Managing Corporate Discovery to Prevent a Reptile Attack

By: Maureen A. Mahoney and Deana I. Davis

Maureen Mahoney provides legal support for a number of endeavors, including eDiscovery for a wide range of litigated matters, as Associate General Counsel at Hackensack Meridian Health (HMH). HMH is a large healthcare network of 18 hospitals and other healthcare facilities, a school of medicine, and research labs serving a diverse population. With 30+ years of experience in healthcare law, Maureen has brought numerous cases to verdict as a medical malpractice trial attorney. She is a member of the International Association of Defense Counsel, member of the Board of Editors of the IADC Defense Counsel Journal*, and a leader in Linkage's GILD, the premier intensive leadership program for senior executives. In 2023 Maureen was awarded the NJBIZ Leaders in Law Honoree Award as a result of a nomination by her peers. Her passion is to facilitate the advancement of healthcare innovation and excellence, while protecting the interests and reputation of HMH and its affiliates. "Illegitimi non carborundum"*

Deana Davis focuses her practice at Walsh Pizzi O'Reilly Falanga LLP on business and commercial litigation. Deana earned her undergraduate degree from the University of Edinburgh and her law degree from Rutgers Law School. In 2023, Deana completed a one-year judicial clerkship with the Honorable Vicki A. Citrino, Superior Court of New Jersey, Law Division, Passaic County.

THE established "Golden Rule" prohibits trial counsel from asking a juror to place themselves in a party's shoes when deciding a client's fate to evoke an inappropriate, emotionally-biased response, rather than a response based on the balanced weighing of facts. A subtle skirting of the Golden Rule has crept into corporate litigation practice in recent years, using the current

corporate bias present throughout social media and the community on both sides of the political spectrum to inflate the value of a case disproportionately beyond its merits. This tactic is known as the "Reptile Theory." By using the Reptile Theory, or Reptile Attack, counsel focuses on a party's actions unrelated to relevant facts to make it appear that the party's actions have caused a danger or public wrong. It then becomes the jury's duty to rectify this wrong by awarding large sums of money as a message and punishment to the party. The goal is the same: inflame the jury, inflate the award.

Plaintiff's counsel has increasingly employed the Reptile Theory in connection with the discovery of electronically stored information ("ESI"). Consider when a plaintiff's counsel requests not only an "audit trail," or digital record of all accesses to the patient's electronic medical record, but also that the responding provider extract as part of its audit trail numerous other fields of information not mandated by federal or state law, and then demands an inspection of the audit trail within the defendant's computer simply to verify that defendant has produced all information in its possession. Or, if counsel cannot find meaningful information in the audit trail, plaintiff's counsel may subsequently request numerous additional audit trails of other equipment that the responding party may face logistical difficulty in producing, then move for sanctions based on the responding party's delay in production.

As these examples suggest, plaintiff's counsel have begun to make overwhelming and disproportionate ESI requests that are impossible for a corporate defendant to respond to while asserting, often by misciting law, their client's right to this data. Defendant's delay or inability to respond to such requests is then aggrandized by making motions to keep the corporate defendant in the state of deficiency, or alleged deficiency. These tactics inflate the cost of litigation and fuel a party's efforts to cast the corporate defendant in a negative light early in the litigation to gain advantage in any early proceeding to resolve the matter.

In the present climate of rampant corporate bias and increasing "nuclear verdicts", counsel must prevent parties from turning claims into intentional torts and seemingly criminal suits with enhanced damages based upon little more than delayed or allegedly deficient discovery responses. This article will address how plaintiff's counsel uses the Reptile Theory in the context of electronic discovery, the law applicable to this strategy, and methods defense counsel may

use to mitigate the dangers of the strategy.

I. What are the Reptile Theory and Reptile Attack and how are they used in the context of e-discovery?

Plaintiff's counsel are well aware that requesting a jury to "put themselves in the plaintiff's situation and fix their verdict in the amount they would want for themselves under the same circumstances" is improper, as it prompts the jury "to decide the case based on personal interest, bias, and prejudice."[1] This principle is known as the Golden Rule.[2] Yet Plaintiff's counsel are increasingly taking advantage of the Reptile Theory, as an iteration of the Golden Rule.

First introduced by David Ball and Don Keenan in *Reptile: The 2009 Manual of the Plaintiff's Revolution*,[3] the Reptile Theory is a strategy to redefine the standard of care in negligence cases, where plaintiff's attorneys appeal to jurors' sense of self-preservation by advising them of the possibility to protect their community from dangerous conduct. This is a method of appealing to jurors' emotions and survival instincts, or "reptilian brains," rather than to the evidence, and thereby obtain large jury verdicts. This strategy can be used at various points throughout litigation but has increasingly been used in the preliminary stages in discovery. Courts have even begun to take note that the "overarching 'Reptile Theory' strategy can be employed in the discovery process."[4]

The Reptile Theory is often applied to the discovery process in the context of electronic discovery. If a defendant objects to any requests for records to which plaintiff's counsel claim they are entitled, plaintiff's counsel argue that any failure or delay of

[1] Stephen E. Arthur and Robert S. Hunter, FEDERAL TRIAL HANDBOOK: CIVIL, § 22:14 (2023); *see, for example,* Michigan First Credit Union v. Cumis Ins. Soc., Inc., 641 F.3d 240 (6th Cir. 2011) (holding plaintiff made "an inappropriate 'golden rule' argument" during its closing statement, which asked the jury to think of their own insurance claims).

[2] *See, for example,* Westbrook v. General Tire and Rubber Co., 754 F.2d 1233, 1238 (5th Cir. 1985) (granting a new trial for damages after plaintiff's counsel appealed to jury as "the conscience of the community"); Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982) ("A 'Golden Rule' appeal in which the jury is asked to put itself in the plaintiff's position 'is universally recognized as improper 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 the evidence.'") (internal citation omitted).

[3] 45 (1st ed. 2009).

[4] Beach v. Costco Wholesale Corporation, No. 5:18-cv-00092, 2019 WL 1495296 at *4 (W.D. Va. April 4, 2019).

electronic data production is tantamount to a public wrong and jeopardizes a fundamental right. By employing the Reptile Attack in the discovery phase, plaintiff's counsel attempt to manufacture an issue of spoliation as early as possible to pressure and corner a corporate defendant. The Reptile Attack may take the form of several discovery tactics other than sanctions, including demanding responses to an overwhelming number of discovery requests, misciting statutes and law as to data production or retention, playing on the bias against corporate defendants, and seeking the court's assistance for an alleged failure to fulfill disproportionate requests.

The Reptile Attack, and its potential consequences, are aptly illustrated in *Angela Prieto v. Rush University Medical Center*. In this birth-injury matter, plaintiffs served numerous data requests on Rush University Medical Center ("RUMC"), including a complete audit trail of the medical record with metadata, an access log, audit reports for any changes or revisions, all documentation regarding the electronic medical record system upgrades, among other documentation.[5] RUMC initially produced what it described as an audit trail, though the production did not contain "word-for-word, specific changes made to the electronic record," as plaintiffs desired.[6] After an inspection of the medical record took place and several documents were found that had not been produced, plaintiff filed a motion for sanctions.

In an inordinately punitive decision, the trial court granted plaintiff's motion for sanctions in *Rush*, holding that inconsistent statements made by RUMC representatives and the failure to produce **all** information available to RUMC from the medical record over two years after plaintiff's initial requests warranted a trial only as to damages, not the merits of plaintiff's case. The court also extensively miscited federal law as to the production and disclosure of a plaintiff's medical record. Although the Illinois Supreme Court later vacated this sanction and ordered the trial court to instead find RUMC in friendly contempt,[7] the time and cost to rectify the mistake of the trial court enabled by plaintiff's strategy was enormous.

Rush provides a prime example of a plaintiff playing on bias against a corporate entity by arguing that a delay or lack of production of records is tantamount to a public wrong and violation of the law. Plaintiff's counsel may seek judgment against a defendant, as in *Rush*, or claims may take the form of

[5] No. 2018 L 3531, at 8 (Ill. Cir. Ct. Cook Cnty., Jan. 18, 2022).

[6] *Id.*

[7] Prieto v. Rush University Medical Center, No. 2018 L 3531 (Ill. May 18, 2023).

spoliation or an intentional tort claim. It is precisely this situation created by a Reptile Attack that is becoming more frequent, and corporations need to prepare for in the discovery stage.

II. Law Applicable to the Reptile Attack

Because the Reptile Theory has been used to obtain similar results to the Golden Rule attack, its use is similarly improper under state and federal rules. The Reptile Theory, by design, violates the courts' rules regarding the relevancy of evidence, proportionality, and the balancing of the parties' interests. The failure to effectively defuse a Reptile Attack leads to improper inferences that have no relevancy to the matter at hand. Much like with the Golden Rule, it is reversible error to overwhelm a party with discovery demands and argue that an inability to comply with these demands amounts to a public wrong when no public statute is at issue.

Federal Rule of Civil Procedure 34 provides that a party may request any designated electronically stored information stored in any medium, yet this broad scope of discovery has very important constraints. Rule 26(b) limits discovery to matters that are relevant and:

> proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Additionally, Federal Rule of Evidence 403 allows for the exclusion of relevant evidence:

> if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

States have also outlined their court rules with regard to the process of electronic discovery. New Jersey has rules that closely mirror the Federal Rules of Civil Procedure and Rules of Evidence with regard to the balance of relevancy and proportionality, but has gone one step further and outlined the procedure for the request of metadata in electronic documents in New Jersey Rule of Civil Procedure 4:10-2(f)(1). Rule 4:10-2(f)(1) encourages the parties

to discuss the discovery request in the spirit of relevance and proportionality:

> A party may request metadata in electronic documents. When parties request metadata in discovery, they should consult and seek agreement regarding the scope of the request and the format of electronic documents to be produced. Absent an agreement between the parties, on a motion to compel discovery or for a protective order, the party from whom discovery is sought shall demonstrate that the request presents undue burden or costs.

Further, parties must meet and confer regarding any production of metadata, and courts must be mindful of cumulative or duplicative discovery requests and consider the needs of the case, per Rule 4:10-2(g).[8]

Overwhelming and disproportionate discovery requests are not supported by either federal or state laws. In addition to discovery requests, there is also the possibility of plaintiffs' assertion of Rule 37(e) in the context of disproportionate requests due to the delay and confusion the burdensome requests can cause. While Rule 37(e) authorizes sanctions where "electronically stored information that should have been preserved in the anticipation or conduct of litigation *is actually lost* because a party failed to take reasonable steps to preserve it," but the court may only "order measures no greater than necessary to cure the prejudice" in the case of negligent spoliation, or upon a finding of intent, issue more severe sanctions. In addition, the standard of proof for the award of issue-related sanctions, such as the preclusion of evidence or adverse inference instructions, is the higher preponderance of the evidence.[9] An adverse inference under Rule 37(e)(2) not only means that the lost information was unfavorable to the party that intentionally destroyed it, but also that the opposing party "was prejudiced by the loss of information that would have favored its position."[10]

While court rules may be used to enforce relevancy and proportionality in the context of ESI discovery, defense counsel must be prepared when plaintiffs cite the

[8] *See* Estate of Lasiw by Lasiw v. Pereira, 475 N.J. Super. 378, 387 (N.J. App. Div. 2023).

[9] Mannina v. D.C., 437 F. Supp.3d 1, 6 (D. D.C. 2020).

[10] FED. R. CIV. P. 37 Advisory Committee note to 2015 Amendment.

broad mandate of discovery and the possible sanctions for failing to meet this mandate.

III. Discovery Strategies to Avoid a Reptile Attack

Due to the increased prevalence of the Reptile Attack, defense counsel must develop discovery strategies that take into account the legal and regulatory framework of their pertinent industry and of electronic discovery, while ensuring that the corporation and its representatives are aware of and prepared for Reptile Attack tactics.

Knowledge of court rules and Rules of Evidence must be employed in tandem with knowledge of the state and federal regulatory framework of the corporation's industry. For example, in the context of medical negligence and healthcare litigation, defense counsel can prepare a better response to a plaintiff's request for items within the electronic medical record if counsel is familiar with the limits of the Health Insurance Portability and Accountability Act ("HIPAA") and the Health Information Technology for Economic and Clinical Health Act ("HITECH"). Corporations in the healthcare industry are fiduciaries of their clients' personal health information and personal identifiable information. The trial court's clear misstatement of the law in the *Rush* case regarding the production of audit trail information highlights the necessity to clearly demarcate the explicit legal requirements of the discovery of electronic information. Further, a corporation must protect its own proprietary intellectual property, as well as that of third parties with which the corporation contracts, and appropriate privacy and trade secret legal and regulatory compliance is indispensable.

Corporations, with the aid of counsel, must also undergo identify key stakeholders with relevant information and data mapping. As regards the internal record keeping of data, such as audit trails and any related information plaintiffs may request, counsel needs to identify record custodians and record retention, destruction, and back-up record-keeping policies. To address data mapping, or collecting essential information, the corporation must develop a template that identifies the most effective way to produce electronic data, how document production may be done in a uniform manner, and ensure that a meet-and-confer occur between counsel regarding document requests, if necessary.[11] Additionally, counsel should

[11] Carole Basri and Joshua Fine, eDISCOVERY FOR CORPORATE COUNSEL, §§ 4.3ff (2024 ed.); *see Pereira*, 475 N.J. Super. at 387.

identify external stakeholders necessary to a corporation's document production, like vendors with a proprietary interest in data systems and data subject to contractual confidentiality obligations. The precedent of cases like *Epic Games v. Google* and *U.S. v. Google* make data mapping, review of data retention policies with all employees, and the identification of stakeholders increasingly necessary. In these cases, counsel's and corporate designee's unsupported citations to corporate policy did not suffice against claims of intentional torts and spoliation.[12] Outside and in-house counsel may build a corporation's awareness of the importance of data mapping and identifying stakeholders in response to electronic discovery in various ways, including white papers and presentations.

Because the primary tactic in the Reptile Attack consists of overwhelming discovery requests, the initial response to discovery requests should include an effort to narrow the request and object to any burdensome production. Objections should be raised as to the use of "any and all," or narrow answers with the phrase "tend to show," so that the corporation is not trapped by conclusory questions. If objections do not suffice, counsel should make motions to limit the discovery requests in accordance with relevant court rules by citing to the need for proportionality. However, because courts often discourage parties from filing motions for protective orders or motions *in limine* seeking to preempt the use of the Reptile Attack without specific evidence of how the Reptile Attack is impacting the corporation, non-specific motions will likely fail.[13]

While the corporation should identify corporate designees and

[12] In Epic Games, Inc. v. Google LLC, et al. 3:20-CV-05671 (N.D. Cal. Oct. 13, 2022) and Federal Trade Commission, et al., v. Amazon.com, Inc., 2:23-cv-01495 (W.D. Wa. April 25, 2024), the requesting party raised each defendant's failure to preserve the content of chat messaging tools. In United States, et al. v. Google, LLC, 1:20-CV-03010 (D. D.C. Feb. 23, 2023), the U.S. Justice Department accused Google of having destroyed numerous chat sessions during the Department's investigation. In Waymo LLC v. Uber Technologies, Inc., 2018 WL 646701 (N.D. Cal. Jan. 29, 2018), the plaintiff requesting party sought an adverse-inference instruction pursuant to Rule 37(e) after electronic evidence, such as emails, communications, and Slack records, were destroyed by Uber employees. While the court found that evidence had been destroyed and that "any reasonable party in Uber's position would have reasonably foreseen litigation from Waymo," the court reserved its "decision on the question of whether or not Uber spoliated evidence with the intent to deprive" Waymo of the use of the evidence and reserved its decision as to instructing the jury that it may presume the evidence was unfavorable to Uber. *Id.* at 18, 30. The court stopped short of ordering an adverse inference to allow the plaintiff to set forth the required factual evidence pertaining to Uber's intent to spoliate at trial. *Id.* at 30.

[13] *Beach*, 2019 WL 1495296 at *4.

internal stakeholders (including clinical informaticists, data analysts, or policy administrators) to assist in responding to electronic discovery requests, defense counsel should seek to avoid depositions of ESI custodians to protect them from the reptilian tactics that seek not information, but inconsistencies which would provide the basis for disparaging the reputation of the corporate client before the court or, worse, an intentional tort claim. One way to avoid the deposition of data custodians is to provide certifications signed by the custodians with accurate testimony as to the information a corporation can or cannot retrieve. Counsel may also argue that the testimony of a corporate designee should not be permitted as it is irrelevant, may create an improper inference, or serve to inflame the jury.

If a corporate designee must be deposed, it is essential to thoroughly prepare the witness on Reptile Attack deposition tactics. Because plaintiff's counsel may attempt to box a witness into an answer and then pursue an argument of fraud or perjury, defense counsel must make sure the witness is familiar with the corporation's interrogatory responses and production. The designee must not be caught unawares during the deposition, and the plaintiff must not be permitted to argue the corporation is obstructive or has committed an intentional tort.

On a final note, corporate counsel should insist on a schedule of rolling discovery and production and include such language in an electronic discovery stipulation or order. It is essential that the parties acknowledge in writing that a corporation may not uncover all relevant documents and ESI at first pass, and that any amendments to discovery responses, as is allowed under the court rules, do not amount to fraud merely by an unavoidable delay.

IV. Conclusion

Plaintiff's counsel deploy various tactics in the discovery stage to achieve high verdicts. These tactics include propounding an overwhelming number of discovery requests, misciting statutes and law to support data production or retention, playing on the bias against corporate defendants, and seeking the court's assistance for an alleged failure to fulfill disproportionate requests. It is therefore urgently necessary for corporate defense counsel to develop responses to these tactics. Defense counsel should become aware of the legal framework concerning electronic discovery—federal and state—identify stakeholders within the corporation with responsibility for the requested information, narrow

requests by objecting to overbreadth, limit depositions of corporate designees or otherwise prepare corporate deponents, and, above all, establish the acceptance of rolling discovery to ensure that partial and supplementary discovery cannot be unfairly penalized to the plaintiff's windfall.