Litigation Tactics for In-House Counsel

Aamer Ravji
Julia Beckley

October 2, 2018

Dentons Presents
Litigation Hold --
How to Avoid Sanctions

Presented by Aamer Ravji
Litigation & Corporate Counsel
Dentons US LLP
aamer.ravji@dentons.com
Direct: 214/259-0987

October 2, 2018

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I. What is “Litigation Hold”?

- “Litigation Hold” or “preservation letter” is a written directive requiring custodian of records to preserve potentially relevant documents and electronically stored information (“ESI”) from destruction in anticipation of future litigation or ongoing litigation.
- Federal Rules of Civil Procedure mandate preservation of electronic information when a lawsuit is “pending or reasonably foreseeable.” (*See Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (*quoting Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *see also Fujitsu Ltd. V. Federal Express Corp.*, 247 F.3d 423, 436 (2nd Cir. 2001); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 175 (S.D.N.Y. 2004); *Metropolitan Opera v. Local 100*, 212 F.R.D. 178, 230 (S.D.N.Y. 2003).
- Notice to preserve records could be verbal, via email, or letter.
- Typically, “Litigation Hold” notices will direct custodians to identify and locate records pertaining to the subject matter of the dispute.
- Failure to comply with “Litigation Hold” notices could result in liability and sanctions.

II. What is a "record"?

- Anything that constitutes a piece of evidence about the past or an event, especially an account of an act or occurrence kept in writing or some other permanent form. *http://www.businessdictionary.com/definition/record.html (last visited September 12, 2018).*
- Definition of a record is broad in scope regardless of its characteristics, media, physical form, and the manner it is recorded or stored. Records include accounts, agreements, books, drawings, letters, magnetic/optical disks, memos, micrographics, etc. Generally speaking, records function as evidence of activities, whereas documents function as evidence of intentions. (*Id.*)
- Electronic records are treated the same as other evidentiary requirements and are subject to discover requests and rules.

III. What duties arise under "Litigation Hold"?

- Suspend routine destruction/purging of records;
- Discontinue all individual practice of destruction/purging of records;
- Exercise preservation of electronic or paper records in their original form;
- Preserve new records generated or received after the Litigation Hold;
- Implement routine sweep of electronic records after issuance of Litigation Hold;
- Contact former employees who may be identified as witnesses to preserve records; and
- Implement thorough exit interviews of departing employees.

IV. Where to search?

Today, relevant information can be found anywhere--think broadly!

V. What to do after gathering the records?

- Follow the instructions in the "Litigation Hold" notice to the letter and ask questions or clarifications if needed.
- Do **not** print copies of electronically stored information and delete the electronic formats--information saved as hard copies and electronic format must be preserved in their original form.
- Store all records in a safe place, preferably password protected, to prevent inadvertent deletion and destruction of records.

VI. How long should the "Litigation Hold" Last?

- Litigation Hold should remain in place until final notification is received that the matter is concluded--this includes all appellate proceedings
- After receipt of final notification regarding complete resolution of the disputed matter, revert back to normal document retention policy--do not simply delete or destroy the information.
- If in doubt, seek advise from counsel!

VII. Will the Records Become Public?

- It depends! There are many factors that govern what becomes a public record, such as the type of case, whether a protective order is in place, the nature of the documents/electronic information produced, whether a request is made to file papers with the court under seal; etc.
- Practically all litigation proceedings are public. Courts are extremely reluctant in denying the public the right to review documents filed with the court.

VIII. Who to engage once "Litigation Hold" notice is received?

- Company's business administrator;
- Custodian of records;
- Outside IT consultants, if necessary;
- Outside counsel; and
- Third-party document review team.

IX. What are the consequences for failure to implement "Litigation Hold"?

- As a guideline, Federal Rule of Civil Procedure 37 ("Rule 37") is instructive. Rule 37 states,

  "If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

  (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

  (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party [*negative inference instructions*]; or (C) dismiss the action or enter a default judgment [*death penalty sanctions*]."

X. “Litigation Hold” Best Practices

- Don't delay in issuing “Litigation Hold” notices or preservation letters;
- Create an information gathering team;
- Identify key custodians and develop an interview strategy;
- Develop a written document collection plan;
- Evaluate the scope of preservation obligation;
- Develop detail reminders, updates and escalation schedules;
- Make document collection and security of ESI a priority;
- Implement regular follow-ups and monitor compliance;
- Implement custodian tracking and automation;
- Select competent vendors such as IT consultants, forensic computer analysts, etc.; and
- Identify competent third-party reviewers, if necessary.

Thank you

大成 DENTONS

Dentons US LLP
2000 McKinney Avenue
Suite 1900
Dallas, TX 75201-1858
United States

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No Reptiles Allowed: Defending Against the Modern Golden Rule Violation

Julia M. Beckley
Dentons US LLP
Dallas, Texas
julia.beckley@dentons.com
Direct: (214) 259-1854

https://reptilekeenanball.com/

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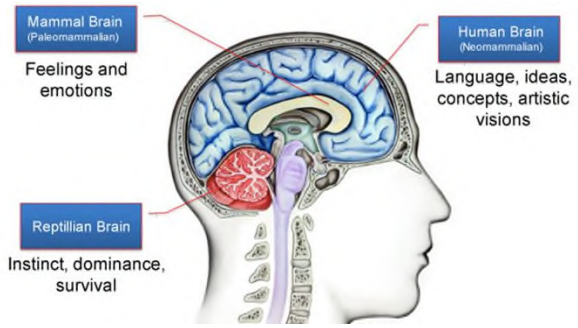
Just A Sample of The Reptile Seminars Offered to the Plaintiffs' Bar

https://reptilekeenanball.com/Online-Seminars_c_29.html

What Is The Reptile Theory?

When Plaintiffs' counsel condition jurors throughout voir dire and trial to tap into their "reptilian brains," associated with their survival instinct which drives them to protect not only themselves but their entire community as well.



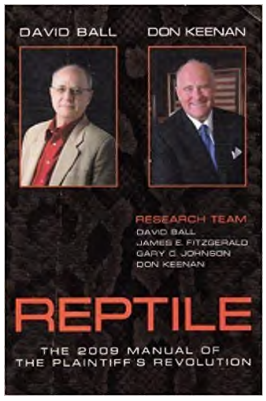
Picture credit: https://upliftconnect.com/make-friends-reptilian-brain/

Why Is The Reptile Theory Bad?

- Awarding large plaintiffs' verdicts based on their sympathies, emotions, and fears rather than the evidence and facts of the case before them.

Reptile Theory Background

- The Reptile Theory began when Don Keenan, a plaintiffs' attorney, and David Ball, a jury consultant, teamed up to publish *Reptile: The 2009 Manual of the Plaintiff's Revolution*, a how-to guide for Plaintiffs' attorneys to transform jurors into reptiles.



Reptile Theory Background

- The Reptile Theory stems from the Golden Rule to "do unto others as you would have them do unto you" which asks the jury to place themselves into the plaintiff's place.
- It is well-settled in Texas that Golden Rule arguments which require the jury to place themselves in the same shoes as the plaintiff are prohibited.
  - In *Farmbrough v. Wagley*, 169 S.W.2d 478, 481-82 (Tex. 1943) the Court held that arguments which invoke the Golden Rule or ask jurors to consider a case from an improper viewpoint, such as putting them in place of a party to decide a case, is improper because it does not employ the reasonably prudent standard;
  - In *World Wide Tire Co. v. Brown*, 644 S.W.2d 144, 145-46 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) the Court found that instructing the jury on the Golden Rule and asking them to put themselves in Plaintiff's shoes was improper.

Reptile Theory Background

- However, while the prohibition of the Golden Rule is clear, the use of the Reptile Theory is alive and well in courts today.
- The Reptile Theory side-steps the Golden Rule by not asking jurors to imagine themselves in the place of the plaintiff but instead urges them to protect *their community*.
- Once in the Reptile mindset, jurors are to demand what is "best," "safest," or "most prudent" of defendants, rather than the applicable standard of care in the case.

Attacking the Reptile Theory

- As touted by Keenan and Ball's own website, the Reptile Theory has been extremely effective in rendering large plaintiffs' verdicts and has been quickly expanding through the Plaintiffs' bar.
- Corporate counsel must be aware of how to identify when and whether a Reptile Theory is being pursued by Plaintiffs in any given case and the arguments against it in order to avoid later "unringing a bell" the jury has heard.

Attacking the Reptile Theory: Pre-Conditioning The Jury

- Often, Plaintiffs' counsel start impermissibly pre-conditioning the jury during *voir dire*, as advocated in the Reptile Manual, by personally involving the jury in the associated dangers of the case.
- For example, in a medical malpractice case, such improper questions include
  - "When selecting a doctor for yourself or your family, how do you choose?"
  - "What kinds of concerns have ever made you change doctors?"

    (*Reptile: The 2009 Manual of the Plaintiff's Revolution*, p. 121)
- These questions are designed to start personalizing the case to the jury and putting them in the shoes of the plaintiff, as the Golden Rule prohibits. *Id.* Other improper questions ask prospective jurors about their feelings and expectations of safety in their own community.

Attacking the Reptile Theory: Appeal to Self-Interest

- Once the jury is pre-conditioned in *voir dire* that this case is personal to each of them, Plaintiffs' counsel evoke fear in the minds of the jurors regarding their own community safety and asks them to act in their own self-interest.

Attacking the Reptile Theory: Appeal to Self-Interest

- The Reptile Theory asks jurors to let their self-interest drive their verdict, rather than the evidence presented.
- The jury is supposed to reach a verdict based on the evidence presented in the case, not on prejudice incited by counsel. (*Lone Star Ford, Inc. v. Carter*, (1993) 848 S.W.2d 850, 854)
- Arguments asking the jury to put themselves to the victim's position is improper because it is a "blatant appeal to the jury's natural sympathy for the victim." (*People v. Vance*, (2010)188 Cal. App. 4th 1182, 1188.)

Attacking the Reptile Theory: Punitive Element of Damages

- The Reptile Jury imputes a punitive component in their damages by focusing on past, potential or future harm to *the community* by behavior *similar* to the allegations against defendant instead of focusing on the evidence presented as to the particular defendant which was causally connected to a particular harm in the particular plaintiff. However, "punitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case*." (*Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68 (emphasis added). *See also, State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422-423.)

Practice Pointers To Defend Against the Reptile Theory: Discovery

- Early identification of whether Plaintiffs are pursuing a Reptile Theory is key to defending against it.
- Although usually revealed in the trial stage, Plaintiffs may begin to develop the theory in discovery.
- During depositions of treating physicians, persons most qualified, corporative representatives or experts, be weary of questioning regarding the "safest," "best, or "better practice."
- This can later be used to preen a Reptile Jury that a safer alternative was available and not utilized, thus endangering the community, even if defendant's behavior did not violate the standard of care.

Samples of Reptile at Corporate Witness Depositions

Plaintiffs asked:

(1) whether Company would agree that safety was a number one priority;

(2) whether Company's approach to projects shall always be safety first; and

(3) whether it was Company's policy that "We will not sacrifice safety for the sake of quantity now and in the future."

Reptile Repetition

- Plaintiffs referenced "***safety rules***" during the deposition at least ten times:

  Q. Another ***safety rule*** for Company for its workers that were working with asbestos is to make every effort to minimize exposures. Correct?

  Q. Another ***safety rule*** that Company was aware of and required when working -- when its people were working with asbestos is to make sure that the work area itself be monitored. Correct?

  Q. Another ***safety rule*** that was important when you had asbestos workers doing asbestos abatement time in terms of what Company required were barriers to be constructed around the work area if the work area was large enough?

  Q. Another ***safety rule*** that was important for the asbestos abatement workers is to make every effort to have and maintain the most effective engineering controls. Correct?

  Q. Another ***safety rule*** for Company's employees that were working with asbestos is that they were to wash or shower thoroughly after handling hazardous substances.

  Q. Another ***safety rule*** for dealing with asbestos workers is to never turn compressed air on yourself or anyone else when working with anything that may be potentially asbestos-containing?

  Q. Another kind of broad ***safety rule*** but a very important one for Company was to make sure that the workers that it had were trained on all good safety practices before they started their work?

  Q. Another ***safety rule*** for asbestos abatement workers at Company is to make sure they have necessary personal protective equipment?

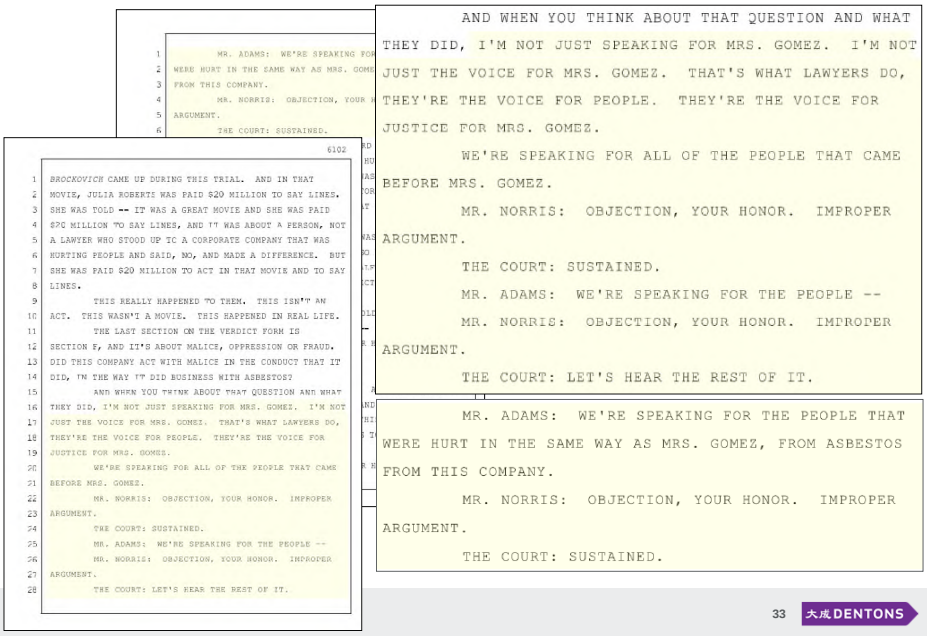
  Q. Another ***safety rule*** that is referenced in Company's safety manual was to have workers present to prevent injury of building occupants outside the area where asbestos abatement work was occurring.

  Q. In your own experience as the representative of Company, if an employee is keeping their eyes open and paying attention, over just a one-year period, if they said in an entire year, "I didn't see a problem with anybody ever for any ***safety rule***," would that raise a concern to Company about that worker and how factual they were in paying attention to the worksite?

Practice Pointers To Defend Against the Reptile Theory: Motions *in Limine*

- Consider filing motions *in limine* to preclude use of the Reptile Theory at trial in *voir dire*, opening statements, and trial testimony, as appropriate to the facts of a given case.
- In particular, to limit questioning during *voir dire* to only whether the prospective jurors can serve as fair and impartial jurors and not pre-conditioning the jury to feel unsafe and protectors of their community.
- For opening statements, to preclude all arguments, certainly, and statements made solely to evoke sympathy or self-interest. Similarly, to preclude questioning and testimony of witnesses regarding better, best, and safer practices, especially those known only in hindsight.

Reptile Objections: Sustained



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BROCKOVICH CAME UP DURING THIS TRIAL. AND IN THAT MOVIE, JULIA ROBERTS WAS PAID $20 MILLION TO SAY LINES. SHE WAS TOLD -- IT WAS A GREAT MOVIE AND SHE WAS PAID $2C MILLION TO SAY LINES, AND IT WAS ABOUT A PERSON, NOT A LAWYER WHO STOOD UP TC A CORPORATE COMPANY THAT WAS HURTING PEOPLE AND SAID, NO, AND MADE A DIFFERENCE. BUT SHE WAS PAID $20 MILLION TO ACT IN THAT MOVIE AND TO SAY LINES.

THIS REALLY HAPPENED TO THEM. THIS ISN'T AN ACT. THIS WASN'T A MOVIE. THIS HAPPENED IN REAL LIFE.

THE LAST SECTION ON THE VERDICT FORM IS SECTION F, AND IT'S ABOUT MALICE, OPPRESSION OR FRAUD. DID THIS COMPANY ACT WITH MALICE IN THE CONDUCT THAT IT DID, I'M THE WAY IT DID BUSINESS WITH ASBESTOS?

AND WHEN YOU THINK ABOUT THAT QUESTION AND WHAT THEY DID, I'M NOT JUST SPEAKING FOR MRS. GOMEZ. I'M NOT JUST THE VOICE FOR MRS. GOMEZ. THAT'S WHAT LAWYERS DO, THEY'RE THE VOICE FOR PEOPLE. THEY'RE THE VOICE FOR JUSTICE FOR MRS. GOMEZ.

WE'RE SPEAKING FOR ALL OF THE PEOPLE THAT CAME BEFORE MRS. GOMEZ.

MR. NORRIS: OBJECTION, YOUR HONOR. IMPROPER ARGUMENT.

THE COURT: SUSTAINED.

MR. ADAMS: WE'RE SPEAKING FOR THE PEOPLE --

MR. NORRIS: OBJECTION, YOUR HONOR. IMPROPER ARGUMENT.

THE COURT: LET'S HEAR THE REST OF IT.

AND WHEN YOU THINK ABOUT THAT QUESTION AND WHAT THEY DID, I'M NOT JUST SPEAKING FOR MRS. GOMEZ. I'M NOT JUST THE VOICE FOR MRS. GOMEZ. THAT'S WHAT LAWYERS DO, THEY'RE THE VOICE FOR PEOPLE. THEY'RE THE VOICE FOR JUSTICE FOR MRS. GOMEZ.

WE'RE SPEAKING FOR ALL OF THE PEOPLE THAT CAME BEFORE MRS. GOMEZ.

MR. NORRIS: OBJECTION, YOUR HONOR. IMPROPER ARGUMENT.

THE COURT: SUSTAINED.

MR. ADAMS: WE'RE SPEAKING FOR THE PEOPLE THAT WERE HURT IN THE SAME WAY AS MRS. GOMEZ, FROM ASBESTOS FROM THIS COMPANY.

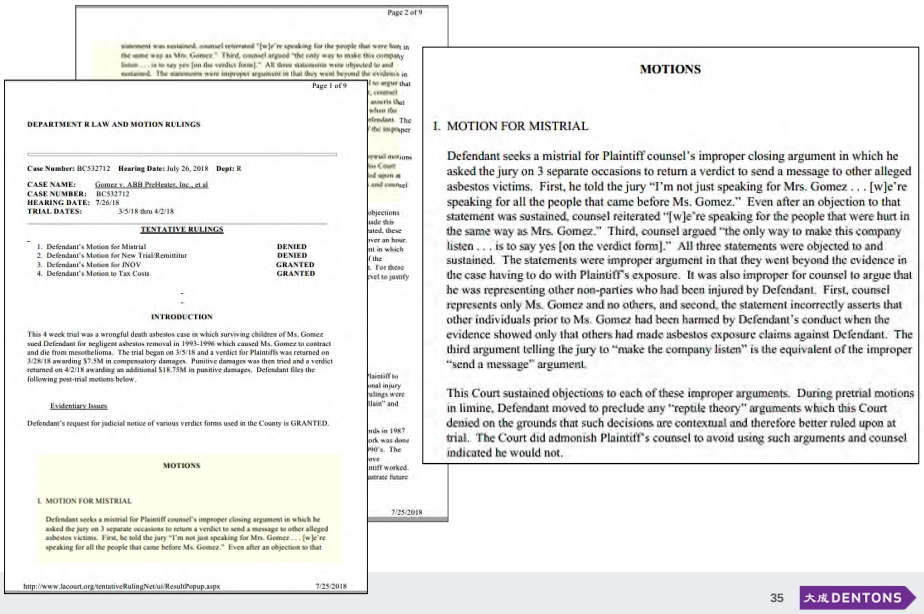
MR. NORRIS: OBJECTION, YOUR HONOR. IMPROPER ARGUMENT.

THE COURT: SUSTAINED.

Practice Pointers To Defend Against the Reptile Theory: Jury Instructions and Limiting Instructions

- The jury must be carefully instructed to render a verdict based only on the evidence presented and not on their bias, sympathy, prejudice, or public opinion. If Plaintiffs engage in any misconduct to evoke the Reptilian brain, request a limiting instruction or mistrial if applicable.

Motion for Mistrial



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statement was sustained, counsel reiterated "[w]e're speaking for the people that were hurt in the same way as Mrs. Gomez." Third, counsel argued "the only way to make this company listen . . . is to say yes [on the verdict form]." All three statements were objected to and sustained. The statements were improper argument in that they went beyond the evidence in

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DEPARTMENT R LAW AND MOTION RULINGS

Case Number: BC532712 **Hearing Date:** July 26, 2018 **Dept:** R

CASE NAME: Gomez v. ABB PreHeater, Inc., et al
CASE NUMBER: BC532712
HEARING DATE: 7/26/18
TRIAL DATES: 3/5/18 thru 4/2/18

TENTATIVE RULINGS

1. Defendant's Motion for Mistrial	**DENIED**
2. Defendant's Motion for New Trial/Remittitur	**DENIED**
3. Defendant's Motion for JNOV	**GRANTED**
4. Defendant's Motion to Tax Costs	**GRANTED**

INTRODUCTION

This 4 week trial was a wrongful death asbestos case in which surviving children of Ms. Gomez sued Defendant for negligent asbestos removal in 1993-1996 which caused Ms. Gomez to contract and die from mesothelioma. The trial began on 3/5/18 and a verdict for Plaintiffs was returned on 3/28/18 awarding $7.5M in compensatory damages. Punitive damages was then tried and a verdict returned on 4/2/18 awarding an additional $18.75M in punitive damages. Defendant files the following post-trial motions below.

Evidentiary Issues

Defendant's request for judicial notice of various verdict forms used in the County is GRANTED.

MOTIONS

I. MOTION FOR MISTRIAL

Defendant seeks a mistrial for Plaintiff counsel's improper closing argument in which he asked the jury on 3 separate occasions to return a verdict to send a message to other alleged asbestos victims. First, he told the jury "I'm not just speaking for Mrs. Gomez . . . [w]e're speaking for all the people that came before Ms. Gomez." Even after an objection to that

http://www.lacourt.org/tentativeRulingNet/ui/ResultPopup.aspx 7/25/2018

MOTIONS

I. MOTION FOR MISTRIAL

Defendant seeks a mistrial for Plaintiff counsel's improper closing argument in which he asked the jury on 3 separate occasions to return a verdict to send a message to other alleged asbestos victims. First, he told the jury "I'm not just speaking for Mrs. Gomez . . . [w]e're speaking for all the people that came before Ms. Gomez. Even after an objection to that was sustained, counsel reiterated "[w]e're speaking for the people that were hurt in the same way as Mrs. Gomez." Third, counsel argued "the only way to make this company listen . . . is to say yes [on the verdict form]." All three statements were objected to and sustained. The statements were improper argument in that they went beyond the evidence in the case having to do with Plaintiff's exposure. It was also improper for counsel to argue that he was representing other non-parties who had been injured by Defendant. First, counsel represents only Ms. Gomez and no others, and second, the statement incorrectly asserts that other individuals prior to Ms. Gomez had been harmed by Defendant's conduct when the evidence showed only that others had made asbestos exposure claims against Defendant. The third argument telling the jury to "make the company listen" is the equivalent of the improper "send a message" argument.

This Court sustained objections to each of these improper arguments. During pretrial motions in limine, Defendant moved to preclude any "reptile theory" arguments which this Court denied on the grounds that such decisions are contextual and therefore better ruled upon at trial. The Court did admonish Plaintiff's counsel to avoid using such arguments and counsel indicated he would not.

7/25/2018

Conclusion

- Identify use of reptile
  - Pleadings
  - Discovery
    - Written
    - Depositions
  - Motion Practice
  - *Voir Dire*
  - Opening Statement
  - Witness Examinations
  - Closing Argument
- Defend
  - Object
  - Motion *in Limine* to Exclude or Trial Brief re Anticipated Improper Use of Reptile Theory
  - Motion for New Trial

Thank you

Dentons US LLP
2000 McKinney Avenue
Suite 1900
Dallas, TX 75201-1858
United States

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