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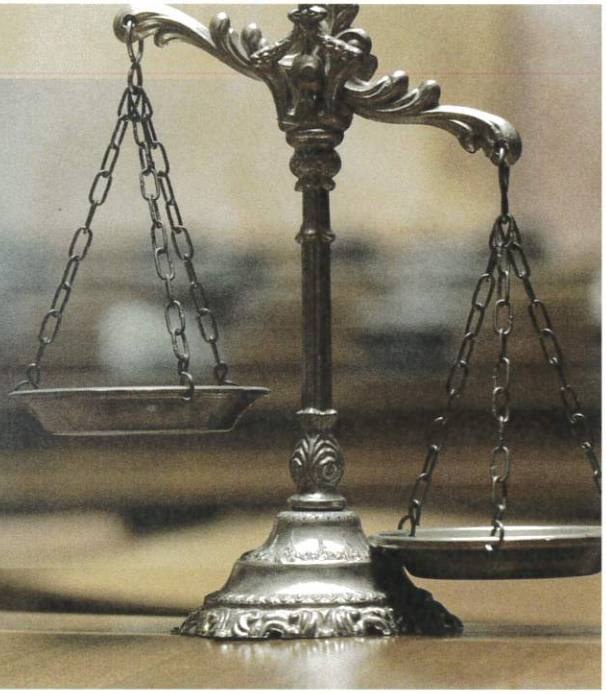

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Defending the Insurance Broker: What's so "Special" About It?

Matthew S. Marrone, Esq. | *Goldberg Segalla, LLP*

It used to be much easier to classify insurance "brokers" and "agents" as they were distinguished from each other and their roles were defined: "agents" were salaried employees or exclusive agents of an insurance company, "brokers" were independent agents of an insured, and their duties were to their respective principals. In large part, however, this clear distinction no longer applies. As independent brokers enter into agency agreements with multiple carriers that permit them to accept applications and premiums on the carrier's behalf, and sometimes even bind coverages, the line between these traditional characterizations becomes blurred. The independent "broker" becomes an "agent," at least in some sense of the term, of several different insurance carriers.

By entering into these agency relationships, the broker is able to more efficiently shop for attractive premiums and coverages, and thus is well-positioned to promote herself to prospective insureds. The dual-agency relationship brokers have with carriers and insureds is widely

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Letter from the President

Kathleen V. Buck, Esq. | *Minnesota Lawyers Mutual Insurance Company*

Dear PLDF Members,

Welcome to our new leadership year! I am thrilled to work with you and continue building on our past achievements. As I sat down to write, I noticed an energy about. The air has cooled here, the wreaths reappeared. At 5:30 a.m. my youngest child eagerly snuck a peak out the window hoping she would discover snowflakes coating the yard. No luck. The excitement remained. I felt the energy as I wandered downtown in search of an espresso, occasionally looking up to see delighted eyes and resilient, joy-filled faces. This crazy, restless season arrived just in time, allowing us to celebrate, look forward, and express our gratitude.

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tion laws. Under the Equal Pay Act, this potential liability includes liquidated damages and attorney's fees. Under Title VII, this potential liability includes compensatory and punitive damages and attorney's fees.

For other employers, innocuous answers to the questions may not be enough to stave off a charge of discrimination or a lawsuit given the intense emotions underlying the psychology of pay. Especially as to a circumstance in which the employer has the burden of defending a pay disparity under the Equal Pay Act or Title VII, the determination may be made that the benefits of legal action outweigh the risks.

While not equating transparency requirements to unleashing a monster, as other scholars have done, legal experts acknowledge such laws heighten the risk of discrimination suits for employers and their insurers. As more and more jurisdictions enact pay transparency laws, this risk will only increase.

It is thus imperative that employers act immediately to mitigate these risks. Such mitigation should include an immediate evaluation of not only of salary ranges, but also of pay structures. ■

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Preparation of the Health Care Provider for Deposition and Trial Testimony (And How This Can Help Prevent "Nuclear Verdicts")

Walter J. Price, III | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

There have always been many challenges associated with preparing healthcare providers for depositions. Today, two issues are of particular concern. The first is the continued use of "Reptile Theory" tactics by plaintiff counsel. The second involves a perceived mistrust of institutions, which affects the impression of employees of hospitals, nursing homes, and the like.

> The "Reptile Theory" . . . generally seeks to focus on fears and concerns broader than the issues in the case, presumably causing jurors to respond to a perceived threat to their own safety.

Reptile Theory

Regarding the former, the purpose of this discussion is not to address the supposed "scientific" background for the "Reptile Theory" but, instead, to present practical examples of the types of questions that may be posed with that strategy and provide examples of simple responses. The "Reptile Theory" was introduced by David Ball and Don C. Keenan in *Reptile: The 2009 Manual of the Plaintiff's Revolution.* The theory generally seeks to focus on fears and concerns broader than the issues in the case, presumably causing jurors to respond to a perceived threat to their own safety. Ann T. Greeley, Ph.D., *Snakes and Lizards and Crocodiles (Oh My!): A Primer on the Reptile Theory of Trial Strategy.* In undertaking this process, the plaintiff attorney attempts to focus on the defendant's behavior , particularly demonstrating that there were safety rules available or in place to prevent the type of danger at issue, yet those rules were violated. Greeley; John R. Crawford and Benjamin A. Johnson. *"Strategies for Responding to Reptile Theory Questions," For the Defense* (December 2015).

The "Reptile Theory" generally involves an effort to obtain key admissions in depositions, condition the jury during voir dire to certain themes, and to set the stage for application of the themes in opening statement. The themes, particularly as sought through deposition questioning, include an assertion that safety is always the defendant's top priority and that any level of danger is inappropriate. Greeley, p. 9. Accordingly, reducing risk is also a top priority. These assertions are concluded with the question or statement seeking affirmation that if someone violated a safety rule that person

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or company would be responsible for the accident or incident. Greeley, p. 10.

The attorney often seeks admissions from the witness regarding broad statements about safety and safety rules which then prevent the witness from escaping those points in case-specific questions. Below is a series of questions presented to a nurse in a recent medical malpractice case in Alabama demonstrating the preliminary, broad safety statements:

(1) Tell me if you agree with the following statement. In your opinion is a hospital, or its staff ever allowed to needlessly endanger a patient?

(2) Should a hospital and its staff ever refuse a patient's request for help walking?

(3) Would you agree that patient safety is the most important thing at a hospital?

(4) So pretty much everything that a hospital nurse does should be ruled by safety?

(5) And at a minimum, a hospital and its staff should at least follow its own safety rules and procedures?

(6) This is because violating a patient's safety rule might end up hurting or killing somebody, right?

(7) So, it's fair to say that a nurse shouldn't make choices that put patients at unnecessary risk?

(8) Because extra risk means more danger, right?

(9) You tell me if you agree with this—I put my life in your hands. In return, you agree to take care of me and keep me safe. Now is that a fair deal?

(10) Do you think most patients expect that? Do you think patients deserve that?

(11) So, you would agree with me that it's basically a patient's right to be taken care of and kept safe?

Of course, medical cases are ripe for such an approach as potential "safety rules" abound. These may include hospital or nursing home policies and procedures, medical treatises and texts, standards promulgated by The Joint Commission and other industry groups, federal regulations, and resources such as the *Physician's Desk Reference.* Advice regarding responses to questions seeking to apply such "rules" will follow.

The "Reptile Theory," while purportedly having a scientific basis, for purposes of witness questioning, involves two tried-and-true techniques. The first is, as alluded to above, the progressive application of general rules to a specific situation. Another example of this progression is as follows:

(1) If a patient's status changes, the safest thing to do is call the physician immediately?

(2) Documentation in the chart must be thorough; otherwise, a patient could be put in danger, right?

(3) When a test or lab is ordered, you would agree with me that you should review the results immediately, because any delay would put the patient at risk?

(4) Nurse Jones, you would agree with me that when a troponin level is elevated, the patient is in imminent danger, correct?

Bill Kanasky, Jr., Ph.D. and Ryan A. Malphurs, Ph.D., *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution,* p. 6. Once the witness has agreed to the paramount nature of safety, including, here, timely contact with the physician, he or she may struggle to escape the assertion that a lab result was not timely reported to the physician.

The other familiar form of witness questioning is to "shame" the witness into feeling obligated to provide a certain response. Examples of these questions include:

(1) Failing to call a physician at 4:00 p.m. was a safety violation?

(2) It exposed my client to unnecessary risk and harm, right? If you would have called a physician it would have prevented by client's stroke, right?

(3) Nurse Jones, failing to call a physician immediately at 4:00 p.m. was a deviation of the standard of care, wasn't it?

Kanasky and Malphurs, p. 9. Often, the witness feels compelled to say he or she "knew better" than to act as occurred.

The most important rule in responding to "Reptile" questions is to "never say yes." Crawford and Johnson, p. 71. General safety rules of this type fail to consider the specific circumstances of the case and, more importantly, fail to consider the complexity of medical matters. While witnesses may certainly testify that safety is important and that they strive to prevent injury to patients, the rather simple example of a surgery shows that medicine does not present a black-and-white home for the use of "safety" rules. It should only take a matter of moments to list the number of risks, and even dangers, associated with many, if not most, medical procedures undertaken in an effort to cure. Indeed, a discussion of this analysis is key to building the witness' confidence in

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disagreeing with the "safety rule" statements which are posed as questions. The key is to avoid the cascade of affirmative responses whereby the witness becomes "boxed in" when finally asked about the care at issue. In doing so, the witness may certainly disagree with the premise of the initial, broader questions.

Recognizing that "Reptile" progression of questioning generally moves from broad to more specific safety questions, witnesses must be prepared to respond to those initial questions asserting that a particular course of care would be the safest course or would be the course least likely to place the patient in danger. Often, the following are true and accurate responses:

(1) It depends on the patient's specific circumstances.

(2) It depends on the full picture.

(3) Not necessarily, as every situation is different.

(4) That is not always true.

(5) I would not agree with the way you stated that.

(6) That is not how I was trained.

Kanasky and Malphurs, p. 12. Again, this approach is not new, and it is not inappropriate.

Returning to the notion that the "Reptile" attorney seeks damaging admissions during discovery depositions, a corollary to the "never say 'yes'" rule is that the witness may say "yes, but". For generations, defense lawyers have been mentored or taught that witness preparation includes instructions such as "answer only the question asked" and "do not volunteer." However, "saying too little can leave false impressions, impair credibility, or otherwise harm the case as much as saying too much, sometimes even more so." Kenneth R. Berman, "Reinventing Witness Preparation," *Litigation* (Summer 2015), p. 27. (Indeed, Berman's article provides an excellent discussion of general witness preparation). The "yes, but" ancillary rule allows the witness to tell the full story without being limited by the attorney's question thereby preventing the witness from being misunderstood or factsbeing left out of the description.

Another concern in the medical field is the potential that the general "safety rule" replaces either the concept of "reasonableness" or even the medical or nursing standard of care. *See, e.g.,* Crawford and Johnson, p. 72. Defense counsel must carefully prepare witnesses in medical malpractice actions to focus on the legal standard applied in a medical liability action; that being, the medical or nursing standard of care.

One way plaintiff attorneys try to change the applicable standard is to ask questions including absolute terms. These include, for example, the following:

(1) Always;

(2) Never;

(3) Number One Priority;

(4) Best; and,

(5) Best Possible.

If the witness answers questions including these terms in the affirmative, he or she has agreed to the higher standard which will then be practically applied to the care at issue. Witnesses need to be taught to identify absolute terms so that they will not fall into this trap.

Finally, regarding the "Reptile" topic, it may be suggested that witnesses not answer "damages" questions. Crawford and Johnson, p. 72. Responsibility for injury or damage is a legal matter and the involved lawyers will argue those issues to the jury.

Institutional Mistrust

Another current trend in witness preparation involves a general thought that many jurors are mistrusting of institutions. Such a concern may go hand-in-hand with the "Reptile Theory" where plaintiff attorneys seek to play upon these biases. In preparing healthcare providers for deposition, it is important to consider those issues significant to patients. In a twist of the "Reptile Theory," one may consider that jurors might assess healthcare providers by considering whether the jurors would themselves welcome the care of the testifying witness. A 2006 article addressed the behavior of healthcare providers considered as "ideal." Neeli M. Bendapudi, Ph.D., et al., "Patients' Perspectives on Ideal Physician Behavior," *Mayo Clin. Proc.* (March 2006). The traits identified included:

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(1) Confidence;

(2) Empathy;

(3) Humanity;

(4) Personal Concern;

(5) Forthrightness;

(6) Respect; and,

(7) Thoroughness.

Bendapudi, p. 340. While one may easily recognize these qualities as a patient, they can also be exhibited by a testifying witness. For example, the most important factor in establishing witness confidence is preparation and practice. Intimate knowledge of the medical record is key to establishing this confidence as well. Empathy, humanity, and personal concern are important to the most basic of trial issues —credibility. A conscientious and polite witness will largely demonstrate these qualities though, yet again, preparation and practice are essential to invoking these qualities, especially in the "Reptile" realm where the questioning often involves attempts to unnerve or humiliate witnesses. Greeley, p. 8, 9. By way of example, the above questions posed in the noted Alabama deposition example came immediately after the witness was asked her name.

Essentials of Witness Preparation

While defense counsel may want to rush into covering accepted "rules" for witness testimony, the initial focus of witness preparation should be on the witness' concerns. Often witness preparation is hindered because the witness is focused on other issues and, therefore, he or she is not paying attention to the attorney instructions. Such witness concerns may be rather simple including, for example, where to park, what to wear, who will be present for the deposition, will the plaintiff be present for the deposition, and when does the witness need to arrive. Other times there may be witness-specific issues which need to be initially addressed. A recent example was a witness who wore hearing aids who was concerned about how and when to bring this to the plaintiff attorney's attention.

The more information the witness has, the more comfortable he or she will be in the deposition. Therefore, it is important that defense counsel take time to explain many basic concepts and issues which will come up in a deposition. At the outset, the attorney needs to explain to the witness the purpose of the deposition. Similarly, the witness should be told what is meant by the "usual stipulations" and the effect of the same. In addition, the attorney needs to explain the nature of objections and instructions and how the witness needs to proceed in the event an objection is made or an instruction not to answer is given. Rather simply, the witness needs to be told that he or she can ask for a break at any time during the deposition. Likewise, the witness needs to be instructed to carefully review any documents the plaintiff attorney shows them during the course of the deposition. Many times, witnesses do not know how to respond when asked how they prepared for the deposition. Counsel must be sure to address this anticipated question during deposition preparation.

Most witnesses, including highly intelligent and successful practitioners, are intimidated by the deposition process. One way to combat this anxiety is to make sure that the witness knows that they have more control during the deposition than they otherwise believe. For example, the witness can, and should, ask the lawyer to rephrase questions which he or she does not understand. Surprisingly, the witness can control the pace of the deposition by pausing or by his or her speaking style. The witness needs to be reminded that it is his or her deposition and it is their opportunity to tell the full story.

Defense counsel should also explain his or her role to the witness. The witness needs to understand that the attorney is not a cheerleader. The witness further needs to understand that the attorney may be firm at breaks and may even appear upset. Defense counsel needs to assure the witness that this is all an effort to see that the witness' deposition goes as well as possible.

Our witnesses receive a minimum of three preparation meetings and often more. During the first meeting, we utilize a PowerPoint in discussing depositions generally, including some tips for identifying trick questions and providing complete answers. During the second session, we begin to address the factual issues involved in the case and begin working on answering some sample questions. This is a good opportunity to use a thesaurus in order to identify strong words which the witness can use to tell his or her story. The third session includes a videotaped mock examination with a critique of the witness' performance. Often times we will copy the plaintiff attorney's style and the examination is usually very aggressive. Sometimes we will conduct a "full" deposition, and, on other occasions, we will focus on key issues and anticipated questions. It is important to take time between these sessions so that the witness can digest the information provided and practice answering sample questions before the next session. It is also helpful to have the witness practice even simple questions such as ones seeking a list of job duties so that they can easily describe those duties during the deposition. Another benefit of the videotaped examination is that witnesses can see themselves on video and identify distracting habits.

Of course, in today's world other issues need to be addressed. For exam-

ple, defense counsel needs to ask the witness if he or she has any cellphone photos, videos, or text messages in any way related to the subject care. In addition, defense counsel should check the witness' social media profile just as he or she would examine the plaintiff's profile.

During the deposition preparation sessions, the witness should be counseled on various tactics used by plaintiff attorneys. These include, for example, questions in which the attorney restates the witness' answer though slightly changes the answer to better support the plaintiff's case. Likewise, witnesses should be counseled about questions in which the attorney tries to create doubt in the witness' recollection or answer. Counterintuitively, witnesses should be told that repetitive questions by the plaintiff attorney are generally a sign of success. The witness should also be told how to address interruptions. It is important that the witness go ahead and finish his or her answer so that his or her whole story or whole truth may be on the record.

Much of witness preparation involves defense counsel attempting to identify questions which will be posed during the deposition. In doing so, the attorney needs to anticipate creative lines of questioning. These may involve questions addressing CMS "never events" or state nursing regulations. The attorney needs to be careful to review hospital policies and procedures, The Joint Commission publications, as well as, for example, ACOG and AWHONN publications and guidelines.

Nuclear Verdicts

There is no real definition of a nuclear verdict. Many commentators suggest that such is a verdict exceeding $10 million. Nonetheless, it is clear that larger and larger verdicts have been seen during recent years.

Deposition preparation can go a long way toward preventing these events. Preparation for "Reptile" questions is important so that the witness does not provide the plaintiff attorney with "sound bites" which can be used to suggest that the witness has admitted breaching the standard of care. In addition, corporate representatives must be prepared to address questions beyond the areas of inquiry included in the deposition notice. Another thing to consider is whether to conduct a direct examination of a corporate representative in the event that the deposition is played in the plaintiff's case. Many commentators say that one of the best ways to prevent nuclear verdicts is to tell the defendant company's story. Seemingly, one of the best ways to do that is to show that the company has good, caring employees as demonstrated by their effective deposition testimony. ■

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Walter J. Price, III is a partner with *Clark, May, Price, Lawley, Duncan & Paul, LLC* in Birmingham, Alabama. The bulk of Mr. Prices' practice is devoted to the defense of hospitals and other healthcare providers in medical negligence cases. He is a member of DRI, the IADC, the Alabama Defense Lawyers Association, and the Professional Liability Defense Federation. From 2015 to 2018 Mr. Price served on the PLDF Board of Directors. He may be reached at wprice@clarkmayprice.com.

Practicing Well: Change it up!

Patty Beck | *A Balanced Practice, LLC*

I've always been a fan of routines. There is a certain comfort in having structure, predictability, and experience making things happen each day. They help us get the kids off to school on time, stay productive throughout the day, and allow for a consistent way to decompress from the day's activities. On the flip side, sometimes they can feel monotonous when we rely on the same routine day after day—taking the same route to work, drinking the same morning beverage, eating out at the same places, etc. The familiarity, although often comforting, can take a mental and physical toll on us over time if we're not paying attention. So, what can we do?

Change it up! No, I don't mean a massive overhaul to your routine. What I mean is that by taking time to think about how we can make small changes to our routines, it can have the effect of breathing new life into a day that might otherwise feel a bit stale.

When I initially sat down to work on this article, I was feeling a bit stuck and uninspired. After three years of doing the same morning routine that typically brings me joy—yoga, drinking my coffee outside on my deck (mindfully, of course), and watching my dogs wrestle in the backyard—I wasn't excited to go upstairs to my home office, which is usually a place of inspiration for me. So, I decided to change up my scenery and work from a nearby European-style coffee shop that I'd heard of but had never been to. I was admittedly a bit nervous since I am a creature of habit, but after my experience, I have never been so happy that I tried something new!

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