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# Explosive Jury Verdicts – Why Are They Happening and How to Fight Back to Protect Your Company

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# Presenters



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## **Agenda**

**1** | Trial Trends – Meet Your 2023 Jury

**2** | Reptile Tactics

**3** | Strategies to Fight Back

**4** | Considerations for Post-Trial and Appeal

# Trial Trends – Meet Your 2023 Jury



## Explosion in Huge Verdicts

- Large verdicts are getting more common, including “explosive verdicts” that are irrational and disproportionate
  - Correspondingly explosive settlements
- Normalization of huge verdicts

# The Why

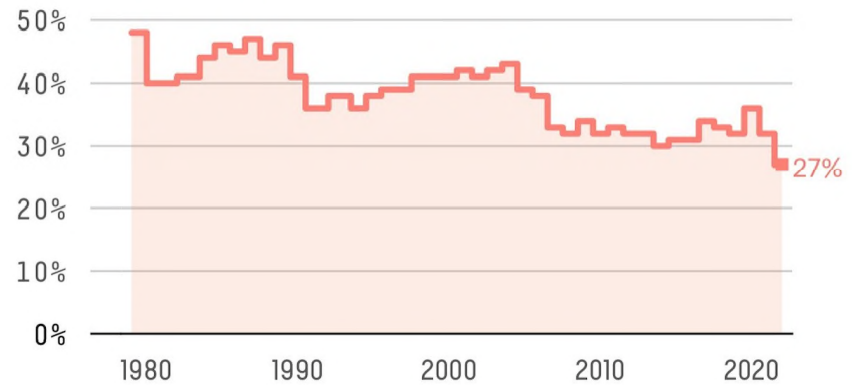
## The Why: Big Societal Shifts

- Don't underestimate how raw most people are from COVID disruptions, fears and divisions
- Increased prejudice against "other" and stronger bonds with people of same/similar background
- In times of stress, people are prone to intuitive rather than logical processing
- As a country we are increasingly polarized
- Anti-corporate sentiment in both major political parties

# Loss of Trust in Institutions

## Americans' trust in major institutions reaches a new low

Average share of Americans who have a "great deal" or "quite a lot" of confidence in 14 institutions\* Gallup has consistently asked about, since 1979



\* Since 1979, Gallup has consistently asked about nine institutions, and in 1993, they expanded the list to include five more — meaning 14 institutions overall — which they've consistently asked about ever since.

FiveThirtyEight

SOURCE: GALLUP



# The Why

## The Why: Social Movements

- #metoo
- Black Lives Matter
- Income Inequality
- Quiet Quitting
- Pay Equity

## The Why: Verdicts as Portrayed on Social Media

“



This victory is not just for me but for every woman who has suffered because she was not believed.

– E. Jean Carroll



I'm even more disappointed with what this verdict means for other women. It is a setback. It sets back the clock to a time when a woman who spoke up and spoke out could be publicly shamed and humiliated. It sets back the idea that violence against women is to be taken seriously.

– Amber Heard

”

# Reptile Tactics



## Reptile Theory – What Is It?



## Reptile “Logic”

- Plaintiff’s counsel is establishing the existence of a safety rule
  - Can’t discriminate by protected class
  - “Shouldn’t everyone be able to complain about discrimination without fear of retaliation?”
- The safety rule exists to protect/avoid a known danger to the plaintiff and community
- The defendant had control over following/not following the rule
- The defendant broke the rule
- Terrible consequences



## What is it?

- “We,” “our” and “us”
  - Example: “The Company let this man into OUR homes”
- Can include reliance on prior reports of discrimination, bad acts, safety failures, or verdicts against the company
- The actual facts of the case are secondary: “How much harm could it cause in other kinds of situations?”



## How Plaintiffs Use it

- Incendiary arguments right from voir dire
- Investing more resources into cases, hoping for a bigger verdict (which means larger fees)
- Burdensome deposition requests -- sound bites from as many corporate representatives as possible
- Make defense witnesses look evasive, insensitive, deceitful
  - dramatic use of hot docs / bad emails
  - aggressive cross
  - pushing on privilege



## How Plaintiffs Use it

- Heavily coached, dramatic / emotional plaintiffs
- Continuous rearguing of motions in limine
- Mischaracterizing evidence
- “Anchoring” – suggesting a specific high verdict number
- Plaintiff’s Bar actively shares tactics





## Why Is Reptile Improper?

- The Reptile Theory is an improper appeal to jurors' concerns about their own safety and the safety of the community
  - The Reptile Theory avoids the merits of the **plaintiff's** claim by appealing to the jurors' personal interest in their own safety and that of their community, with the **plaintiff's** claims being merely a placeholder for deep-seated, even subconscious, fears that jurors harbor about themselves and their families
  - Rather than focus on whether the **defendant's** conduct actually caused injury to the **plaintiff**, the Reptile Theory asks whether the **defendant's** conduct "represents a community danger"

# Strategies to Fight Back



## Arguments to Preclude Reptile Tactics

- The Reptile Theory violates the bar against appeals to the self-interest of jurors
  - Threatens the jury's impartiality
  - Litigants have a constitutional right to a trial of their claims before an impartial jury
  - It is improper for counsel to ask the jurors to put themselves in the shoes of a party, because doing so invites the jurors to become partisan advocates for the party rather than objective triers of fact
  - The jury's role is to render a verdict based on the evidence admitted *at trial*



## Fight from the Beginning

- Push back against Reptile tactics from the very beginning of the case
- Even the answer is an opportunity
  - Go beyond “denied”
  - Don’t let Plaintiff’s be the only story
  - Emphasize fairness



## Strategic Discovery

- View discovery through Reptile lens
  - May be worth motion practice
- Discovery
  - Use written discovery to your advantage
  - Be careful with privilege issues
- Depositions
  - Make sure corporate reps are very well prepared



## Jury Selection

- Avoid stereotypes based on demographics
- Focus on uncovering jurors biased against your client – not finding the ideal juror
- At voir dire, weed out jurors susceptible to Reptile Theory
- In describing case, and in questions, try to get out themes of fairness, company as good citizen that employs people



## Motions in Limine

- Call out Reptile directly
- Educate your judge
- Include case citations
- Preclude improper Reptile arguments like “Golden Rule,” “Protect Community,” “Send a Message”



## Two Can Play This Game

- How can the defense appeal to jurors on a human level?
  - tone of compassion
  - concern for safety
  - good citizenship
  - responsibility
- In cases involving misconduct, lean into how that affects others (customers, coworkers, clients)
- Emphasize the *people* who work for the defendant rather than the big entity
- Diversify witnesses – not just managers and HR but peers





## Limit Compensatory Damages

- Limit on compensatory damages is effectively a limit on a runaway verdict
  - In event of punitive award, compensatory award will act as a limit
- Aggressive push back on compensatory damages



## Closing

- Remind jurors that most things in life are complicated
- Own mistakes where they're clear
- Humanize the defense witnesses – they're not just the “company” or the “hospital” – they are people
- Consider objections to plaintiff's Reptile closing – but be careful!



## Consider a Counter-Anchor

- Rethink the rule that it's always bad form to talk about damages



## Work Those Jury Instructions

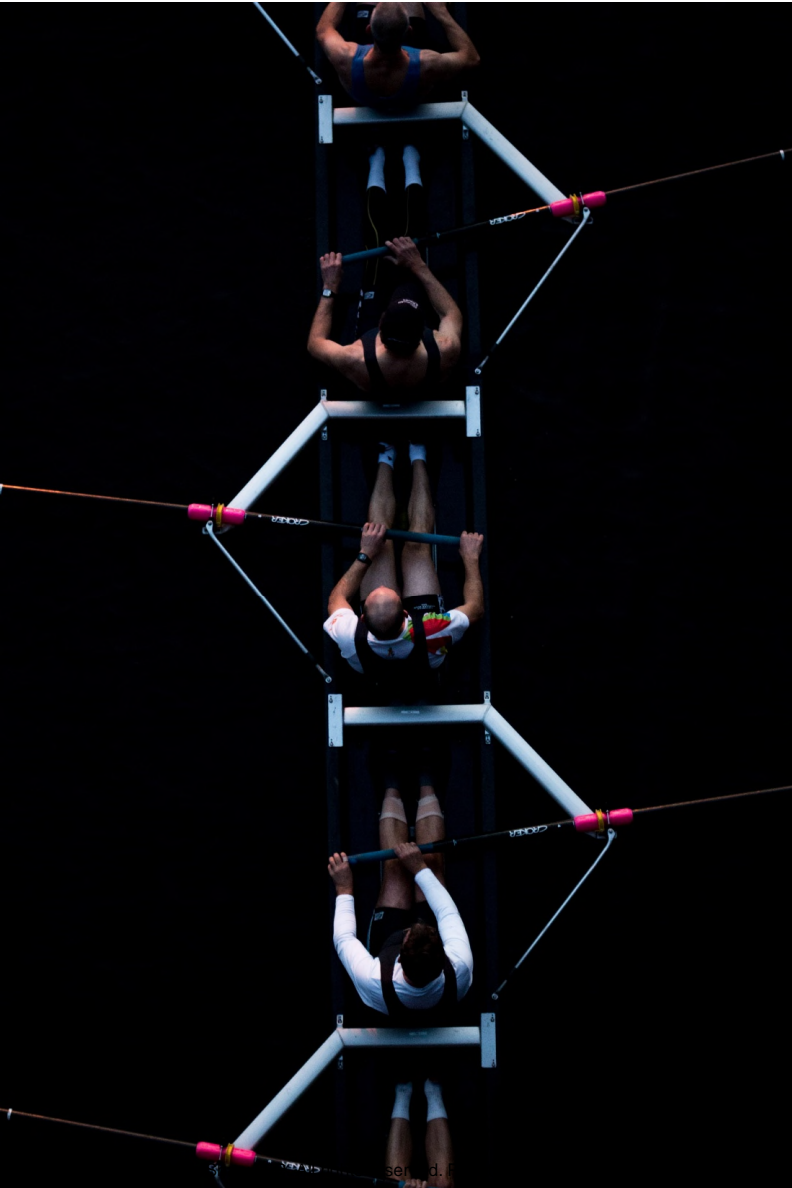
- Pay special attention to any Reptile jury instructions
- Look for opportunities to tether the case and damages to the parties and facts

# Post Trial and Appeal: Choosing a Team for Post-Trial and Appeal



## Be Efficient in Choosing a Team

- Following a judgment, **time is of the essence**.
- As soon as judgment enters, the clock starts ticking on quick and important deadlines for motions for new trial, remittitur, and judgment as a matter of law.
- If you are facing an adverse verdict, you will face the first deadlines in a matter of weeks.
- Drafting these motions is a substantial undertaking that requires detailed study of the trial record.



## How to choose?

- It is not obvious that the trial team should handle post-trial motions and appeal.
  - Trial counsel's deep knowledge of the trial record is an important resource
  - But if that team does not also have appellate experience, **consider an appellate specialist to lead the next phase of the case.**
  - Was trial counsel effective at trial?



## Experience

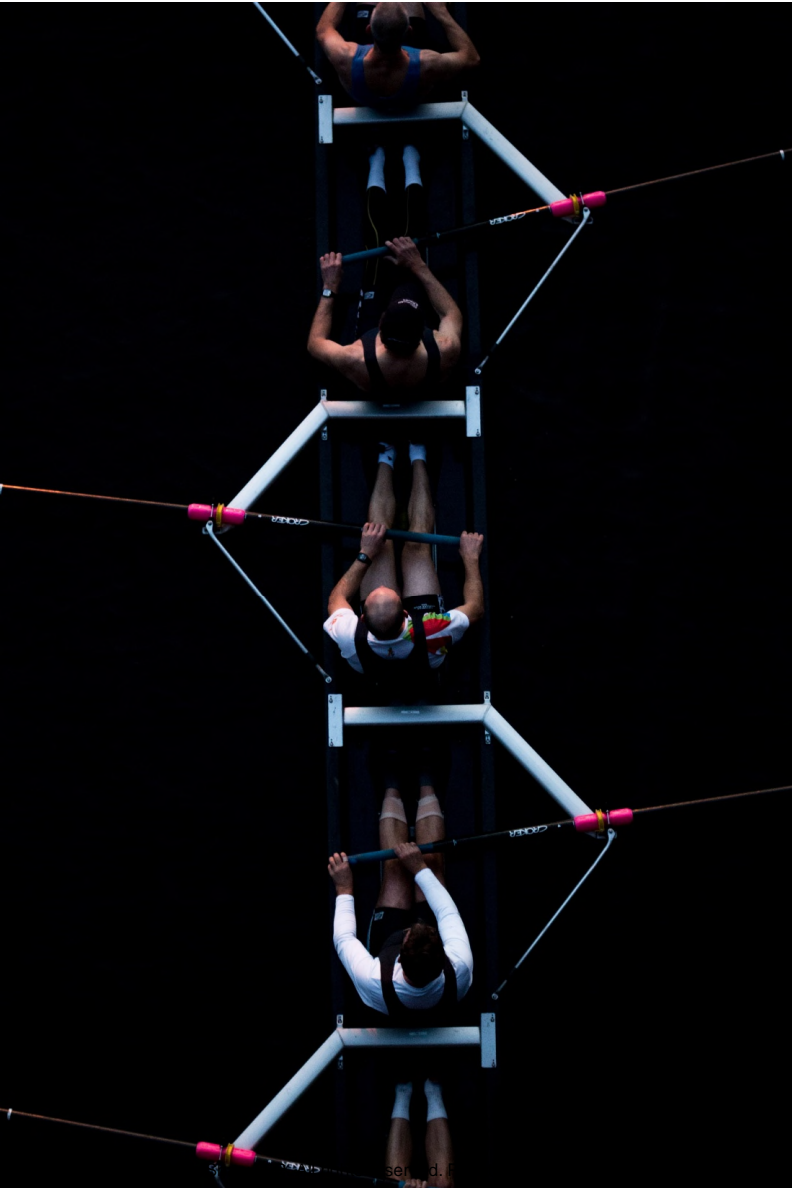
- Your ideal team will have:
  - Trial experience
  - Post-trial motion experience
  - Appellate experience
  - Subject matter expertise
  - Each is a separate skill set





## Other Considerations

- Familiarity with the particular appellate court and local rules
  - Consider local counsel
- Availability to dive into case in depth right away
- Experience tackling the sort of judgment you are facing (e.g., large punitive or compensatory award)



## Optics

- Consider how substituting or adding counsel will appear to the Court.
  - What is Court's view of trial counsel?
  - If adverse verdict, removing trial counsel from pleadings entirely may signal loss of confidence in trial counsel.
  - Adding experienced appellate counsel may get Court's attention and suggest new rigor for the post-trial motions.

# CLE CODE

# Considerations for Post-Trial Motions and Appeal



## What Your Post-Trial Team Needs Immediately

- Judgment
  - Verdict Form (as completed by jury)
  - Jury Instructions (as given)
  - Verdict Form (as proposed by each party)
  - Jury Instructions (as proposed by each party)
  - Directed verdict motion and ruling (if written)



## What Your Post-Trial Team Needs Next

- Immediately get someone working on compiling the record
- Transcripts
  - If you don't have them already, **order immediately**
  - Open a channel of communication with court reporter
  - Consider paying for expedited if budget allows
  - Transcribe charge conference first if given a choice
- Exhibits
  - Make sure you have a complete, organized set of admitted exhibits
  - Any exhibits offered and marked for i.d., but not allowed
- Motions *in Limine* and rulings



## Reviewing the Pleadings for Prejudicial Error

- Judgment
  - Consistent with verdict, rulings, and law?
- Verdict Form and Jury Instructions
  - Consistent with the law?
  - Internally consistent?
  - Did jurors follow instructions?
  - Did the Court err in declining language proposed by parties?
- Motions in Limine
  - Adverse rulings?
  - Legal error?



## Reviewing the Transcript for Prejudicial Error

- Read the transcripts!
  - There is no substitute
  - Designate one team member to read in entirety
- Look for:
  - Erroneous evidentiary rulings
  - Does the evidence support the liability verdict?
  - Does the evidence support the damages?
  - Any impropriety in opening statement or closing argument?
  - Invitations for jury passion or prejudice?
  - Impropriety in jury selection or juror misconduct?





## Check for Preservation of Error

- Verdict Form and Jury Instructions
  - Was error preserved at charge conference?
  - Was error preserved after giving the charge/verdict form?
- Motions *in Limine*
  - Was error preserved at time of ruling? When trial began? Continuously during trial?



## Check Transcripts for Preservation of Error

- Erroneous evidentiary rulings
  - Was there a timely objection?
- Does the evidence support the liability and damages verdict?
  - Was there a timely motion (and renewed motion) for directed verdict?
- Any impropriety in opening statement or closing argument?
  - Was there a timely objection?
- Invitations for jury passion or prejudice?
  - Was there a timely objection?
- Impropriety in jury selection or juror misconduct?



## Organize the Issues

- All prejudicial errors
- Whether errors were preserved
- With citations to record
- If not preserved, plain error or otherwise not waived?



## Select the Issues to Raise Post-Trial and on Appeal

- Generally, need to raise in post-trial in order to preserve for appeal, so broader scope in post-trial motions
- Prioritize which issues are most important to include and feature in post-trial and on appeal
  - Which are associated with the largest amount of damages?
  - Which errors are most prejudicial?
  - Which have the strongest legal arguments?
  - Which errors were soundly preserved?
  - Which issues has trial court indicated it may be receptive to?



## On Post-Trial Motions / Appeal

- Call out Reptile tactics directly
  - Passion / prejudice
  - Improper argument
  - Evidentiary rulings

**Interested in More on Best Practices for  
Post-Trial Motions and Appeal?**

**thank  
you**

**contact information**

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