach to the jurors. The following are some examples of questions that

might be asked by a plaintiff's counsel which, in the authors' view, violate the Golden Rule admonition:

> Q. (During argument) "How would you like it if someone ran a stop sign and ran into you for no apparent reason?"
>
> Q. (During voir dire) "Are you scared or nervous? Well, you are in good company. So is my client. She is scared. She is nervous. Because this is her only chance at justice."
>
> Q. (During voir dire) "If my client knew what you know, would my client want you to serve as a juror in this case?"

3. "NEEDLESS ENDANGERMENT" QUESTIONS.

Some of the cases that prohibit the Reptile strategy have made it clear that a question that essentially asks, "[D]o you agree that a defendant should not 'needlessly endanger' the public" are improper and inadmissible into evidence. *See, e.g., Pracht v. Saga Freight Logistics, LLC,* No. 3:13-cv-0059-RJC-DCK, 2015 U. S. Dist. Lexis 149775, at *4 (W. D. N. C. Oct. 30, 2015); *Bigelow v. Eidenberg,* No. 112,701, 2016 Kan. App. Unpub. Lexis 285, at *39 (Kan. Ct. App. Apr. 15, 2016); and *Hopper v. Ruta,* No. 12cv1767, 2013 Colo. Dist. Lexis 249, at *1 (Colo. Dist. Ct. Oct. 29, 2013).

In *Pracht,* a trucking accident case and discussed *supra,* the trial court granted a motion by the defendant to prevent plaintiff's counsel from questioning defense witnesses in a way that suggested that the jurors put themselves in the plaintiff's position, or implied that the defendants were a danger to the public or a threat to the community. *Id.* The specific interrogation in *Pracht* that was barred by the trial court was the following:

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

The defense in *Pracht* objected and argued that these questions were irrelevant, violated provisions against the "Golden Rule" arguments asking jurors to put themselves in the position of the injured party, were improper under longstanding bars against speculative proof of liability and damages, and improperly invited a decision based on emotion and prejudice, rather than on the facts. Those objections were sustained.

4. "SEND A MESSAGE."

Most defense counsel are familiar with this argument in a case where punitive damages are submitted. At least there is a colorable argument that this is proper since deterrence is one of the reasons for exemplary damages. *Miranda v. Said,* 836 N.W.2d 8 (Iowa 2013)(punitive damages punish bad behavior and deter future bad conduct). But the "send a message" argument we are talking about, used by many Reptiles, is one which is made in any suit for *compensatory* damages. The aim of this strategy is quite clearly to increase and enhance the compensatory damages verdict by punishing the defendant and making an example out of them.

Counsel's comments, during closing argument, telling the jury to "send a message" to the community with its compensatory damages verdict have been held to be improper. *Murphy v. Murphy,* 622 So.2d 99 (Fla. 2d Dist. Ct. App. 1993); *Florida Crushed Stone Co. v. Johnson,* 546 So.2d 1102 (Fla.5th Dist. Ct. App. 1989); *United States v. Solivan,* 937 F.2d 1146, 1153 (6th Cir. 1991)(reversing conviction based on prosecutor's closing argument urging jurors to "send a message"); *Pierce v. Platte-Clay Electric Cooperative,* 769 S.W.2d 769, 779 (Mo. 1989)("send a message" arguments are inappropriate). The "send a message" argument is very closely akin to the "you are the conscience of the community" argument. Both are improper. In one case, the court held that it was improper for the estate of a motorist, who was killed by a driver during a high-speed police chase, to ask the jury during closing argument that although money would not bring the decedent back, it would help to tell the deceased's parents that the jury recognized that what had been done was wrong, and should not have ever happened. The court found that these comments were an improper send-a-message argument, because the jury was being asked to award money not based on the proof supporting properly recoverable damages in a wrongful death action, but was asking to remedy wrongful and intentional, as opposed to negligent, conduct. *City of Orlando v. Pineiro,* 66 So.3d 1064 (Fla. 5th Dist. Ct. App. 2011).

Believe it or not, some jurisdictions have found "send a message" arguments to not be improper. *See* Am. Jur. 2d Trial § 474. In those jurisdictions, defense counsel may need to work to change the law to the more correct rule.

Even in cases where punitive damages are *pled,* plaintiff's counsel are not necessarily entitled to argue "send a message" willy-nilly. Instead, defense counsel should first require the court to judicially find that punitive damages are *submissible* to the jury, before any "send a message" argument is permitted. This position is legally supportable. Under Iowa Code Section 668A.1, the punitive damages statute, a party's wealth or ability to pay a punitive damages judgment is not admissible into evidence unless and until the court has determined that a *prima facie* case to support

punitive damages has been established by plaintiff. *See* Iowa Code § 668A.1(3). Absent this, and armed with nothing more than an unsupported allegation, wealth or ability to pay is not admissible into evidence. *Burke v. Deere & Co.,* 6 F.3d 497, *rehearing and suggestion for rehearing en banc denied, certiorari denied,* 114 S. Ct. 1063, 510 U.S. 1115, 127 L.Ed.2d 383 (8th Cir. 1993). By the same token, prior to a judicial finding that a *prima facie* case for punitive damages has been shown, any argument or plea to "send a message" would be premature and unfairly prejudicial. For example, the court might later determine (on a directed verdict motion, or Rule 50 motion in federal court) that punitive damages were not submissible, yet the jury had been previously told to "send a message." It is impossible to unring the bell and reversible error or a mistrial could result.

Even where both compensatory and punitive damages claims are at issue, a plaintiff may not use "send a message" and "conscience of the community" arguments when discussing whether the plaintiff should be compensated, due to the potential for the jury to punish the defendant unfairly through the compensatory award. *R. J. Reynolds Tobacco Co., v. Gafney,* 188 So.3d 53 (Fla. 4th Dist. Ct. App. 2016).

5. THE "YOU ARE THE CONSCIENCE OF THE COMMUNITY" ARGUMENT.

A tried and true stratagem of many Reptiles is the argument that the jury serves as the "conscience of the community" and that their verdict must reflect that. But it is impermissible for counsel to use closing arguments to divert the jury from its duty to decide the case solely on the evidence and suggest that the jury is answerable to the public for its verdict. *See State v. Musser,* 721 N.W.2d 734, 755-56 (Iowa 2006)(citing with approval *Lisle v. State,* 113 Nev. 540, 937 P.2d 473, 482 (Nev. 1997)(which found impropriety in telling the jury that it must be "accountable" for its verdict). *See also State v. Delaney,* 973 S.W.2d 152, 157 (Mo. Ct. App. 1998) (finding it improper for a prosecutor to suggest in closing argument that the community was watching the jurors to see if they would convict: "The jury should not be encouraged to decide the guilt of a defendant on whether the citizenry of a community will approve of the verdict."). In *Bunch v. Pac. Cycle, Inc.,* No. 4:13-cv-0036-HLM, 2015 U. S. Dist. Lexis 183890, at *6-7 (N. D. Ga. Apr. 27, 2015), the court ordered that plaintiff's counsel could not "argue that this lawsuit was brought to ensure or promote community safety." Counsel's comments, during summation, appealing to the jury as the "conscience of the community" are improper. *Kiwanis Club of Little Havana, Inc. v. de Kalafe,* 723 So.2d 838 (Fla. 3d Dist. Ct. App. 1998); *Airport Rent-A-Car, Inc. v. Lewis,* 701 So.2d 893 (Fla. 4th Dist. Ct. App. 1997); *Superior Industries Intern., Inc. v. Faulk,* 695 So.2d 376 (Fla. 5th Dis. Ct. App. 1997); and *Maercks v. Birchansky,* 549 So.2d 199 (Fla. 3d Dist. Ct. App. 1989). The range of what will be considered an impermissible "conscience of the community" argument includes all impassioned and prejudicial pleas intended to evoke a sense of community law through a common duty or expectation. *Airport Rent-A-Car,* cited *supra.*

Suppose the plaintiff's attorney were to argue that they must find in favor of the plaintiff, because if they don't, the public at large "will be mad at them, and there will be rioting in the streets." This is a patently improper argument. But how is this any different than the emotional plea that "[Y]ou are the conscience of the community?" This example demonstrates how the Reptilian "conscience of the community" argument is clearly improper and invites the jury to decide the case based on factors that are irrelevant and not based on the evidence presented at trial.

6. "THE DEFENDANT VIOLATED ITS OWN STANDARDS" OR "SAFETY RULES" ARGUMENT.

As a part of the Reptile strategy, plaintiffs will seek discovery about and cross examine defense witnesses in an attempt to establish an internal standard that can be applied to defendant's conduct. This internal standard seems to always impose duties even greater than the baseline reasonableness standard that governs tort liability. Courts have held, however, that this strategy is misleading and improper. *See, e.g., Randolph v. QuickTrip,* 16-cv-01063-JPO (D. Kan.). *Randolph* was a premises liability case. Plaintiff claimed he was injured due to the fact that Quick Trip had not properly marked an area that had been recently mopped. The defendant filed a pretrial motion in limine against reptile arguments. The plaintiff argued that the standard jury instruction in Kansas, (No. 126.02, duty to maintain land) rendered Quick Trip's self-imposed safety rules to be not only relevant, but a *mandatory* consideration. The instruction at issue included as a proper element to consider "the individual and social benefit of maintaining the land" in a reasonably safe condition. In his argument, plaintiff emphasized the word "social" in the instruction.

In its pretrial ruling, the *Randolph* court excluded the introduction of safety rules to the jury, but the court noted that the ruling was without prejudice to the defense's objecting to questions at trial. Plaintiff's counsel reportedly made limited efforts to make community-type arguments in summation, but fortunately for the defense, a jury verdict for the defendant was entered at trial on May 25, 2017.

Another case in Kansas provides persuasive authority for the improper nature of "safety rules" evidence. In *Lanam v. Promise Reg'l Med. Ctr.—Hutchinson, Inc.,* the trial court issued a pretrial order barring a medical malpractice plaintiff from referring to the medical center's policies and procedures as "safety rules." No.

113,430, 2016 App. Unpub. Lexis 18, at *5-7, 19-24 (Kan. Ct. App. Jan. 8, 2016). In *Lanam* the court allowed the plaintiff to indicate that the purpose of the policies and procedures was for patient safety, but the court required that they be referred to as "policies and procedures." The district court reasoned that reference to them as "safety rules" risked that the jury "would conflate the standard of care with an alleged safety rule," and the appellate court agreed. Also, we would point out that "policies and procedures" denoted as such, but called "safety rules" is argumentative. Plaintiff's counsel in opening statement violated the order by referring to "the safety requirements that protect patients." Finding that this argument likely to prejudice the jury, the appellate court in *Lanam* affirmed the trial court's decision to grant a mistrial.

In a medical malpractice case, *Melott v. Holloway* (Okla.)(and the last we knew, currently on appeal with the Oklahoma Supreme Court), the defendant argued during pretrial motions *in limine* that the phrase "patient safety rules" or other phrases beginning with the words "patient safety" would be prohibited at trial. The trial ended in a defense verdict in favor of several health care providers. One of the issues currently on appeal in *Melott* is whether the ruling disallowing plaintiff's counsel from using the phrases referenced above denied the plaintiff's right to a fair trial.

7. EVIDENCE OF AN EMPLOYER'S SAFETY REVIEW OF AN EMPLOYEE'S CONDUCT.

When an employee is involved in an accident involving harm to a third-party plaintiff, an employer may choose to conduct an internal safety evaluation of the employee's actions. For example, when a semi driver is involved in a collision, the trucking company that employs him may prepare a written safety evaluation that discusses hypothetical actions the driver could have taken to avoid the collision. A Reptile plaintiff will assuredly seize on such written safety evaluations and argue to the jury that these safety evaluations establish a standard of care that the employee violated. Of course, this ignores the fact that an internal discussion of hypothetical ways an employee could have avoided an accident is clearly distinct from a legally enforceable duty of care. For example, in any auto accident, either driver could have avoided the accident by simply choosing not to drive on that particular day. Nevertheless, the mere decision to drive and thereby risk an accident does not violate a driver's legal duty of care.

Defense counsel faced with a client's internal safety evaluation should carefully examine the evaluation to determine whether the plaintiff could use it to establish a new standard of care. One way to deal with such "after-the-fact" safety evaluations is to file a motion *in limine* to preclude the introduction of the internal safety evaluation on the basis of Iowa Rule of Evidence 5.407, addressing subsequent remedial measures. That rule states in part, "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." This prohibition on the use of subsequent remedial measure evidence is based on two polices: (1) subsequent remedial measures are "irrelevant" or have "little probative value" to the defendant's alleged negligence, and (2) courts want to encourage parties to take subsequent remedial measures that increase public safety without fear of having these subsequent remedial measures used against them in a lawsuit. *Tucker v. Caterpillar, Inc.,* 564 N.W.2d 410, 412 (Iowa 1997) (quoting Iowa R. Evid. 407 advisory committee's note (1983)).

An employer's post-accident safety evaluation fits neatly into this rule. The evaluation "would have made the event less likely to occur" if it had been conducted previously, because it would have alerted the employee to the potential dangers involved in the incident. Applying the rule in this situation also advances the public policy of encouraging parties to take post-accident safety measures such as internal safety evaluations without fear of having these measures used against them in court.

Iowa Rule of Evidence 5.403 provides an additional basis for excluding post-accident safety evaluations. Rule 5.403 excludes evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." A post-accident safety evaluation that presents hypothetical ways for avoiding an accident has little probative value for the issue of whether an employee failed to act with reasonable care. This minimal probative value is substantially outweighed by the danger of unfair prejudice and confusion that would result from a Reptile plaintiff using an internal safety analysis to create a new standard of care.

8. ALTHOUGH THE PLAINTIFF ONLY RECEIVED A MINOR INJURY, "THEY COULD HAVE BEEN KILLED OR MAIMED IN THE ACCIDENT."

This argument is often used when the injury that actually occurred was relatively minor or slight. But how are these more severe circumstances relevant to the case at bar? How is this evidence admissible if it is not relevant? Even if it is somehow relevant as, for example, an indication of the severity of the risk involved, how does this "evidence" get past a Rule 403 objection? The fact is, the plaintiff was *not* killed or maimed in the accident; instead, they sustained a much more modest or minor injury. The only element of damages that plaintiff can recover for is the injury that actually occurred, not some other, hypothetical injury or set of facts.

Defense counsel in a motor carrier accident case gave examples of this tactic in a motion *in limine* by quoting the series of questions

used by plaintiff's counsel: "Somebody could be hurt? Someone could be killed? A child could be run over? A mom could be run over? A grandparent could be run over? A wife could be run over?" *See* Defendant's Motion in Limine No. 1 3-4, *Haley v. Westfreight Sys., Inc.,* No. 3:15-cv-1161-JPG-SCW, ECF No. 79 (S. D. Ill. Feb. 15, 2017). The questions set forth above "invoke the underpinnings of the golden rule arguments" that "seek to have jurors decide a case, not on the evidence presented at trial as instructed, but rather on the potential harms and losses that could have occurred within the community." *Id.* Another court agreed with this analysis in a decision in 2016, explaining that "asking the jurors to put themselves in Plaintiff's position and make a judgment based on their hypothetical reality" amounts to improper 'golden rule' arguments. *Sialoi v. City of San Diego,* No. 3:11-cv-02280-JLS-KSC, 2016 U. S. Dist. Lexis 145013, at *4 (S. D. Cal Oct. 18, 2016). Such arguments are "irrelevant to the actual damages alleged" and "have a substantial likelihood of unfairly prejudicing the jury" because they "may encourage the jury to render a verdict based on personal interest and bias rather than on the evidence." *Id.* (granting in part Defs. Mot. In Limine No. 1 to Preclude "Golden Rule" Arguments Framed as References to or Arguments About "Public Safety or "Community Safety," *Sialoi v. City of San Diego,* No. 3:11-cv-02280-JLS-KSC, ECF No. 83 (Sept. 23, 2016).

Suppose there is a minor, fender bender-type rear end collision, with a claim of a soft-tissue neck injury, or whiplash. Would the court permit plaintiff's counsel to argue for an award of damages as if the client had a broken neck and quadriplegia that did not, in fact, occur, simply because the plaintiff was "lucky" to only have a soft-tissue injury? Would the court allow a biomechanical engineer to testify that with a differently-designed head rest, the plaintiff might have sustained a spinal cord injury? How is this evidence relevant? How would this evidence withstand a Rule 403 objection? How is such evidence, not involved in the case at bar, not a waste of the court's and jury's time? If you let a little bit of this evidence in, i.e., the proverbial "camel's nose in the tent," where do you draw the line? Would the court allow the plaintiff to call to the stand a life-care planner to testify as to what the care costs might be, in the case of a broken neck, if no broken neck was involved in the case actually being tried? Of course not, and to suggest otherwise is ludicrous.

9. INJECTING PERSONAL BELIEFS INTO THE ARGUMENT.

Any attempt to offer "a personal opinion about the merits of a case is not acceptable argument under Iowa law." *See Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa,* 541 N.W.2d 904, at 908 (Iowa Ct. App. 1995)(holding counsel may not interject personal beliefs into argument). It is improper to express a personal belief in the justice of a client's cause. *See* Rule 32:3.4(e), Rules of Professional Conduct; *State v. Phillips,* 226 N.W.2d 1619 (Iowa 1975). It is also improper to state a personal belief as to culpability of a civil litigant, or the guilt or innocence of an accused. *Id.; State v. Monroe,* 236 N.W.2d 24, 30-31 (Iowa 1975); *State v. Vickroy,* 205 N.W.2d 748, 749-50 (Iowa 1973).

Defense counsel should be ready with this objection whenever plaintiff's counsel begins an argument with the phrases "I think. . . " or "I believe that . . ." As a practical matter, many summations are littered with "I *think* this" or "I *think* that" and for the most part, defense counsel has been sloppy to let this go by, without an objection. But the law clearly states that this is improper argument. This is a solid ground for a pretrial motion *in limine* and making the argument at the outset of trial may have an effect on opposing counsel's entire trial strategy. Any argument prefaced in this matter is *per se* objectionable as an improper (and unethical) personal comment on the evidence by counsel.

10. APPEALING TO THE PASSIONS OR PREJUDICES OF JURORS.

In Iowa, counsel may not use closing arguments to appeal to the passions or prejudices of the jurors. *See Rosenberger, supra,* at 908. Iowa Uniform Civil Jury Instruction No. 100.3, entitled "Duties of Judge and Jury, Instructions as a Whole" provides in pertinent part as follows:

> "As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices or emotions. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions."

In any lawsuit for personal injury damages, this subject must be confronted and addressed, early on. One of the most important aspects of the law of pretrial motions *in limine,* is that in general, a pretrial ruling on a motion *does not preserve the issue for appeal.* Although there are some unique instances where a pretrial ruling on an *in limine* issue will preserve error on appeal, the more conservative, safe approach is to renew the objection again at trial, when the evidence is offered. If the judge doesn't want to hear from you again, he or she will let you know. If the evidence is offered at trial, timely and specific objection must be made, else error is waived. *See, e.g., Matter of Estate of Workman,* 903 N.W.2d 170, 175 (Iowa 2017) (failure to preserve error when party argues proper burden of proof in summary judgment motion but does not object to jury instructions on burden of proof); *Mitchell v. Cedar Rapids Community School Dist.,* 832 N.W.2d 689, 697-98 (Iowa 2013)(failure to preserve error when the defendant does not object to court's

formulation of the defendant's duty until post-trial motions, because the defendant's failure to timely raise the issue deprived the plaintiff of the "opportunity to be heard on the issue before the verdict" and the court of the "opportunity to take corrective measures"). No defense counsel should experience the ignominy of allowing an appellate court to avoid an issue because defense counsel "failed to preserve error."

11. MOTION IN *LIMINE* STRATEGY.

Any motion *in limine* that attempts to limit or exclude "Reptile tactics" in general and by identifying it only in that way may well be doomed to failure. Instead of referring to "Reptile strategy" in conclusory fashion, the focus of the motion should be on the specific arguments that plaintiff is making, or will attempt to make, that are prohibited by law and established case precedent. Most judges, and nearly all lawyers, at least until the Reptile book was published in 2009, did not have any idea what a "Reptile strategy" was, much less that it should not be allowed in court. The more specific your motion is, in terms of describing exactly what plaintiff's counsel will do at trial, the greater your chances of success.

G. Trial

1. *VOIR DIRE*

Voir dire in federal court in Iowa is typically very limited. But in state court, most judges allow counsel a fair amount of freedom. This is defense counsel's only chance to have a give-and-take discussion with prospective jurors. This is a golden opportunity; it should not be squandered. All too often we have seen defense counsel posit such "enlightening," albeit worthless inquiries such as "[D]o you believe that you could be a fair and impartial juror in this case?" Counsel might as well ask: "[D]o you love your mother?"

In *voir dire* it is fundamentally important to make sure that plaintiff does not gain an advantage by going first and by doing an aggressive and interesting *voir dire* of the jury panel. The "runaway freight train-plaintiff's case" needs to be avoided at all costs. Do not let the other side take an advantage from the start.

Defense counsel must work hard to be as dynamic, engaging and interesting as Plaintiff's counsel in all presentations to the court and jurors. Defense lawyers should have no monopoly on boring presentations. Standing board-stiff at the podium, having no eye contact with the jurors, and reading verbatim from a yellow legal pad does not cut it anymore; 21st century jurors expect to be entertained. Now, you shouldn't act like a used car salesman, but try to be interesting and engaging, at the very least. If the plaintiff's *voir dire* is strong and defendant's is weak, you face the prospect of the potential jurors having formed preliminary opinions in the case in favor of the Plaintiff. These initial impressions can be difficult, if not impossible, to turn around. "You have only one chance to make a first impression." Some studies have shown that jurors make up their minds early in a case, in terms of who they feel should win, and thereafter cubbyhole later evidence and information into that framework. You absolutely must get off to a strong start, and *voir dire* is the start of the case!

A claim often encountered in defending industrial or product liability cases is one in which plaintiff is injured by reaching into a machine or area without first turning the machine off and locking it out so another person cannot mistakenly start up the machine while it is being worked on. The specific term is "LOTO" or "lock-out, tag out." This safety procedure is based on common sense; before working on something, you turn it off.

One of the authors tried a case several years ago where a farmer was picking corn, and his mechanical cornpicker became plugged up (most likely from trying to drive too fast through the field.) *See Hillichs v. Avco Corp.,* 478 N.W.2d 70 (Iowa 1991), *appeal after remand,* 514 N.W.2d 94 (Iowa 1994). Instead of turning the machine off and disengaging the PTO, the farmer left the machine running and tried reaching into the interior of the cornpicker, in the area of the husking bed where the ears of corn are stripped away from the husk. In the course of doing so, his hand was caught between the husking rollers, and he received a severe de-gloving injury to his right (dominant) hand, which in turn led to amputation of all of his fingers on that hand, except the thumb.

Defense counsel wanted to educate the prospective jurors on the common-sense concept that before reaching into a machine, you turn it off. The *voir dire* on this point went something like this:

> Q. Does everyone here on the jury panel have a garbage disposal in their sink at home in their kitchen?
>
> Q. Let me ask you this, have you ever, by accident, dropped a spoon or fork into the garbage disposal? Have you ever done that while it was running? It made quite a racket, didn't it? And it really tore up the kitchen utensil?
>
> Q. Now let me ask you: before you reached with your hand to go down into the disposer and retrieve the spoon, did you first turn off the garbage disposer?

Using an everyday example like this proved to be a good way to get this point across to the prospective jurors, as the jurors in the first trial of this case returned a defense verdict. The Iowa Supreme Court later reversed and remanded the case for a new trial on a

separate issue, when it adopted, for the first time, the theory of "enhanced injury."

One of the authors tried a serious injury, crashworthiness case for five weeks to a jury in an urban county in Iowa several years ago. Even though this was many years before the term "Reptile strategy" was coined, a somewhat aggressive, "in your face" approach to *voir dire* was used. In some ways this could be considered a "Defense Reptile." The case involved a head-on collision between a large pickup truck, with a hardened steel snowplow mount on the front, with a smaller passenger car. The truck had veered out of its lane into the on-coming path of the smaller car. The driver of the car, the Plaintiff, sustained a broken neck. The case was defensible on the facts and the engineering merits. All reasonable efforts to settle the case were exhausted, so the case proceeded to trial.

One of the theories of product defect was that the Plaintiff's car was not "crashworthy" because it did not have a driver's side airbag. In 1993 when the car was manufactured, FMVSS (Federal Motor Vehicle Safety Standards) did not require the manufacturer to have a driver's side airbag in its passenger vehicles. Instead, the manufacturer could choose to have an airbag; could have an integrated manual shoulder harness and lap belt combination; or, in their discretion, could select an automatic or "motorized" shoulder belt in conjunction with a manual lap belt. The Defendant-car manufacturer chose the third option. Efforts to get the "no-airbag" claim dismissed based on federal preemption failed. Thus, as a primary argument Plaintiff asserted that the car was defective because it did not have a driver's side airbag.

In the defense *voir dire,* the interrogation went something like this:

Q. Juror No. 1, do you drive a car?
A. Yes.

Q. What kind of car is it?
A. It's a 1988 Ford Taurus. It's a four door sedan.

Q. Do you own the car?
A. Yes, me and my wife.

Q. Do you know, does your car have a driver's side airbag?
A. No.

Q. I see from the juror questionnaire that you have 3 children, is that correct?
A. Yes.

Q. Two girls and boy?
A. Yes.

Q. Now, on your Ford Taurus, did you buy that new?
A. Yes.

Q. Does your wife ever drive that?
A. Yes.

Q. Does your family ride in it on occasion?
A. Yes.

Q. Now, when you bought that car, did you know and understand that it did not have a driver's side airbag?
A. Yes.

Q. I mean, you could look at the window sticker and see that, right?
A. Yes.

Q. You didn't pay for that option, is that correct?
A. No, I didn't.

Q. They don't give those airbags away for free, do they?
A. No, sir.

Q. Have you ever thought that your Ford Taurus was defective, deficient or unsafe because it did not have a driver's side airbag?
A. No.

The remaining panel members were questioned in similar fashion. Not one person of the approximate panel of 35 jurors owned or drove a car with a driver's side airbag.

This is one example of what could be termed by some as an aggressive defense *voir dire* a/k/a "Defense Reptile." This technique can be used to help identify jurors who would not be sympathetic (if not downright antagonistic) towards the defense. In the crashworthiness case, after the first day of trial Plaintiff's counsel *dismissed* his claim that the vehicle was defective because it did not have a driver's side airbag. One of plaintiff's defect claims was no longer in issue.

Another area worth covering in jury selection is the likelihood of defense objections to argument and testimony during trial. If plaintiff's counsel is well known for Reptile tactics and you think there will be many objections, you may want to have *voir dire* and opening statement reported by the court reporter. This is not normally done. If warranted, you should give the court and the court reporter plenty of advanced notice. If you foresee a situation where you may be required to object a lot to Plaintiff's trial presentation, it also might be a good idea to warn the potential jurors about that in *voir dire.* You may need to desensitize the jurors to the fact that you may be objecting a lot, and that you are not objecting to "cover anything up," but you are objecting to make sure that the proper procedure is followed.

You might consider doing this:

Q. There is another subject I would like to cover. That is objections. Has anyone on the panel here ever watched Perry Mason, or some of the other law shows?
Note: one of the authors is dating himself by offering this example.
A. (Several hands raise).

Q. Ms. Johnson, what shows did you watch?
A. Perry Mason. I especially liked Paul Drake (laughter).

Q. I personally liked Della Street. Now, back to my question, in those shows did you watch some of the courtroom scenes?
A. Yes.

Q. In some of those scenes, would an attorney ask a question, a lawyer would object, and then the judge or court would make a ruling?
A. Yes, I guess.

Q. And that is how the trial process occurs; a question is posed, an objection is made, and the court rules on the objection. Now, in this case, we have some strong objections to some of the evidence and arguments of the other side. Does anyone here have any problem with that?
A. (no one raises their hand; all shake their heads 'no'.)

Q. That is how the process works. That is part of the lawyer's job, to object to matters that we feel are improper. Will anyone on the jury be offended if we object to some things?
A. (all shake their heads 'no').

Q. If you do, please speak up, everyone here will respect you for your candor.
A. (no one responds).

Q. Will anyone here hold it against my client, or hold it against me, if we feel, in our professional judgment, that in order to properly represent our client, we have to object?
A. (All shake heads 'no').

The basic concept is this: if it looks like you will be objecting a lot during trial, it's best to bring up that subject in *voir dire,* and prepare the jury for it.

Another strategy is meeting some of the issues addressed in Plaintiff's *voir dire,* point for point. "For every thrust, there should be a parry." Fight fire with fire. Do not leave any argument or mode of attack unanswered or unchallenged.

For example, it is common for Plaintiff's counsel to do something like this:

Q. Do you understand that if I win my client's case, there will be a money judgment?

Q. Do you understand that is how our justice system works, in this type of case, that my clients gets a judgment for a money or dollar amount?

Q. And that this is the only 'remedy' that can be ordered in this case, and that is a judgment for a monetary or dollar amount.

Q. Does anyone here have any problem with that?

Q. Does anyone here think that jury verdicts are sometimes too high?

Q. Now, in this case, we believe that the Plaintiff has sustained a very serious injury. As a result, we will be asking the jury for a judgment for more than a million dollars. In fact, we will be asking you for a verdict of $5 million. Now, if we meet our burden of proof, and prove our case, is there anyone here that would not return a verdict of $5 million dollars if we prove our case?

Plaintiff's purpose here is to quite obviously get the jurors comfortable with the prospects of a large, multi-million dollar verdict. Alternatively, if a juror responds that they could not, under any circumstances, return such a verdict, then the Plaintiff will try to get that juror excused for cause, thus saving one of their peremptory strikes. This is a fundamental theme of most Reptiles: they keep repeating "15 million dollars," "15 million dollars," "15 million dollars" (or some other totally exhorbitant amount) and before long, it doesn't seem so bad and the jurors are not so turned off by it.

In one recent case tried by a Reptile Plaintiff's attorney, a Polk County jury awarded over $4 million for a garden-variety broken leg (although there was also a punitive damages claim involved, since the defendant driver had been drinking). In post-trial juror interviews, the jurors said they thought they were being *conservative* in their award, since Plaintiff's counsel had continually asked the jury throughout the trial for a verdict of $16 million. This is almost unbelievable, but it happened, and it happened in Iowa. Other examples abound. In situations like these, common sense (like Elvis) "has left the building." It is defense counsel's challenge to get things back on track.

To counteract this approach, you might consider something like the following:

Q. Do you remember Plaintiff's counsel's questions about a $15 million dollar verdict? I would like to ask some questions about that, from our perspective.

Q. Now, I represent the women and men of ABC Corporation. I will be very blunt with you. We are defending this case because we firmly believe that our 2014 automobile was not defective in design or manufacture. Do you understand what our position is?

Q. Since we firmly believe we are not liable, it will be our position that at the end of this case, the Plaintiff will receive a verdict of $0, zero, nothing, a defense verdict. Do you understand that's what our position is?

Q. Is there anyone here that would have any problem with awarding the Plaintiff zero damages, if they believe, at the end of the day, that Plaintiff has not proven their case, and that my client is not liable for a defectively designed or manufactured motor vehicle?

Q. But what about the fact that the Plaintiff has an injury? Wouldn't you feel sorry for them?

Q. If that gives anyone a problem here, please speak up, we will all appreciate your honesty.

Q. Is there anyone here, on this jury panel that honestly feels that they could not send the Plaintiff away with no money, if they haven't proved their case of product defect, even though they may have sustained a serious injury?

> PRACTICE POINTER: if you find with this questioning that there is a juror or jurors who cannot make this pledge to you, then attempt to get the juror(s) stricken for cause, thus saving your precious peremptory challenges.

There is another topic that must be confronted head-on in jury selection: sympathy. Any serious personal injury case has a "pink elephant" in the courtroom, and that is the natural, human tendency to feel sympathy for anyone that has been injured in an accident.

Formerly there was a Uniform Civil Jury Instruction in Iowa that said, "You are not to decide this case based on bias, sympathy, passion or prejudice." In the trial of any case involving a serious personal injury, the subject of sympathy *must* be addressed in jury selection. It might go something like this:

Q. Now, as you have heard, this case involves a serious personal injury.

Q. The Plaintiff, Mr. Smith, unfortunately, sustained an amputation injury to his hand.

Q. In this accident, the proof will be that he lost the tips of his ring, long and index fingers on his right hand. And the evidence will be that Mr. Smith was right handed. He had three different surgeries on his hand and fingers, and that the injury was quite painful. You may even see some bloody photographs of his injury. Is anyone on the panel queasy about such things? Does anyone here faint at the site of blood? I use to do that when I was a little kid, it happened to me a couple of times, I couldn't control it.

Q. All of us, in this courtroom, feel bad for Mr. Smith. We all wish that this had never happened. We would all be very empathetic towards his plight.

Q. And that brings up the topic of: bias, sympathy, passion and prejudice.

Q. At the very end of this case, before you go to jury deliberations, if you are chosen to be a juror in this case. I believe that the court will give you an instruction that every court in Iowa gives in every personal injury case. And that instruction says, and I quote: "You are not to decide this case based on bias, sympathy, passion or prejudice." Is there anyone on the panel that feels that, for whatever reason, they could not follow that instruction? We would all understand if you had a problem with that, it's only a natural, human reaction.

> PRACTICE POINTER: If any juror(s) cannot pledge to you that they will follow the jury instruction to set aside sympathy, then get the juror stricken from the panel for cause.

In using this technique, consider going into excruciating detail with respect to plaintiff's injury. You might even read from some of the worse medical records, if you know they are coming into evidence. If there are some gory, post-injury accident scene photographs that the court has ruled will come into evidence (notwithstanding your Rule 403 objections), consider describing the photographs in detail to the jury, and gauging their reactions. You may be able to excuse overly sympathetic or "queasy" jurors based on a challenge for cause. But in some form or fashion, the issue of sympathy and the severe and gruesome (if applicable) nature of the injury should be addressed, up front and without apologies. This is true even in cases where the defense is based solely on liability or causation.

2. OPENING STATEMENT

It is vitally important to get off to a strong start in any jury trial. An outline of the defense case presented on a spiral bound art-pad, in the form of a flip chart, can work well. More recently the techno-savvy attorneys can present their case in a PowerPoint or Trial Director slide presentation, and this can be very effective. Just make sure that the court approves of this technique ahead of time. One downside risk of this approach, is that the court may require you to show your slides to the other side, before you are permitted to use them in front of the jury. If any evidence is shown, make sure

it is stipulated into evidence before trial and that the court has no problem with you exhibiting the evidence in opening statement.

What you want to avoid is a situation where Plaintiff's counsel has a professional-looking PowerPoint slide show in opening statement, with compelling colors and graphics, and the only thing defense counsel has is a podium, yellow legal pad and a no. 2 pencil. The old frumpy "Columbo" approach has gone the way of high-button shoes.

One of the authors once took over a products case after there had been a sizable plaintiff's verdict in a federal court trial. We were hired for the appeal and fortunately for the client, the plaintiff's verdict was reversed by the 8th Circuit and the case remanded for a retrial. In the course of working on that appeal, we had access to the trial transcript. At the trial, when it came time for defendant's opening statement, defense counsel stood up at counsel table and literally said the following:

"Well, I'm not going to beat a dead horse here. You will hear our case and our evidence. And I'm convinced that you will rule in my client's favor. Thank you."

And with that, he sat down. That was the entire defense opening. What a wasted opportunity! Please don't ever do that, or the same fate that occurred to that counsel, may happen to you: he was fired!

3. DEFENSE THEMES.

Using a consistent defense theme throughout the course of the trial can be an effective and persuasive technique. "Personal responsibility" or "safety is a shared responsibility" are two examples. Once you have determined a theme, use of a consistent theme during each stage of the trial process can help "anchor" jurors to your message.

One potentially risky strategy, but one that might be considered nevertheless, is adopting or co-opting the Reptile approach *yourself* if the trial court judge refuses to prohibit plaintiff from using the technique. If the judge is allowing plaintiff to present Reptile arguments ("voice of the community" to appeal to fear, for example), you might consider "turning the tables" and adopting the same arguments. In the authors' view this should only be considered if no other options are available. For example:

> "Ladies and Gentlemen, I agree – you are the voice of the community. So ask yourselves – what does this community stand for? Is this a community that believes someone should unfairly and unjustly pay huge amounts of money for a minor car accident that could have happened to anyone? Should we make someone rich just because they were in an accident? If you pay this Plaintiff and their lawyer a wheelbarrow full of money, will that mend their injury? Or, instead, is this a community that uses logic and reasoning, that sets aside the dramatic, grossly-exaggerated arguments of the plaintiff and looks at the facts in this case for what they really are: a minor accident, the type that happens every day?"

Again, this approach is risky, but there is no rule that says that a defendant has to fight "fair and square" with one hand tied behind their back, while the trial court is allowing the plaintiff to "cheat." At least this approach merits consideration.

4. DIRECTED VERDICT MOTIONS.

Defense counsel should be on the lookout for an opportunity to deal with a claim, or part of a claim, with a motion for directed verdict. The advantage gained in narrowing a claim down cannot be overemphasized. The proper time to move for a directed verdict is at the close of both parties' evidence. *Royal Indem. Co. v. Factory Mut. Ins. Co.,* 786 N.W.2d 839, 845 (Iowa 2010). In Iowa, it is no longer necessary to make a motion for directed verdict at the close of the plaintiff's case in order to preserve error and make a post-trial motion for JNOV. *See id.* However, if you later want to make a post-trial motion for judgment notwithstanding the verdict (JNOV), you must have made, during trial, a motion for directed verdict at the close of all the evidence on the same issue in order to preserve the issue. Iowa R. Civ. Pro. 1.1003(2).

A motion for directed verdict can be a key tool against a Reptile plaintiff. An aggressive plaintiff will often claim enormous damages without supporting evidence in the hope that the jury's fear will overcome this lack of evidence. Defense counsel can attack this lack of evidence with a motion for directed verdict.

To survive a motion for directed verdict, the plaintiff must present "substantial evidence on each element of the claim." *Gibson v. ITT Hartford Ins. Co.,* 621 N.W.2d 388, 391 (Iowa 2001). When a personal injury plaintiff claims future pain and suffering, future loss of use, or future medical expenses, the plaintiff generally needs accompanying medical testimony supporting these claims. In the absence of supporting expert medical testimony, courts generally hold that a plaintiff cannot recover future medical expenses. *See Brundage v. McElderry,* No. 00-0811, 2001 WL 725688 (Iowa Ct. App. June 29, 2001); *DeBurkarte v. Louvar,* 393 N.W.2d 131, 140 (Iowa 1986); *Shover v. Iowa Lutheran Hosp.,* 107 N.W.2d 85, 95 (Iowa 1961). One exception to this medical expert testimony is where "the plaintiff has suffered severe pain right up to the time of the trial, and…she [is] not then yet fully recovered from the injury." *Arenson v. Butterworth,* 54 N.W.2d 557, 563 (Iowa 1952). However, a plaintiff's subjective testimony is not sufficient to establish an injury so severe that courts will allow a claim for future damages to proceed to the jury without supporting expert testimony. *Brundage,* 2001 WL 725688 at *3.

A classic example of a case that lends itself to a directed verdict is a low-speed motor vehicle accident where a plaintiff makes a claim for future damages despite sustaining nothing more than soft tissue injuries. The plaintiff will likely be unwilling or unable to secure expert medical testimony at trial, meaning the plaintiff's evidence of future damages will be limited to the plaintiff's medical records and the plaintiff's own subjective reports of generalized pain. In such situations, Iowa courts will generally grant a defendant's motion for directed verdict on the plaintiff's claims for future pain and suffering, future loss of use, and future medical expenses.

Some recent sizable verdicts in Iowa have featured claims for emotional distress in the total absence of physician testimony. In many cases, by design, these claims are made with no supporting medical expenses. A plaintiff's strategy that appears to be "in vogue" is the making of such claims and *intentionally* deciding to forego putting on evidence of medical bills supporting those emotional or mental distress claims. If this occurs, the *defendant* might consider putting on evidence of plaintiff's insignificant medical expenses. This will allow the defense to argue that these damages are not significant, otherwise, the medical expenses associated with those damages would be much greater. The defense can also point out plaintiff's strategy in this regard and demonstrate how the plaintiff's attorney is essentially attempting to manipulate the jury into a verdict more favorable for his or her client.

5. SUMMATION.

Advice on how to do an effective final argument or summation is beyond the scope of this article. In defending against a Reptile, if you haven't prepared your deposition witnesses correctly, and haven't filed and argued your pretrial motions *in limine,* and objected throughout the trial process, then objecting in closing argument will definitely be a case of "too little, too late."

Defense counsel should note that in many courts, the final argument is not transcribed by the court reporter, unless a specific request to do so is made. In any trial involving Reptile tactics, defense counsel should request that the summation be reported. This is the only way to get a good, clean record of what transpires. Then, if improper arguments are made, an appropriate objection can be made and the objection will be documented in the record. In some situations merely the fact that the summation is being reported might cause your opponent to be just a little bit more careful in making their closing argument. Making a complete record is the paramount concern. In countless cases an appellate court has been able to avoid a ruling on an issue that was not properly preserved for appeal, or shown in the trial court record.

Defense counsel should try to think of new and creative ways to argue the subject of damages. In many cases, especially if there is a very strong liability or causation defense, counsel may be tempted to not argue damages at all, for the fear that you will appear as if you are "conceding" liability. But one problem inherent in this approach is this: if the jury finds in favor of plaintiff on liability, they may go along with plaintiff's suggested number on damages, since they have no other point of reference. Yet, on the other hand, if the defense gives the jury a "number," does this then become the "floor" for the jury?

The mere occurrence of larger jury verdicts in Iowa begs the question: are plaintiff's lawyers making more effective arguments, in comparison with the defense? As a practical matter, in a serious injury case, how does defense counsel go about arguing "X" amount of money is too much money?

One approach that might be effective is talking to the jury about the value of money. Your argument might go something like this:

> Folks, we have just discussed liability and causation. We firmly believe that we did nothing wrong here, and that the evidence has proven that. But there is one more element to every lawsuit, and that is the subject of damages. I would be remiss, I would not be doing my job, if I didn't address, head-on, the subject of damages. Now, I don't want you to think that we are giving up our defenses on liability and causation, by talking about damages. We most certainly are not. But I need to defend the case, and I need to defend the entire case, and damages are part of the case.
>
> Damages are very difficult to talk about, and very difficult to consider. Because you are trying to put a monetary value on someone's injury. How do you go about doing that? Whose to say that "X" amount of money, is too much money for an injury?
>
> But one thing I would like to talk about with you, is the "time value of money." This is the simple concept that an amount of money invested today, can earn interest over a period of time, and can pay out larger amounts of money in the future.
>
> For example, Plaintiff's counsel in this case has just given her closing argument. In that summation she asked you for a verdict of damages in the amount of $10 million. Let's stop for a second, and consider how much money $10 million is.
>
> We all know that since the time of the 2016 election, the stock market is up approximately 30 per cent. Now, that kind of positive return is very unusual, and will not, unfortunately last forever. So, as a starting point, let's take a more reasonable rate of return over a longer period of time. For example, and for ease of computation, assume an annual rate of return of

10%. Over the past 20 or 30 years, persons who are invested in the stock market have averaged a 10% annual rate of return, if not higher. But let's be conservative and consider an annual rate of return of 10%.

Now, in this case, let's suppose you award the Plaintiff $10 million. $10 million invested at 10% would yield an income of $1,000,000 per year. $1,000,000 per year—that is a lot of money and a person could easily live off of an investment earning $1,000,000 per year.

Now, let's further assume, as is true of the Plaintiff in this case, a life expectancy of 20 years.

So, if you award $10 million to Plaintiff, he will earn $1,000,000 per year, for the next 20 years..

Now, let's suppose the Plaintiff lives off of the interest income each year, and spends the entire $1,000,000 each year. That would mean that at the end of Plaintiff's life, his estate would still be worth the full original amount of the judgment, $10 million, because none of the principal had been spent, only the interest.

Now, these numbers are conservative in that I am talking simple interest. If compounded interest were used, or if the Plaintiff lived on something less than $1,000,000 per year for the rest of his life, then the numbers would grow even higher.

This simple example illustrates how much money Plaintiff's counsel is talking about.

H. Post-Trial motions.

1. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A defendant cannot move for a judgment notwithstanding the verdict unless she first moved for a directed verdict on the issue. Iowa R. Civ. Pro. 1.1003(2). Defense counsel should not let an unsuccessful motion for directed verdict discourage them from filing a motion for judgment notwithstanding the verdict. "The Iowa Supreme Court encourages district court judges to deny motions for directed verdicts in most cases even if the district court judge believes the motion should be sustained. It is considered more prudent for a district court judge to submit a weak case to the jury and avoid a second trial in case there was error in sustaining the motion for directed verdict. It is preferable to give the jury an opportunity to consider the evidence and potentially reach the same conclusion as the district court so that unnecessary re-trials and additional appeals may be avoided." *Kula v. Boone Cnty. Hosp.,* 2007 WL 1827523 at *2 (Iowa Ct. App. June 27, 2007)(citing *State v. Keding,* 553 N.W.2d 305, 308 (Iowa 1996). For many years this has been known as the "Uhlenhopp" rule, named after a former Iowa Supreme Court Justice. The court will apply the same "substantial evidence" standard for motions for directed verdict and motions for judgment notwithstanding the verdict. *See Schlegel v. Ottumwa Courier,* 585 N.W.2d 217, 226 (Iowa 1998).

2. MOTION FOR NEW TRIAL..

In the unfortunate event of a runaway verdict that may have been influenced by improper Reptile tactics, defense counsel should consider a post-trial motion for new trial. Iowa Rule of Civil Procedure 1.1004 outlines the situations allowing the court to grant a new trial. These situations include "misconduct" by the plaintiff, 1.1004(2); excessive damages "appearing to have been influenced by passion or prejudice," 1.1004(4); a verdict that is "not sustained by sufficient evidence," 1.1004(6); and errors by the trial court, 1.1004(8). Each one of these grounds for a new trial might very well fit with a Reptile lawyer on the other side.

I. The trial court's inherent power to control its own courtroom.

Under Iowa law (and the law of every jurisdiction), the trial court has the inherent judicial power to control its own courtroom. At common law, the inherent power of courts to make rules governing practice and procedure and admission to the bar was firmly established. Gertner, The Inherent Power of Courts to Make Rules, 10 U.Cin. L. Rev. 32 (1936); Stewart, Rules of Court in Iowa, 13 Iowa L. Rev. 398 (1928). As recently as 1973 it was asserted to be an inherent and exclusive power to supervise the conduct of attorneys and to prescribe rules governing their admission to the bar and practice. Court Rule 121, Preamble.

The Iowa Supreme Court has confirmed a trial court's "inherent authority to do what is reasonably necessary for the administration of justice in a case before the court" where the exercise of such inherent authority is "essential to the court's existence and necessary to the orderly and efficient exercise of the court's jurisdiction." *State v. Iowa Dist. Court for Johnson Cty.,* 750 N.W.2d 531, 534 (Iowa 2008). This includes "some degree of inherent authority to ensure the orderly, efficient, and fair administration of justice." *In re K.N.,* 625 N.W.2d 721, 734 (Iowa 2001). Other jurisdictions similarly recognize a trial court's inherent authority to manage courtroom proceedings. *See Int'l Union, United Mine Workers of America v. Bagwell,* 512 U.S. 821, 831 (1994) (recognizing courts' "inherent contempt authority" as including the "power to impose silence, respect, and decorum… and submission to their lawful mandates") (internal quotation marks omitted); *People v. Majors,* 956 P.2d 1137 (Cal. 1998) (noting a "trial court's inherent power to establish order in its courtroom"

and "sanction various acts of contempt of court"). Federal courts possess "inherent power to assess attorney's fees against a party or that party's attorney as a sanction for bad faith conduct." *Hill v. Clark,* No. 2:10-CV-00260-WCO, 2012 WL 13018385 at *4 (N.D. Ga. Aug. 16, 2012).

There are cases recognizing a trial court's inherent authority to control Reptile-like conduct. For example, in *Emerson v. Eighth Judicial Dist. Court of State, ex. rel. County of Clark,* the Supreme Court of Nevada held that a district court has the inherent authority to sanction trial attorneys who offer improper personal opinions in closing arguments. 263 P.3d 228-30 (Nev. 2011). Similarly, in *Conboy v. Wynn Las Vegas, LLC,* a federal district court noted that federal district courts "have broad discretion when ruling on motions *in limine*." No. 2:11-CV-1649 JCM, 2013 WL 1701073 at *1 (D. Nev. Apr. 18, 2013). The court explained that this broad discretion stems from federal district courts' inherent authority to manage trials. *Id.*

In *Rogal v. American Broadcasting Companies, Inc.,* plaintiff's counsel engaged in improper conduct in multiple ways, including "expressing his own opinions with respect to the evidence" and violating the "Golden Rule" argument by asking the jurors to put themselves in the plaintiff's position. No. CIV.A. 89-5235, 1994 WL 105548 at *7 (E.D. Pa. Mar. 29, 1994) (reversed on other grounds by *Rogal v. American Broadcasting Companies, Inc.,* 74 F.3d 40 (3rd Cir. 1996)). The district court explained, "As an experienced trial lawyer, [plaintiff's counsel] is well aware of the prohibition against making an argument which asks the jurors to put themselves in the party's place (the "Golden Rule" argument). Nevertheless, that is exactly what he did." *Id.* The court concluded, "This record unquestionably demonstrates [Plaintiff's counsel's] total disregard of the standards of conduct imposed by the rules of professional responsibility. This unparalleled display of arrogance by a person of [Plaintiff's counsel's] experience and standing at the bar is difficult to comprehend. I am persuaded that his conduct…requires the imposition of sanctions." *Id.* at *12. On appeal, the 3rd Circuit reversed part of the district court's order, but noted that the district court's sanction against the plaintiff's attorney for $13,573 was not at issue on appeal. *Rogal,* 74 F.3d at 42 n.1.

Defense counsel should cite to a trial court's inherent authority to manage its courtroom as additional legal justification for a favorable ruling limiting Reptile tactics. A judge whose first inclination is to defer (or *abdicate*) to a jury rather than limit plaintiff's counsel's ability to present Reptile-like arguments may be more willing to grant a motion *in limine* or motion for new trial when presented with legal authority demonstrating the court's inherent power to limit such argument. In any case the trial court will be trying to draw the proper balance between letting counsel "zealously" advocate for their client, on the one hand, with proper courtroom decorum and conduct, on the other hand. The ability to recover attorney's fees and costs from an attorney that engages in bad faith conduct may also serve as a useful deterrent to plaintiff's counsel's use of Reptile strategies.

J. Conclusion

Let's give credit where credit is due: the Reptile theory has been employed by plaintiff's personal injury lawyers with many notable successes. It is here to stay for the foreseeable future. Defendants have possibly been "slow on the draw" to respond to this development. We need to make up for lost ground. We should think about using specific and creative, "out of the box" strategies to counteract this challenge. Defense counsel should create a three-ring binder and call it the "Reptile Notebook." Counsel should research cases on the Reptile, collect motions *in limine,* collect court rulings limiting the tactic, and work to develop an effective response. The Iowa defense bar is made up of two kinds of lawyers: those who have confronted the Reptile, and those who will. The Iowa Defense Counsel Association prides itself in offering to its members information, resources and strategies that can serve to help them meet the needs and of their clients and the challenges of today's courtroom. The authors hope that this article might ultimately be considered one small effort toward that goal.

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New Lawyer Profile

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Brandon Lobberecht of Beatty Neuman & McMahon, P.L.C. in Davenport.

Brandon Lobberecht, Beatty Neuman & McMahon, P.L.C.

Brandon Lobberecht has been practicing law in Iowa since 2013 and in Illinois since 2014. He graduated from the University of Iowa in 2010 with a bachelor's degree in accounting. He graduated with high honors from Drake University Law School in 2013 and he also earned a business law certificate. While in law school he was the Managing Editor in 2012–13 of the *Drake Journal of Agricultural Law*. He joined Betty Neuman & McMahon, P.L.C. in 2013.

Brandon's primary focus is insurance defense, general liability defense and workers' compensation defense. He practices in the state courts of Iowa and Illinois and the United States District Courts for the Northern District of Iowa, Southern District of Iowa, and Central District of Illinois.

Brandon is a co-author of the *Iowa Workers' Compensation Claims Handling Guidelines for the Claims & Litigation Management Alliance*, January 2014, and was the recipient of the CALI Excellence for the Future Award – Debtor/Creditor Law, Spring 2013.

Brandon is a member of the Iowa State Bar Association, Scott County Bar Association, Rock Island County Bar Association, Dillon Inn of Court, Iowa Defense Counsel Association and Illinois Defense Counsel Association. He volunteers his time as a Board Member of Iota Chi Housing Corporation, 2017–present.

Brandon resides in Bettendorf with his wife, Jenna, and their dog, Oliver. He enjoys golfing, vacationing with his wife as they attempt to visit all 50 states, and watching his favorite NFL team—the Green Bay Packers—play at Lambeau Field.

Legislative Update

COMPARATIVE FAULT - FAILURE TO USE SEATBELT

After many years of effort, the IDCA secured a well-deserved lobbying victory in recent weeks. On March 15, 2018, Governor Kim Reynolds signed into law an amendment to Iowa Code Section Section 321.445, subsection 4, paragraph b, subparagraph (2). The amendment raises the potential amount of comparative fault that can be assigned to the occupant of a vehicle not wearing a seatbelt from 5% to 25%. The IDCA had long lobbied against the 5% figure as both arbitrary and a "cap," which the Iowa State Bar Association has steadfastly argued should be avoided in all respects. The amendment was the result of a compromise negotiation between the lobbyists representing IDCA and the Iowa Association for Justice.

Many thanks to Brad Epperly, the IDCA's lobbyist, for his hard work on this important issue.

IDCA Welcomes Our Newest Members!

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IDCA Schedule of Events

September 13–14, 2018	**54TH ANNUAL MEETING & SEMINAR** September 13–14, 2018 Embassy Suites by Hilton Des Moines Downtown Des Moines, IA.
September 12–13, 2019	**55TH ANNUAL MEETING & SEMINAR** Embassy Suites by Hilton Des Moines Downtown Des Moines, IA