



GROWING A THICK SKIN

How to Insulate Your Warm-Blooded Driver Against Reptilian Attacks

By Melissa Skilken and Bharat Varadachari

Why do juries dislike our drivers, and how do we change those negative perceptions?

How do we change the narrative to focus on the facts of our individual case and humanize our drivers against the reptilian strategy employed by so many plaintiffs? When representing a company that operates large commercial vehicles, these are the questions that every attorney needs to ask and answer long before the jury is selected. When

it comes to neutralizing the reptilian approach to litigation, nothing is more important than presenting the driver in a favorable light.

Jurors have little sympathy for commercial companies and their drivers. Many jurors consider them to be the bullies of the road simply because commercial drivers usually operate large vehicles. It is also likely that, at some point in their lives, jurors have had a negative experience with a driver of a large vehicle, such as being passed on the interstate in heavy rain or being followed too closely down a

hill. The process of making the driver a likeable witness to the jury is critical to overcoming these subconscious biases, and it starts long before the driver enters the courthouse.

SUPPORTING THE DRIVER

A driver will be a better witness if the company and the attorney show that they support and believe in the skills and integrity of the driver. Of course, this is easier to do when the driver is not at fault. In these cases, it is important that the company contact the driver and let him know that he is a valued part of the



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company, that driving is a difficult job, and that, despite all precautions taken by the driver, accidents can happen.

Once the attorney is retained, she and the company must convey that the attorney's job is not only to represent the driver and the company, but also to show the plaintiff, the plaintiff's attorney, and the jury that the driver is free from negligence. It is often the driver's expertise that has mitigated the severity of the incident and the driver will be put at ease knowing that his attorney recognizes this fact. The earlier the driver feels like part of the team, the better he will present in front of a jury.

When liability is adverse, the situation gets more complicated. Depending on the circumstances, the driver may be terminated. If that is the case, then it is even more important that the attorney build a relationship with the former employee or owner/operator. When someone is at fault, it is human nature to skew the facts and minimize culpability. On top of that, when a driver is terminated or loses a client under an owner-operator agreement, there is often a degree of hostility toward the company. This can lead to damaging deposition testimony simply because the disgruntled driver goes out of his way to hurt the company.

The attorney must reach out to the driver and convey true empathy for the turn of events. The attorney should both build a personal relationship with the driver and try to put the company's position in a more understandable light. To the extent possible, explain that the company has limited discretion in making decisions of termination, that the company appreciates the driver's contributions, and that representation is being provided at the company's expense in large part because of those past contributions. If this message is communicated properly, then the company can likely expect less hostility and a better effort.

PREPARATION FOR DEPOSITION.

Once it appears that trial is certain, most companies will do whatever is

necessary to properly and thoroughly prepare a company executive for a Rule 30 (B) (6) deposition. The same level of groundwork should be devoted to preparing the driver for deposition in the early stages of the case. A deposition is an extremely awkward process for most drivers, and it is only through extensive preparation that the driver can develop some level of comfort.

Repetition is critical. Plaintiffs' attorneys have become adept at utilizing the "reptile theory" in their cross examinations. Drivers must not only be prepared for the types of questions that will be asked, but also they should participate in multiple mock depositions so that they are able to answer questions effectively under similar conditions. Determining how many mock depositions a witness should undergo depends on the driver's performance. In particular, the driver's ability to answer questions on topics such as hours of service, fatigue, log books, and speed not only affects settlement value, but also minimizes the chances of a claim for punitive damages.

In addition, drivers must be trained on mannerisms, how to testify professionally, and being able to maintain their composure when a plaintiff's attorney inevitably tries to rattle them. If they are comfortable with the process and have been through it before—even in mock settings—the drivers will provide more thoughtful and less reactive testimony. Investing the time and resources to thoroughly prepare the driver for deposition is critical to earning a favorable result.

TRIAL TESTIMONY

With each passing year, it seems fewer cases involving large vehicles go to trial. That does not mean cases should never be tried, though. Obviously, there are numerous factors that influence whether a case should go to trial, such as venue, the nature of the damages, and the quality of the judge, but the driver will almost always be the most critical witness.

At trial, the plaintiff's attorney will likely try the case by relying upon

reptilian themes and suggesting that because the company's employee is driving a much larger vehicle, he owes the general public a greater duty given the increased risk of serious injury. Where state law permits, the defense attorney should consider filing a motion in limine arguing that it would be confusing to a jury to argue that there is a different standard of care applied to a driver of a commercial motor vehicle when the law does not provide for an elevated duty.

It is important to remember that, in most cases, the only person in the courtroom with actual, hands-on experience driving a bus or tractor-trailer is your driver. This can be used to the driver's, and company's, advantage. If the driver can effectively play the role of "teacher," then he should be prepped on how to explain the expertise required to drive a large vehicle and that the accident occurred despite the driver relying on his training and experience.

Again, this may fall outside of the driver's comfort zone, and may take extensive preparation. But if the driver maintains composure and can confidently and modestly explain the steps unique to the driver of a large vehicle for ensuring safety (which he undertook), then it can be a substantial factor in obtaining a favorable result.

Regardless of the facts of the individual case, most companies operating large vehicles will be confronted with jurors' subconscious biases when trying cases involving large commercial vehicles. Jury verdicts in cases involving large commercial vehicles are getting bigger around the country, so it is an absolute necessity to prepare drivers both on the important facts and issues of the case and in the manner in which those facts and issues are presented. The ultimate goal is to ensure that the jurors are more drawn to, and sympathetic toward, the driver than the plaintiff. Whether it results in a defense verdict or a plaintiff's verdict with reduced damages, there will be a tangible benefit if the jury finds the driver both credible and, perhaps more importantly, likeable at the close of evidence. ■