



D-Reptile

**Winning Cases Using Defense
Reptile Strategy**

OR

The Reptile Manifesto: It Ain't Brain Surgery

Introduction to the Reptile

- The science behind the theory
- Does it work?
- Is this really something new?

How To Spot The Reptile

- **Safety “Rules”**
- **Frequency Facts**
- **Key Words**
- **“Reptile” book targets doctors and insurance companies...but, government beware! Time to be pro-active and start to D-Reptile**

Hypothetical

The County of Deep Pockets owns and controls Main Street, which runs alongside Tyler Middle School. The street is north/south, and the school is located on the east side next to the northbound lane. It is a Monday holiday, and the school is closed. There are cars and work trucks parked on the east side of the street. Driver John Cluess, 22, is traveling northbound on Main Street at 45 mph, the posted limit (25 mph when “children are present”). A group of children are at the school playing soccer on the front lawn; the ball goes out into the street and Billy runs after it. He is hit and killed by the Cluess vehicle. Well known plaintiff firm, Dewey, Cheatum & Howe, represents Billy’s mother, and brings suit alleging a dangerous condition of public property.

Under "Reptile" How do you Evaluate this Lawsuit?

- Know your opponent
- Put money and time into the case (D-Reptile)
 - Consider videotaping depositions
 - Sub Rosa?
 - Mock Trials
 - Exposures/Reserves/Risk Management

Mediation

Don't Let Your Guard Down





The Reptile Deposes

Take time to Make time

- The Reptile suggests preparing the Plaintiff over a two day period or greater.
- Defense counsel: develop rapport with your client/witness
 - Meet at scene or at their office
 - Personalize the process
 - Assure them you are their lawyer
 - Let them tell you – cognitive interview - provide context – let witness tell you how sausage is made

Frequency Facts and Experts

- Define
- Use frequency facts which support the defense side; and
- Make sure expert has frequency facts to study and know for deposition and trial.

Frequency Fact Example:

- Plaintiff (creating a general “safety rule” for protecting pedestrians): 15,000 pedestrians are seriously injured or killed each year by automobiles

vs.
- Defense (providing assurance to the jury that they are not endangered by this section of Main Street): 2.2 million drivers passed by Tyler Middle School in the last five years, without a single pedestrian being hit by a vehicle

DMQ not PMK

- CCP section 2025.230
- Object to term “most knowledgeable”
- No 7 hour limit for DMQs
- DMQ deposition can be used for any purpose
- No statutory limit to number of topics for DMQ
- Fight back: seek reasonable number of categories, and require “reasonable particularity”
- Seek motion to quash DMQ notice or other relief
- Prepare DMQ for “safety” questions and avoid “I don’t know” or “It isn’t part of my job”

New era...

Don't just say "yes" or "no"

Major Truths

- What are they?
- A major truth is YOUR client's side to each of the main points the Plaintiff will try to establish in deposition
- How are truths different than theme?
- Theme might be "The Road Didn't Do It"
- Truths are more specific
- You cannot get to major truths with "yes" or "no" responses

Stay on Message

- Having “Major Truths” in mind keeps the witness focused and gives him or her a comfort zone
- The “truths” have to be true, and the witness has to believe them
- Hypo example: while sympathy for the child’s family, the truth is that there were no road conditions that caused the accident. The truth is that someone else—even the child—was at fault.

(Plaintiff’s counsel will try to sidetrack the witness, get him/her to agree to “safety rules” out of guilt/sympathy/empathy. The witness must always keep the major truths of the case in mind—and keep their responses in line with those truths.)

Major Truths (using hypothetical)

- I am saddened by what happened. Traffic safety is what we do, and we do that with all users of the road in mind—drivers, pedestrians, bicyclists, children, handicapped.
- Since traffic is unavoidable in our society, we try to bring order to it by way of guidelines, often called traffic standards. Those standards were met in this case.
- Standards take into account many users of the roadway, and are regularly under review nationally, statewide and locally.
- However, we cannot control human behavior. We have to assume reasonable use and responsible individuals.

And D-Reptile...

- Drivers cannot needlessly endanger our children, and should be aware of activities around them at all times.
- The County's safety rules here are clear, orderly and easily understood.
- The other driver caused this accident.
- The community did not cause this accident.
- The community is protected by the County's road standards and guidelines.

Preparation for Deposition

- Best to boil down the “major truths” to a small number, 5 to 7 at most
- Have the witness write them down and claim ownership of the truths—the witness has to believe them
- Have witness put the truths into his/her own words
- Experts: in addition to having frequency facts at the ready, prep them for Reptile questions and hypotheticals

Deposition prep, in summary:

Plaintiff will use guilt, which is what your witnesses major truths must counter—for example, any inherent guilt regarding the death of a child. Your witness will want to show sympathy and empathy. But they cannot fall prey to the Reptile's misuse of their humanity.

The witnesses' preparation needs to be second nature for the long haul.

Depositions

Sample Deposition: Take One

THE REPTILE APPEARS

(Sample Deposition, Take One)

- **DEPOSITION OF ROBERT JONES, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS**
- **Q: Before the break we covered your background, including the past 7 years as Director of Public Works, correct?**
- **A: Yes.**
- **Q: And in your oversight capacity, one of the main goals of your department is to ensure that the public roadways operate safely, correct?**
- **A: Yes**

Sample Deposition (Take One)

- Q: You would agree that by ensuring the safe operations of County roads, you are considering the safety of all users, including motorists, bicyclists and pedestrians, correct?
- A: Yes

- Q: Earlier, when you talked about traffic accident rates, you said you didn't have any evidence of collisions at this particular site, correct?
- A: Correct

- Q: How many collisions would it take before you thought that it was dangerous?
- A: I don't know. That would be something I would have to evaluate once I saw and pulled the collisions.

Sample Deposition (Take One)

- Q: Could it be as few as one?
- A: Could be—I would have to evaluate the accident factors.

- Q: Does your department—the traffic division--recognize that kids need extra protection when it comes to traffic safety?
- A: Well, they are certainly users we try to protect

- Q: Traffic engineers are not allowed to needlessly endanger pedestrians, right?
- A: Well...correct.

Sample Deposition (Take One)

- Q: Isn't that a standard of care?
- A: I am not sure what you mean—we try to maintain safe passage for all users of our roadway system.
- Q: And in striving for that goal, you stay within a set of standards, right?
- A: Roadway standards, if they apply, yes.
- Q: And when considering pedestrian use, don't you look for extra safety precautions for kids?
- A: Well, again, we try to ensure safe passage for all users.

Sample Deposition (Take One)

- Q: You have a sign lowering the speed limit when children are present, right?
- A: Yes

- Q: There are no signs lowering the speed limit for when adults are present, are there?
- A: Well, not as a group—there are speed signs lowering the limit for all users under various circumstances.

- Q: Yes, but as to children, risk of danger is greater—hence the need for specific signs when they are present, right?
- A: There is a need for an added layer of protection, yes.

Sample Deposition (Take One)

- Q: When looking at the types of protection afforded to children, engineers make choices?
- A: Yes

- Q: Often, several available choices can achieve the same benefit?
- A: Sometimes, yes.

- Q: Sometimes, some of those are more dangerous than others?
- A: Could be.

Sample Deposition (Take One)

- Q: So you have to avoid selecting one of those more dangerous ones?
- A: Sure

- Q: Because that is what a prudent engineer would do?
- A: Yes

- Q: Because when the benefit is the same, the extra danger is not allowed?
- A: Um, yes.

Sample Deposition (Take One)

- Q: The standard of care should not allow extra danger unless it might work better or increase the odds of success?
- A: Yes

- Q: So needless extra danger violates the standard of care?
- A: Well, as you have stated it, yes.

(Reptile pounces...)

- Q: And there's no such thing as a standard of care that allows you to needlessly endanger a child pedestrian?

(Note: the trick within this question is the use of the word "needlessly"--after all, nothing can be 100 percent fail-safe given human behavior)

- A: Um...sure, I guess.

Depositions

Take Two

**Your witness sticks to the
Major Truths**

(Sample Deposition, Take Two)

➤ DEPOSITION OF ROBERT JONES, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS

- Q: Before the break we covered your background, including the past 7 years as Director of Public Works, correct?**
- A: Yes.**

- Q: And in your oversight capacity, one of the main goals of your department is to ensure that the public roadways operate safely, correct?**
- A: By operate safely, the drivers, pedestrians, bicyclists, all who use the streets, cross walks, sidewalks need to conduct themselves safely.**

(Sample Deposition, Take Two)

- Q: You would agree that by ensuring the safe operations of County roads, you are considering the safety of all users, including motorists, bicyclists and pedestrians, correct?
- A: Yes

- Q: Earlier, when you talked about traffic accident rates, you said you didn't have any evidence of collisions at this particular site, correct?
- A: Correct

- Q: How many collisions would it take before you thought that it was dangerous?
- A: I am not sure what you mean, drunk drivers cause accidents, inattentive drivers cause accidents, untrained bicyclists cause accidents. By it you mean the road itself? The road here is safe.

(Sample Deposition, Take Two)

- Q: Could it be as few as one?
- A: As I said I would have to evaluate the accident factors, but this road meets all the governing safety standards.

- Q: Does your department—the traffic division--recognize that kids need extra protection when it comes to traffic safety?
- A: Yes, and so do the governing codes that incorporate safety standards for all users.

- Q: Traffic engineers are not allowed to needlessly endanger pedestrians, right?
- A: As we described earlier, the design of roads and the applicable safety standards accommodate the safe use by all types of users.

(Sample Deposition, Take Two)

- Q: Isn't that a standard of care?
- A: I am not sure what you mean— the standard of care is part of a whole set of basic engineering principles governing materials, markings, signs, speed limits.

- Q: And in striving for that goal, you stay within a set of standards, right?
- A: Yes, of course, the standards I just described.

- Q: And when considering pedestrian use, don't you look for extra safety precautions for kids?
- A: Well, again, safety standards apply to all users.

(Sample Deposition, Take Two)

- Q: You have a sign lowering the speed limit when children are present, right?
- A: Yes, at schools like this accident.
- Q: There are no signs lowering the speed limit for when adults are present, are there?
- A: The speed signs and the standards for setting the limits may vary depending on various circumstances.
- Q: Yes, but as to children, the risk of danger is greater—hence the need for specific signs when they are present, right?

[The D-Reptile Pounces!]

- A: If you mean in assessing the use of a roadway by drivers, pedestrians and others, must an engineer consider and balance the risks and benefits of all signage and other engineering options available and known to him, I would agree with that. Otherwise, I don't understand your question.

(Sample Deposition, Take Two)

- Q: When looking at the types of protection afforded to children, engineers make choices?
- A: Yes

- Q: Often, several available choices can achieve the same benefit?
- A: Like I said the designs and choices for safety take into account the inherent balance of automobile operation.

(Sample Deposition, Take Two)

- Q: Sometimes, some of those are more dangerous than others?
- A: There are always risks to vehicle operation and people.
- Q: So you have to avoid selecting one of those more dangerous ones?
- A: Your question is hard to understand. If you mean in this case, the road was safe as designed and it met all safety codes.

(Sample Deposition, Take Two)

- Q: Because that is what a prudent engineer would do?
- A: Like I said, for this road the choices meet safety standards, and the road is safe.

- Q: Because when the benefit is the same, the extra danger is not allowed?
- A: I am sorry, you seem to suggest this road was not designed according to safety standards. I do not see that.

(Sample Deposition, Take Two)

- Q: The standard of care should not allow extra danger unless it might work better or increase the odds of success?
- A: As I said the standard of care, if you mean in assessing the use of a roadway by drivers, pedestrians and others, must an engineer consider and balance the risks and benefits of all signage and other engineering options available and known to him, I would agree with that. Otherwise, I don't understand your question.

- Q: So needless extra danger violates the standard of care?
- A: Like I said

- Q: And there's no such thing as a standard of care that allows you to needlessly endanger a child pedestrian?
- A: Like I said

Other Defense Strategies



- Show jury that they and their loved ones are NOT like the plaintiff
- Plaintiff's veracity questioned: inconsistencies within medical records, prior statements, Sub Rosa
- Fight the Safety Manifesto with Responsibility Mantra (comparative fault)

Other Defense Strategies

- Trial Brief, Jury Instructions and In Limine Motions
- Educating the Court on the “Golden Rule”



The Golden Rule



Plaintiff to Jury: It could be you!

Voir Dire (State Court)

- One school of thought: the case is decided as soon as jurors raise their hands to be sworn in
- Utilize CCP section 222.5, which allows pre-selection opening statements, questionnaires and for “particular counsel” who are known to engage in “improper questioning” the court could require prior submission of the questions to be asked
- Rules of Court 3.25(f): trial judge should not permit counsel to attempt to precondition the prospective jurors to a particular result...

“... people have a way of carrying their resentments right into a jury box.”

Atticus Finch

And in the end...



--make a record!
