Cases/Sources Citing Wahlstrom

Rule 3.3(a)(1), Model Rules of Professional Conduct

A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

1. **Gamache v. Metro Health Foundation of Mass., Inc., et. al. -Defendant's MIL**
   a. **UNTRUE, MISLEADING, INSIGNIFICANT, IRRELEVANT**

"a simple "google search" of "reptile theory" will reveal the increasing frequency of this topic in both the plaintiff and defense bars across the country. This issue has been directly addressed in Superior Court decisions, including: Wahlstrom v. LAZ Parking Limited, LLC (Suffolk Superior Court, Civil Action No: 1084-CV01022) (Wilson, J.). The Wahlstrom case actually involved Attorney Keenan, the author of the "Reptile Theory" who served as plaintiff's counsel in a case involving a premises liability claim arising from a rape that occurred at a local parking garage. (See id.). The jury returned a verdict for the plaintiff in excess of $4.0 million. The defendant filed numerous post-trial motions including a motion for a new trial that was allowed by the trial judge on the grounds that Attorney Keenan asserted improper "golden rule" and "reptile theory" arguments during the course of the trial, thereby denying the defendants its right to a fair trial. (See id.). In his decision, Judge Wilson outlined the theories utilized by attorney Keenan during the trial and compared them to his theories outlined in his book and in his trial tactics seminars. (See id.). **Of Note: at the time of filing this motion the Order granting a new trial was vacated. Defense chose not to disclose this to the court or explain the procedural posture. In addition, Judge Wilson recused himself. Wilson's order for a new trial has no relevance and is insignificant now that the Appeal's Court vacated it. Defense counsel are wrong when they wrote that "Judge Wilson outlined the theories utilized by attorney Keenan during the trial and compared them to his theories outlined in his book and in his trial tactics seminars." Judge Wilson actually wrote in his opinion that the Reptile had nothing to do with the trial or his ruling.**

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2. ***Satiro v. DES Senior Care Holdings, LLC*, et. al. – Defendants' MIL**

   a. **UNTRUE, MISLEADING, INSIGNIFICANT, IRRELEVANT**

   "Community safety, "reptile" trial tactics, and similar tactics, have been used throughout the Massachusetts plaintiff's bar and have served as the basis for ordering new trials against the plaintiff's attorney's firms…..Exhibit 2 (ordering a new trial where plaintiff was represented by the same law firm as in this case, and where the "prejudicial misconduct of counsel" including argument that the jury should "render a verdict that would deter future bad conduct by Defendants" deprived the Defendants of the right to a fair trial)." [Exhibit 2 was the Wahlstrom decision]. **Of Note: at the time of filing this motion the Order granting a new trial was vacated. Defense chose not to disclose this to the court or explain the procedural posture.**

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3. ***D'Amico v. Kindred* – Defendants' MIL**

   a. **UNTRUE** – "Judge Wilson further noted that [plaintiff's counsel] followed the "Reptile" playbook at trial and, in fact, the author of the "Reptile" joined [plaintiff's counsel] in representing the plaintiff. [FN 2 – describing "Reptile" strategy] [plaintiff's counsel's] conduct in *Wahlstrom* appears to have been inspired by the "Reptile," and similar conduct should be anticipated at this trial." Defs' MIL at 4. The motion was denied.

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4. ***Gaylord v. Blatman* – Defendants' MIL**

   a. **UNTRUE** – "In his decision, Judge Wilson outlined the ["golden rule" and "reptile"] theories utilized by attorney Keenan during the trial and compared them to his theories outlined in his book and in his trial tactics seminars." Defs' MIL at 3-4. This is untrue, because—as we know—Judge Wilson did NOT compare the Reptile theories from Keenan's book with 'the theories utilized by attorney Keenan during the trial…'

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5. ***Ray v. Mid Coast Hospital – Defendants' MIL***

   a. **UNTRUE** – "In yet another example, a Massachusetts Superior Court granted a new trial where plaintiff's counsel was permitted to extensively use "Reptile" tactics, depriving the defendants of a fair trial. *See Wahlstrom v. Lax* **(sic)** *Parking, Ltd., LLC*, No. SUCV2010-1022, 2016 Mass. Super. LEXIS 120 (Mass. Super. Ct. May 19, 2016). In so doing, the court noted that the "major axiom" of the "Reptile Theory" is that…" This language undeniably gives the impression that the Court's ***basis*** for it's decision to grant a new trial was because of the extensive use of Reptile tactics.

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6. ***Masse v. Liberty Mut. Ins. Co.***

   a. **UNTRUE** – Within the text of a footnote to the following assertion, Defendant cites to the *Wahlstrom* Order for new trial, thus lumping *Wahlstrom* together with "courts [that] have rejected use of arguments and trial tactics, such as those advocated in REPTILE, which are designed to thrust the factfinder into the shoes of the plaintiff or the role of community guardian." Def's MIL at 3-4, n. 1.

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7. ***O'Rourke v. Sunbridge*** **(Barry) – Sun Defendants' MIL**

   a. **UNTRUE** – The MIL states that, "the trial judge granted a motion for new trial in *Wahlstrom*, after completing a jury trial which took over 3 weeks, due to the numerous instances of contemptuous, vexatious, and other prejudicial misconduct, by [plaintiff's counsel], ***which conduct was part and parcel of Plaintiff's "Reptile" trial strategy***." Defs' MIL at 11, citing Judge Wilson's Order Memorandum for new trial.

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8. ***Taubin v. Red Sox* – Defendants' MIL**

   a. **UNTRUE** – Referring specifically to Reptile 'tactics', the MIL states: "Such tactics are improper under Massachusetts law, are not susceptible to remediation through a curative instruction, and have required trial judges of this Court to set aside a jury verdict at least twice in the past two years alone." Def's MIL at 2.

   b. The MIL goes on to state, inaccurately, that: "…as Judges Wilson and Brieger [trial judge in *Fitzpatrick v. Wendy's*] learned the hard way, curative instructions do little to counteract the reptile approach; once an improper question is posed or argument made, the bell cannot be unrung—indeed, the objection itself may be as useful as a tactic as the improper question…" Def's MIL at 15.

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9. ***Fitzpatrick v. Wendy's* – Court's Decision and Order on Defs' Motion for Mistrial**

   a. **UNTRUE** – "Recently, this court, Wilson J., ordered a new trial arising from plaintiff's counsel's impermissible use of reptile tactics in *Wahlstrom v. LAZ Parking Ltd., LLC*. In that decision, the court highlighted the fact that all parties are at risk from the use of these tactics…"

   b. In its Order, the Court incorporated [what is,] an inaccurate representation with regard to the *Wahlstrom* case; *Hon. Heidi Brieger, Superior Court Judge (MA).*

Supported and adopted by defense attorney Christopher Duggan
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10. **New York Law Journal – *Defending Against 'Reptile Theory' Trial Strategy in Tort Litigation***

   a. **UNTRUE** – Under a section labelled "Courts on Reptile-Type Arguments", the article lists the following reference to *Wahlstrom*: "Massachusetts Superior Court (2016): Granted a new trial where plaintiff's counsel's extensive use of Reptile Tactics deprived defendants of a fair trial. *Wahlstrom v. LAZ Parking Ltd.*, 2016 WL 3919503 (Mass. Super. May 19, 2016)."

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11. *Carnevale, et al. v. Boeing* – Def's m2 Alter/Amend Court's Judgment

a. **UNTRUE** – Footnote 5 of the Defendant's Memorandum in Support of Motion states: "In two other recent Superior Court cases, presently on appeal, the trial judges ordered new trials to remedy similar 'reptile tactics.' In *Wahlstrom v. LAZ Parking Ltd. LLC*, the trial judge ordered a new trial after ruling that "the errors committed by plaintiff's counsel, considered in their totality, 'injuriously affected the substantial rights' of the defendants, and deprived them of a fair trial." No. SUCV20101022, 2016 WL 3919503, at *12 (Mass. Super. May 19, 2016) (quoting *Fyffe*, 86 Mass. App. Ct. at 458). Similarly, in *Fitzpatrick v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, the trial judge granted defendants' motion for a mistrial following the jury verdict, ruling that "prejudicial aspects of the closing argument likely influenced the jury's verdict, thereby depriving the Defendant of a fair trial." No. 1384CV03045, 2017 WL 6040174, at *8-9 (Mass. Super. July 7, 2017). True and correct copies of these cases are attached as Exhibit 14A, 14B to the Declaration of Kathleen M. Guilfoyle, which is filed herewith."

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12. *Discovering the Reptile* – Matt Moffett and Jeff Wasick

a. **UNTRUE** – In footnote 13, p. 15-16, the article states: "Of particular relevance to this point, see *Wahlstrom v. LAZ Parking Ltd., LLC*, [ ](order granting defense motion for new trial). The groundwork for opposing the Reptile was laid pretrial and all through the course of the trial; ultimately the defense was granted a new trial. Arguably the laying of the foundation by defense counsel led to the granting of their motion for new trial in this case in which the lead Reptile Don Keenan himself was the plaintiff's lead counsel."

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13. ****Strafford* presentation – *Combating Plaintiff Reptilian Tactics in Complex and High-Stakes Litigation: Transforming Perception of the Company***

    a. **UNTRUE** – Page 28 of the presentation (on the topic of Courts on Reptile Theory) asserts that "The court granted a new trial where use of Reptile Theory tactics was prejudicial and deprived Defendants of a fair trial. *Wahlstrom v. LAZ Parking Ltd., LLC*, 2016 WL 3919503 (Mass. Super. May 19, 2016).

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****Strafford* is a provider of defense-side CLEs, based in Atlanta, Georgia**

14. ****Strafford* presentation – *Combating Plaintiffs' Reptilian Tactics in Commercial Vehicle, Premises Liability, Products Liability and Med Mal Cases***

    b. **UNTRUE** – Page 27 of the presentation (on the topic of Courts on Reptile Theory) asserts that "The Court granted a new trial where use of Reptile Theory tactics was prejudicial and deprived Defendants of a fair trial. *Wahlstrom v. LAZ Parking Ltd., LLC*, 2016 WL 3919503 (Mass. Super. May 19, 2016)."

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15. ***Miller v. Kindred* – Defendants' MIL**

    a. **MISLEADING** - Defendants' references to Reptile are misleading. Specifically, the following language misleads the reader into believing that the "Plaintiff's use of reptile theory", "cited in other cases", was the actual impetus for Judge Wilson's decision granting a new trial.

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16. *Johnson v. Kindred* – Defendants' MIL to Order Plaintiff's Counsel to Comply with the Court's Orders

a. **MISLEADING** – The defendants' motion *in limine* misrepresents what is stated in Judge Wilson's Order regarding the amount of alleged misconduct, which was said to have been 'admitted' by plaintiff's counsel during oral argument.

b. The defendants in *Johnson v. Kindred* filed separately, a related motion *in limine*, which asked the Court to preclude the use of "Reptile" during trial. That motion was DENIED.

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17. *Davitch v. CHHS Hospital Co., LLC* – Defs' MIL

a. **MISLEADING** – though the memorandum implies that the Order for a new trial in Wahlstrom falls among other, similar decisions, where "courts have precluded attorneys from making reptile-arguments or found such arguments to be improper,…," the defendant's specific citation to the *Wahlstrom* case identifies 'safety rules', and other misconduct, as being the basis for Judge Wilson's decision to order a new trial.

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18. *Fortin v. Sepe & Hawthorn Medical Associates, LLC*

a. **MISLEADING** – The motion's discussion of Judge Wilson's Order in Wahlstrom undoubtedly casts the impression, that, Judge Wilson's decision was based—at least, in part—upon the use of "improper 'golden rule' and 'reptile theory' arguments", which (as defendants argued), deprived the defendant in *Wahlstrom* from receiving a fair trial.

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19. ***Koziol v. Kindred*** **– Defendants' MIL**

a. **MISLEADING** – Defendants' references to Reptile are misleading. Specifically, it states that the "'Reptile Litigation Tactic' creates a false legal standard by which the care and treatment at issue in a medical malpractice action is to be judged", that plaintiffs encourage jurors to ignore medical standard, and that plaintiffs manipulate jurors into rendering a verdict based on 'non-legal standard' of safety rules." Motion also incorrectly cites to the Calandro case and a sidebar conference, insinuating that plaintiff's counsel did not follow the Orders of the Court as it relates to safety rule.

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20. ***Vetrano v. Lighthouse of Revere*** **– Defendants' MIL**

a. **UNTRUE and MISLEADING** - Defendants' references to Reptile are misleading. Specifically, the following language misleads the reader into believing that the "Plaintiff's use of reptile theory", "cited in other cases", was the actual impetus for judges ordering new trials against plaintiff's attorney's firms (cite to Fyffe v. Mass Bay Transit Authority and Wahlstrom). Defendant's claim "reptile trial tactics" was, in part, the reason a new trial was Ordered in Wahlstrom. This is UNTRUE.

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21. ***Magness v. Singh & Padda Express, et al.*** **– Defendants' MIL**

a. **IRRELEVANT** – The language that Defendants' quote was taken directly from Judge Wilson's Order.

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22. ***Spriggs v. Cardinal Logistics – Defendants' MIL***

a. **IRRELEVANT** – The Defendants' MIL does not say that Judge Wilson's decision in *Wahlstrom* was based on the plaintiff's use of Reptile tactics or strategy; rather, it describes the specific conduct upon which the Court's decision was purportedly based.

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23. ***Sylvestre v. Metropolitan – Defendant's MIL***

a. **IRRELEVANT** – Defendant's MIL only paraphrases Judge Wilson's comments from *Wahlstrom* regarding Reptile.

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24. ***Hughbanks v. Kindred*** **– Defendants' MIL**

a. **INSIGNIFICANT** – Defs' MIL sought a Court Order that required Plaintiffs' counsel to 'comply with Orders of the Court.' Defendants referenced Judge Wilson's Memorandum in connection with the Court's decision to Order a new trial in the *Wahlstrom* case, purportedly based upon "the abundance of unfavorable behavior by Plaintiff's counsel [in the *Wahlstrom* case]." The Defendants' MIL further commented on Judge Wilson's Memorandum in *Wahlstrom*, claiming that it "pointed to numerous instances of misconduct used by plaintiff's counsel throughout the entire duration of the trial."

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25. ***Personalizing the Corporate Client: Reversing the Reptilian Theory in High-Stakes Litigation*** **– article written for defense bar**

a. **IRRELEVANT** – despite discussing the *Wahlstrom* decision at length, the article was careful to quote Judge Wilson's remarks regarding his decision *not* being based upon Reptile.

    i. **AUTHORS** – Sonya D. Naar, Vice President– Senior Claims Counsel, Attorneys' Liability Assurance Society, Inc. (Chicago, IL); Hildy Sastre, Partner, Shook, Hardy & Bacon L.L.P. (Kansas City, MO); Todd Silberman, General Counsel, Mesilla Valley Transportation (Las Cruces, NM); Miranda Lundeen Soto, Partner, Shook, Hardy & Bacon L.L.P (Kansas City, MO).

By making statements that are false, misrepresentations, or, 'half-truths', attorneys are improperly attempting to mislead both, the courts, and other attorneys.