Limiting Reptile Arguments, By Appeal And Otherwise

There is nothing new under the sun. Ecclesiastes 1:9. The "reptile" theory is the latest advocacy rage for the plaintiff's bar. The appellation stems from a book (and related seminars) by David Ball (a trial consultant) and Don Keenan (a plaintiff's lawyer) entitled Reptile: The 2009 Manual of the Plaintiff's Revolution ("The Reptile"). The book's pseudo-scientific premise is that "[w]hen the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community." *Id.* at 8. From this premise Ball & Keenan urge counsel representing plaintiffs to posture the case so as to put jurors in the position of protecting themselves, their loved ones, and their community. The premise that there is such a thing as an evolutionary "reptilian" portion of the human brain is scientifically unsupported. Ben Thomas, *Revenge of the Lizard Brain*, Guest Blog, Scientific American (Sept. 7, 2012), https://blogs.scientificamerican.com/guest-blog/revenge-of-the-lizard-brain/.

But the theory itself is nothing new. It is a repackaging of tried and true demagoguery of appealing to the audience's (here a jury's) emotions, especially fear and anger. *See* Aristotle, Rhetoric, Book II, Chapter 1, http://rhetoric.eserver.org/aristotle/rhet2-1.html ("The Emotions are all those feelings that so change men as to affect their judgements, and that are also attended by pain or pleasure. Such are anger, pity, fear and the like, with their opposites"); Ann T. Greeley, *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response*, ABA 2015 Section Annual Conference, at 1–2, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/4_1_reptile_theory_of_trial_strategy.authcheckdam.pdf.

Much of what the Reptile theory advocates in presentation and argument is improper under long established legal rules. The problem is that those same rules make it exceedingly difficult to correct such inappropriate advocacy on appeal.

The Legal Landscape Limiting Improper Argument.

Demagoguery works, but for all of the wrong reasons. That's why consistently, throughout the country, the law prohibits appeals to jurors' passions. *E.g.*, *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931) ("In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one"); *Solorio v. Atchison, Topeka & Santa Fe Ry. Co.*, 224 F.2d 544, 547 (10th Cir. 1955) ("strong appeals in the course of argument to sympathy, or appeals to passion, racial, religious, social, class, or business prejudice lie beyond the permissive range of propriety"); *Stone v. Foster*, 164 Cal. Rptr. 901, 913 (Ct. App. 1980) ("attempts to appeal to the prejudice, passions or sympathy of the jury are misconduct").

One form of the prohibition on appeals to juror passion is barring counsel from asking the jurors to put themselves in a party's place and to ask themselves how they individually would want to be treated or what compensation they would view as appropriate had they suffered the same injuries. This is known colloquially as an improper "Golden Rule" argument. *E.g.*, *Granfield v. CSX Transp., Inc.*, 597 F.3d 474, 491 (1st Cir. 2010) (A "Golden Rule" argument is "'universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence'"); *Arnold v. E. Air Lines, Inc.*, 681 F.2d 186, 199 (4th Cir. 1982) ("The Golden Rule and sympathy appeals are . . . obviously improper arguments . . . . Having no legal relevance to any of the real issues, they were per se objectionable"); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496 (5th Cir. 1982) (a "Golden Rule" argument "encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence"); *Caudle v. District of Columbia*, 707 F.3d 354, 359–60 (D.C. Cir. 2013); *DuBois v. Grant*, 835 P.2d 14, 16 (Nev. 1992) (banned golden rule argument is the impermissible suggestion that the jurors trade places with the victim); *Boyd v. Pernicano*, 385 P.2d 342, 343 (Nev. 1963) (improper to ask the jurors to place themselves in the shoes of the victim because such argument interferes with the objectivity of the jury); *Seffert v. L.A. Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting)

(“‘“No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages”’”); *Horn v. Atchison, Topeka & Santa Fe Ry. Co.*, 394 P.2d 561, 565 (Cal. 1964) (“it was improper to appeal to the jurors to fix damages as if they or a loved one were the injured party”); *Collins v. Union Pac. Ry. Co.*, 143 Cal. Rptr. 3d 849, 861 (Ct. App. 2012) (“A ‘golden rule’ argument is one where counsel asks the jury to place itself in the victim’s shoes and award such damages as they would charge to undergo equivalent pain and suffering” and is prohibited as an improper appeal to passion).

“‘The appeal to a juror to exercise his subjective judgment rather than an impartial judgment predicated on the evidence cannot be condoned. It tends to denigrate the jurors’ oath to well and truly try the issue and render a true verdict according to the evidence. Moreover, it in effect asks each juror to become a personal partisan advocate for the injured party, rather than an unbiased and unprejudiced weigher of the evidence. Finally, it may tend to induce each juror to consider a higher figure than he otherwise might to avoid being considered self-abasing.’” *Loth v. Truck-A-Way Corp*., 70 Cal. Rptr. 2d 571, 576 (Ct. App. 1998) (citations omitted) (counsel “impermissibly asked the jurors to place themselves in [plaintiff’s] position when he asked them to ‘tap into feelings’ about [her] fears, in light of her physical condition . . . . [T]he fact that [counsel] did not expressly remind the jury that [plaintiff] is ‘people like you’ does not save him from a violation of the golden rule. He clearly asked the jurors to ‘allow such recovery as they would wish if in the same position.’ Moreover, [counsel’s] ‘testimony’ during his argument, that he personally would not want to trade ten million dollars for the use of his fingers, violated the golden rule. While making this argument, he asked the jurors, ‘How do you put a value on not using your fingers?’ He thus invited the jury to agree that neither would they make such a trade,” internal quotation marks omitted, quoting *DeJesus v. Flick*, 7 P.3d 459, 464 (Nev. 2000), *overruled on other grounds*).

The bar on “Golden Rule” arguments is near universal. The Reptile book itself has an appendix of cases from virtually every jurisdiction recognizing the Golden Rule, some attempting to skirt it. *See* The Reptile, at 267–326. Yet, ultimately, the underlying premise of The Reptile is that

the jurors need to put themselves in the plaintiff's place and to protect themselves and their loved ones from the same harm befalling them. There is some debate whether the "Golden Rule" prohibition extends to liability determinations or is limited to appeals as to damages. *Compare, e.g.*, *Cordova v. City of Albuquerque*, 816 F.3d 645, 660 (10th Cir. 2016) (although "Golden Rule" argument improper on damages issue, proper when argued on issue of ultimate liability to ask jurors to put themselves in officers' shoes accused of unreasonable use of deadly force); *Shultz v. Rice*, 809 F.2d 643, 652 (10th Cir. 1986) (permitting defense argument that jurors place themselves in defendant physician's shoes with choices he faced); *Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983) ("It is not improper when urged on the issue of ultimate liability"; not improper to ask jurors to put themselves into jailed plaintiff's shoes as to why he did not seek help from deputies in face of assault by other inmates); *Lopez v. Langer*, 761 P.2d 1225, 1231 (Idaho 1988) ("Golden Rule" arguments prohibited as to damages; but "where such arguments merely appeal, in a moderate manner, to the jury's common sense by asking them to ascertain the reasonableness of a defendant's actions (or a plaintiff's actions) in the context of the case, they will be permitted," footnote omitted), *with Caudle v. District of Columbia*, 707 F.3d at 359–60 (collecting cases going both ways; "Golden Rule" prohibition applies to both liability and damages; improper to ask jurors to put themselves in discrimination plaintiffs' shoes); *Edwards v. City of Philadelphia*, 860 F.2d 568, 574 n.6 (3d Cir. 1988) (same).

Despite The Reptile book's attempt to narrow its scope, the prohibition on appeals to jurors' self-interest are not limited strictly to direct or explicit appeals that jurors put themselves in a party's shoes. Thus, more generally, appeals to jurors' self-interest – the fundamental Reptile premise – are improper. *E.g.*, *Allstate Ins. Co. v. James*, 845 F.2d 315, 318–19 (11th Cir. 1988) (defense argument that jurors' policy premiums might be affected); *Roy v. Emp'rs Mut. Cas. Co.*, 368 F.2d 902, 904–05 (5th Cir. 1966) (same); *Cassim v. Allstate Ins. Co.*, 94 P.3d 513, 521 (Cal. 2004) ("An attorney's appeal in closing argument to the jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality"); *Brokopp v. Ford Motor Co.*, 139 Cal. Rptr. 888, 899–900 (Ct. App. 1977) (plaintiff's claim that defendant,

rather than public healthcare [Veteran's Administration] should pay to treat plaintiff's injuries improperly appealed to self-interest).

In fact, some of the favorite Reptile attempts to avoid the "Golden Rule" prohibition fall within improper-argument precedent. Thus, counsel cannot simply say "I'm not going to ask you to put yourself in plaintiff's shoes" because doing so has just that effect. *Loose v. Offshore Navigation, Inc.*, 670 F.2d at 496–97; *Woods v. Burlington N. R.R. Co*., 768 F.2d 1287, 1292 (11th Cir. 1985), *rev'd*, 480 U.S. 1 (1987). Likewise, the "newspaper ad" gambit—asking the jury to think how much a newspaper advertisement (or these days eBay or the like) would have to offer for someone to agree to endure plaintiff's injuries—is improper. *Collins v. Union Pac. Ry. Co.*, 143 Cal. Rptr. 3d at 861. These are simply not-too-subtle dodges of a prohibited Golden Rule argument.

So, too, the Reptile favorite that the jurors act as the "conscience of the community" and its fundamental premise that the jurors protect the community can cross the line and be improper argument. *E.g.*, *Blue Grass Shows, Inc. v. Collins*, 614 So. 2d 626, 627 & n.1 (Fla. Dist. Ct. App. 1993), quoting *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238–39 (5th Cir.1985) ("'You are the conscience of community'" argument improper); *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1021 (Fla. Dist. Ct. App. 1996) (defense argument that verdict would put an end to local culture and hold jurors to community ridicule); *Regalado v. Callaghan*, 207 Cal. Rptr. 3d 712, 725–26 (Ct. App. 2016) ("in our view the remarks from Regalado's counsel telling the jury that its verdict had an impact on the community and that it was acting to keep the community safe were improper"); *United States v. Rogers*, 556 F.3d 1130, 1143 (10th Cir. 2009) ("Prosecutors are not permitted to incite the passions of the jury by suggesting they can act as the 'community conscience' to society's problems"); *Gilster v. Primebank*, 747 F.3d 1007, 1011 (8th Cir. 2014) (Counsel's closing rebuttal argument "'giving'" to the jury "'the power and responsibility for correcting injustices'" akin to prosecutor's improper plea that jury act as conscience of community); *Fyffe v. Mass. Bay Transp. Auth.*, 17 N.E.3d 453, 460–66 (Mass. App. Ct. 2014), *review denied*, 23 N.E.3d 107 (Mass. 2014) ("conscience of the community"/ "guardians of the safety of all of the moms, all of the dads, and all of the children, and all of the grandparents that ride in these trains" so prejudicial as to not be

cured by later instruction); *see also Baldwin v. Adams*, 899 F. Supp. 2d 889, 905–06 (N.D. Cal. 2012) (criminal habeas case; "A prosecutor may not urge the jurors to convict in order to protect community values, preserve civil order, or deter future law-breaking"; "The vice in such an argument is that it increases the possibility that the defendant will be convicted for reasons unrelated to his own guilt"); *United States v. Sanchez*, 659 F.3d 1252, 1256 (9th Cir. 2011) (prosecutor committed misconduct in suggesting to jury that accepting defendant's duress defense would be tantamount to sending a memo to all drug couriers to use the duress defense and would lead to increased drug trafficking); *United States v. Weatherspoon*, 410 F.3d 1142, 1149 (9th Cir. 2005) (prosecutor repeatedly stated in his closing argument that finding the defendant guilty of being a felon in possession of a weapon would protect individuals in the community); *United States v. Reynolds*, 534 F. App'x 347, 367–68 (6th Cir. 2013) ("The government's argument that the defendant brought Mexican drug cartels into the local community" and that a conviction would send a message to drug cartel members to leave the community "is the sort of appeal to the jury's passions or prejudices that would constitute misconduct"); *but see Freeman v. Blue Ridge Paper Prods., Inc.*, 229 S.W.3d 694, 712 (Tenn. Ct. App. 2007) ("'An appeal to the jury to act as the community's conscience is not necessarily improper argument,'" citation omitted).

Likewise, it is improper, in a nonpunitive damages case, to urge the jury to "send a message" or to "preserve the rights not just of [these] plaintiffs but of everyone." *E.g.*, *Caudle*, 707 F.3d at 361 (preserve rights of everyone); *Nishihama v. City & County of San Francisco*, 112 Cal. Rptr. 2d 861, 865 (Ct. App. 2001) ("[a]ny suggestion that the jury should 'send a message' by inflating its award of damages . . . would be improper where, as here, punitive damages may not be awarded"); *Gielow v. Strickland*, 363 S.E.2d 278, 279–80 (Ga. Ct. App. 1987) (argument to punish defendant for wrongdoing).

A subtheme in Reptile presentations is often an attempt to demonize the defendant and defense counsel. This plays into the narrative that the defendant (and counsel) pose an ongoing danger to the jurors that must be stopped. Again, that is typically improper. *E.g.*, *Cassim*, 94 P.3d at 521 ("Nor may counsel properly make personally insulting or derogatory

remarks directed at opposing counsel or impugn counsel's motives or character"); *Las Palmas Assocs. v. Las Palmas Center Assocs.*, 1 Cal. Rptr. 2d 301, 315 (Ct. App. 1991) ("Personal attacks on opposing parties and their attorneys, whether outright or by insinuation, constitute misconduct. [Citation.] 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"); *DeJesus*, 7 P.3d at 464 (Counsel impermissibly asked jurors to "'send a message' to law firms that try to prevent injured persons from recovering ('that's what the power brokers of this world do to people like you')"); *Kaas v. Atlas Chem. Co*., 623 So. 2d 525 (Fla. Dist. Ct. App. 1993) (counsel's comments improper which accused a medical expert of perjury and accused opposing counsel of committing of fraud upon the court, because they caused the proceeding to be "'not, in any meaningful sense, a trial at all but a thoroughly unseemly name-calling contest, reflecting a personal vendetta between a lawyer and an expert witness, in which the jury was essentially asked to choose between the combatants'" quoting *Venning v. Roe*, 616 So. 2d 604, 605 (Fla. Dist. Ct. App. 1993).

Finally, a related psychological ploy is "anchoring," that is, presenting to prospective jurors on voir dire a large potential damages number in hopes of preconditioning them to a large result, even as a "discounted" or compromise figure. This may be prohibited, depending on the jurisdiction and the role counsel plays in juror voir dire. *See* Cal. Rules of Court, Standards of Judicial Administration, Standard 3.25(f).

The Need To Preserve Error And The Difficulty Of Obtaining Appellate Redress For Such Error.

The foregoing rules *should* act as a brake on much of the trial advocacy that the Reptile theorists promote. But the hard fact is that, in practice, appellate restraint is nominal. That is because of two generally applicable principles of appellate review: (1) error preservation and (2) prejudice.

Preservation. "'Generally, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial.' In addition to objecting, a litigant faced with opposing counsel's misconduct must also 'move for a mistrial or seek a

curative admonition' unless the misconduct is so persistent that an admonition would be inadequate to cure the resulting prejudice. This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' . . . However, 'the absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request."'" *Cassim*, 94 P.3d at 520 (citations omitted); *see Horn v. Atchison, Topeka & Santa Fe Ry. Co.*, 394 P.3d at 565 ("The sum result of counsel's remarks was such as to create an atmosphere of bias and prejudice which manifestly was calculated to deprive defendant of a fair trial. Certainly such conduct cannot be condoned. However, we are nevertheless persuaded to the conclusion that defendant has waived its right to complain by its failure to make timely objections, and the instant judgment should not be reversed").

This is the general rule throughout the country, including in some of the above cited cases. *E.g.*, *DeJesus*, 7 P.3d at 462 ("Generally, a failure to object to attorney misconduct precludes review"); *Millen v. Miller*, 308 A.2d 115, 118 (Pa. Super. Ct. 1973) ("An indispensable element to finding such comment to have constituted reversible error is the requirement that opposing counsel make a prompt and specific objection on such grounds to give the trial court the opportunity to caution the jury to disregard the comments"); *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1057 (Ind. 2003) (no review of closing argument without objection); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 660 (Ohio Ct. App. 2006) (upon plaintiff's counsel's "comments to the jury about the 'close-knit community' and the plaintiffs being the jurors' 'friends and neighbors,'" defense "counsel did not object to these classifications. '[T]he failure to object to misconduct of counsel at the time it occurs constitutes a waiver of the right to object on review of the case'").

Nor is mere objection enough. To begin with, the objection must be timely. One recent California appellate decision, although expressly finding a "Reptile" argument—telling "the jury that its verdict had an impact on the community and that it was acting to keep the community safe were improper"—improper, held that an objection at a break in plaintiff's

counsel's still uncompleted closing argument came too late. *Regalado*, 207 Cal. Rptr. 3d at 725–26; *but see People v. Jasso*, 150 Cal. Rptr. 3d 464, 473 & n.5 (Ct. App. 2012) ("Defense counsel's objection, though not immediate, was timely, because it came in time for the trial court to cure any harm made by the remarks").

And, "[i]n addition to objecting, a litigant faced with opposing counsel's misconduct must also 'move for a mistrial or seek a curative admonition' [citation]" unless an admonition would have been inadequate under the circumstances. *Cassim*, 94 P.3d at 520; *see Smith v. Haugland*, 762 N.W.2d 890, 898, 900–01 (Iowa 2009) (plaintiff argued to the jury that "[y]our decision will make a statement to this community and . . . all of the many, many, many patients who have this benign [medical condition] problem"; trial court sustained objection, but defense did not ask for curative instruction or timely ask for a mistrial; plaintiff reiterated statement once more; held on appeal: No abuse of discretion in not granting a new trial). Even then, where a curative admonition is given, it is often the case that counsel will have to move for a mistrial to preserve the issue for appellate review. *See Seabury-Peterson v. Jhamb*, 2011 ME 35, 15 A.3d 746, 751 (trial court did not abuse discretion in giving curative instruction and denying mistrial).

Some jurisdictions may even require a new trial motion to preserve the issue for appellate review. *See Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986).

The preservation rules are not always absolute. Some jurisdictions permit "plain error" review even if there is no objection. *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1144, 1147–48 (9th Cir. 2001) (permitting "plain error"/due process review of closing arguments without contemporaneous objection; surveying circuits and finding that all but the Seventh Circuit allow such review); *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 278 (5th Cir. 1998) (reversing for plain error in closing arguments, including "Golden Rule" argument); *contra Kafka v. Truck Ins. Exch.*, 19 F.3d 383, 385 (7th Cir. 1994) ("'no plain error doctrine exists [in civil cases] to remedy errors which are alleged to have occurred during closing argument'").

Even then, the standard is incredibly high. *E.g.*, *Lioce v. Cohen*, 174 P.3d 970, 980, 982 (2008) (trial court may not grant a new trial for unobjected misconduct unless "'no other reasonable explanation for the verdict exists' except for the misconduct"; "[i]n the context of unobjected-to attorney misconduct, irreparable and fundamental error is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different"); *Strickland v. Owens Corning*, 142 F.3d 353, 358–59 (6th Cir. 1998) ("we have also found that 'the conduct of Plaintiffs' counsel was so outrageous as to warrant reversal of the verdict and [a] new trial,' despite opposing counsel's failure to object. Nonetheless, failure to object at trial to closing arguments does raise the degree of prejudice which must be demonstrated in order to get a new trial on appeal," citations omitted); s*ee Reese v. Mercury Marine Div. of Brunswick Corp.*, 793 F.2d 1416, 1429 (5th Cir. 1986); *Mears v. Bethel Sch. Dist. No. 403*, 332 P.3d 1077, 1085 (Wash. Ct. App. 2014), *review denied*, 345 P.3d 785 (Wash. 2015) ("Where an attorney commits misconduct 'so flagrant that no instruction could have cured the prejudicial effect,' however, failure to timely object does not preclude appellate review").

Prejudice. Even if the misconduct is objected to, reversals are rare. "The question is whether counsel's misconduct so permeated the trial as to lead to the conclusion the jury was necessarily influenced by passion and prejudice in reaching its verdict." *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir. 1991) (although directed verdict struck punitive damages claim, counsel urged jury to inflict punishment on defendants and characterized a low verdict as a "hunting license" for defendants).

"Significantly, the test most often applied by appellate courts to these cases, holds that the use of a 'Golden Rule' argument is rendered harmless either by an immediate curative instruction, *see, e.g.*, *Shultz v. Rice*, 809 F.2d 643, 652 (10th Cir.1986) (potential for prejudice adequately cured where, immediately following objection to use of 'Golden Rule' argument, the court 'sufficiently admonished the jury to weigh [the offending attorney's] argument against the whole of the evidence and the law presented them'), *or* by a complete final instruction to the jury concerning its proper role in the determination of liability and damages

issues. *See, e.g., Joan W. v. City of Chicago*, 771 F.2d [1020,] 1023 [(7th Cir. 1985)] ('although the judge did overrule the City's objection to the Golden Rule argument and did not give a limiting instruction, we have noted that any prejudice can often be cured simply by a general instruction that properly informs the jury on the law of damages'); *Spray-Rite* [*Svc. Corp. v. Monsanto Co.*], 684 F.2d [1226,] 1246 (harmless error where 'the jury was properly instructed concerning the law it should apply in determining liability and damages')." *Edwards v. City of Philadelphia*, 860 F.2d at 574–75; *see Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 180 (5th Cir. 2005) (no prejudice where objection sustained and some admonition given); *cf. Millen v. Miller*, 308 A.2d at 118–19 (only immediate admonishment would remove prejudice of Golden Rule argument; later instruction to jury insufficient).

Thus, counsel faced with improper argument faces a no-win, catch-22 situation. If counsel does not ask for an admonition or curative instruction, the error may be waived, at least in all but the most extreme cases; but if counsel does ask and the court agrees, the appellate court may find any prejudice cured.

And, even if objection and requests for an admonition and curative instructions are made, appellate courts are still reluctant to find prejudice. *E.g., United States v. Reynolds*, 534 F. App'x at 368 ("But the misconduct was not flagrant. The statements were isolated. They 'did not mislead the jury because it did not marshal them to punish all the drug dealers in their community by convicting [the defendant]; rather, the comment accurately identified [Reynolds] as [a] drug dealer[ ]' who dealt with a Mexican cartel"); *United States v. Wettstain*, 618 F.3d 577, 589–90 (6th Cir. 2010) (no prejudice where no evidence that the prosecutor intentionally sought to mislead or prejudice the jury; case against the defendant was strong; prosecutor's statements did not "'seriously affect the fairness, integrity or public reputation of the judicial proceedings,'" quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)); *Nishihama*, 112 Cal. Rptr. 2d at 865.

That doesn't mean reversals never happen. But they are rare, often involving multiple examples of misconduct or counsel disregarding specific trial court directives. *E.g., Caudle*, 707 F.3d at 359, 361 (repeated misconduct in face of sustained objections); *Whitehead*, 163 F.3d at 278

(multiple misconduct, no objection); *Loose v. Offshore Navigation, Inc.*, 670 F.2d at 496 (objection made and overruled); *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068, 1082 (Nev. 2009) (objected-to and unobjected-to misconduct including "Golden Rule" and "send a message" arguments [while counsel was crying] required new trial on punitive damages). Trial courts' exercise of discretion to grant a new trial are more favorably reviewed than asking the appellate court to reverse for misconduct in the first instance. *E.g.*, *Collins v. Union Pac. Ry. Co.*, 143 Cal. Rptr. 3d at 861 (affirming trial court grant of new trial even though no contemporaneous objection during argument meant error would have been waived if trial court had denied new trial motion); *Baptist Mem'l Hosp., Inc. v. Bell*, 384 So. 2d 145, 146 (Fla. 1980) (affirming trial court grant of new trial based on "Golden Rule" argument where objection sustained and curative instruction given and subsequent arguably excessive damages); *see Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1216 (Ala. 1999) (remittitur, rather than new trial, can be proper remedy for improper argument).

What To Do.

Given the limited prospects for appellate recourse, the best defensive position to take on reptilian arguments is in the trial court.

Motions in Limine. One place to start is with motions in limine. Such motions have the advantage, even if not fully successful, of educating the trial court as to likely tactics and their impropriety. To date, such motions appear to have met with limited success. *Jackson v. Asplundh Construction Corp.*, No. 4:15CV00714 ERW, 2016 WL 5941937, at *1, *5 (E.D. Mo. Oct. 13, 2016) (reptile motion in limine "held in abeyance": "The Court will not issue a ruling on this motion at this time. The Court will address any objections as the evidence is introduced"); *Turner v. Salem*, No. 3:14-CV-289-DCK, 2016 WL 4083225, at *2–3 (W.D.N.C. July 29, 2016) ("Defendants move to prohibit Golden Rule argument and Reptile Theory questions and argument, arguing with respect to Reptile Theory that the arguments are meant to use a general sense of promoting safety to evoke an emotional response in the jury. Plaintiff agrees to the motion with respect to Golden Rule arguments, but objects with respect to Reptile Theory arguments on the grounds that safety and negligence are too

interconnected, and Reptile Theory is not adequately defined. Defendants' motion is GRANTED in part and DEFERRED in part. The Court will not allow Golden Rule arguments. The Court also discourages Reptile Theory arguments, but will handle objections to statements purported to be Reptile Theory arguments as the need arises"); *Colman v. Home Depot U.S.A., Inc.*, No. 1:15-CV-21555-UU, 2016 WL 4543119, at *1–2 (S.D. Fla. Feb. 9, 2016) (describing Reptile theory; granting "Golden Rule" motion, but denying reptile motion in limine: "the jury will be asked to determine whether Defendant failed to use reasonable care, which is the 'degree of care that a reasonably careful person would use under like circumstances.' Arguments about community safety standards and the extent that Defendant failed to comply with such standards may be relevant to this inquiry," citation omitted); *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) (granting "Defendants' motion to prohibit any Golden Rule argument and/or Reptile Theory questions and argument"); *Hensley v. Methodist Healthcare Hosps.*, No. 13-2436-STA-CGC, 2015 WL 5076982, at *4–5 (W.D. Tenn. Aug. 27, 2015) (denying motion, apparently without prejudice: "Defendants seek an order prohibiting Plaintiffs from offering testimony concerning violations of guidelines or safety rules or any other 'scare tactics' in order to establish the standard of care. Defendants reference the 'Reptile Theory,' which appears to be in use by the plaintiffs' bar in some states as a way of showing the jury that the defendant's conduct represents a danger to the survival of the jurors and their families. The Reptile Theory encourages plaintiffs to appeal to the passion, prejudice, and sentiment of the jury. [¶] Defendants have again not identified the specific evidence that is sought to be excluded. The Court will be cognizant of appeals to the jurors' prejudice, and any attempt by either party to appeal to the prejudice or sympathy of the jury will not be condoned").

Trial Briefs and Pocket Briefs. Motions in limine can be supplemented and expanded upon by a comprehensive trial brief that addresses Reptile issues. In addition, pocket briefs during trial at critical junctures, e.g., before expert testimony, before closing argument, can remind the trial court of the appropriate standards for conducting examination and for argument. In addition to reminding the trial court of applicable standards, such briefs provide a written record that objection to improper argument was made and provide a foundation for succinct

objections during closing argument, e.g., "Objection, for the reason in yesterday's brief."

New trial motions. And, if there is an adverse result, there is the option (in some jurisdictions the requirement) of a new trial motion. *See Collins v. Union Pac. Ry. Co.*, 143 Cal. Rptr. 3d at 861 (affirming order granting new trial; in California trial court has broad discretion to grant new trial for misconduct, even without a timely objection); *Wahlstrom v. LAZ Parking Ltd., LLC*, No. SUCV20101022, 2016 WL 3919503, at *4, *6 (Mass. Super. Ct. May 19, 2016) (describing Reptile book and "philosophy" but granting new trial by "focusing on particular actions of Plaintiff's counsel without considering whether they were products of that philosophy"; counsel's repeated violation of court orders meant to preclude inflammatory matters other than Reptile tactics required a new trial).

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There is a theory that any new legal approach or argument takes a half-dozen years or so to become generally known in the legal community. That theory seems to ring true with the Reptile approach. The addendum to that theory is that it takes as long again for the same argument to wend its way into judicial consciousness and into published judicial decisions. Key to defending against Reptile tactics is educating the bench, trial and appellate, on the true nature of Reptile arguments and unmasking those tactics for what they really are – a reprise of long-barred gambits.

Sources:

John R. Crawford & Benjamin A. Johnson, *Strategies for Responding to Reptile Theory Questions*, 57 No. 12 DRI For the Defense 70 (Dec. 2015);

Bill Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, DRI for the Defense 14 (Apr. 2014);

S.W. Allen, J.M. Schwartz, and D. Wyzga, "Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea" (May 1, 2010), http://www.thejuryexpert.com/2010/05/atticus-finch-would-not-approvewhy-a-courtroom-full-of-reptiles-is-a-bad-idea;

Ann T. Greeley, *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response*, ABA 2015 Section Annual Conference, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/4_1_reptile_theory_of_trial_strategy.authcheckdam.pdf;

Beth C. Boggs, *Combating Reptile Tactics in Litigation*, http://www.namwolf.org/page/ReptileTactics/Combating-Reptile-Tactics-in-Litigation.htm;

Ben Howard & Neill Dymott, *A Field Guide to Southern California Snakes: Identifying and Catching Plaintiffs' Reptile Theory in the Wild*, Vol. 3 2013 Verdict 11 (Ass'n of Southern California Defense Counsel 2013);

David C. Marshall, *Lizards and Snakes in the Courtroom: What every Defense Attorney needs to know about the Emerging Plaintiff's Reptile Strategy*, DRI For the Defense 64 (Feb. 2013).