

DEFENDING THE REPTILE THEORY

FDCC Webinar

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Defending the Reptile Theory

WARNING: The Reptile strategy and techniques are being effectively used by more of the Plaintiff's Bar across the country, and the Defense Bar, Corporate America and the insurance industry must become better schooled in this methodology and proactively react as outlined in this paper. The "Reptile" strategy is designed and used to produce higher verdicts in personal injury cases. According to the Reptile website, the Reptile program is "the most powerful tool in the fight against Tort Reform...The proof is in the numbers—over \$6 Billion in verdicts and settlements have been credited to the Reptile since its introduction in 2009." (No source is cited.) To be sure, the Reptile model is a skilled marketing tool of plaintiffs' counsel, Don Keenan, and jury consultant, David Ball, to sell books, seminars and the like (www.reptilekeenanball.com).

1. Background

The alleged foundation of the Reptile strategy is the "triune" brain. In the 1960's, neuro-psychologist Paul MacLean posited that there were three (3) parts of the brain that reflected the different strata of human evolution: the first, the reptilian brain (which includes the brainstem

and cerebellum), the limbic or paleo-mammalian system, and the neocortex or neo-mammalian brain. See Paul D. MacLean, *The Triune Brain in Evolution: Role in Paleocerebral Functions*, Springer, 1990. According to MacLean, each portion of the brain was formed upon the previous, older layer. He posited that each of the three brains is connected by nerves to the other two, but each seems to operate as its own brain system with distinct capacities. Much of MacLean's work has been debunked. See Striedter, G. F. (2005) *Principles of Brain Evolution*. Sinauer Associates; Patton, Paul (December 2008). *One World, Many Minds: Intelligence in the Animal Kingdom*. Scientific American. Retrieved 29 December 2008; Butler, A. B. and Hodos, W. *Comparative Vertebrate Neuroanatomy: Evolution and Adaptation*, Wiley; Smith CU., 2010, *The triune brain in antiquity: Plato, Aristotle, Erasistratus*. Journal of the History of the Neurosciences, 19:1-14.; and Ben Thomas "Revenge of the Lizard Brain, <http://Blog.Scientific.American.com>, 9/7/12.

The Reptile system is based on themes taken from neuroscience, psychology, marketing, and subliminal messaging that are intended to activate jurors' instinctive "reptilian brains" and persuade jurors to render verdicts based on primitive fear instincts, rather than using their higher brain which is thoughtful and discerning, to apply the law in order to protect the juror's family and the community. This is based on MacLean's theory that the physically lower limbic system, which rules emotions, can hijack the higher mental functions when it needs to. Translated into the litigation and trial worlds, however, Reptile tactics encourage jurors to produce a reactionary verdict, rather than one based on rational thought.

One can argue whether Ball and Keenan have concocted a new trial strategy seizing on "survival advantages" and minimizing "survival dangers." David Ball and Don Keenan, *Reptile: the 2009 Manual of the Plaintiff's Revolution*. Balloon Press. 2009, p. 17. What has been the

focus of the plaintiff's bar in the past, and what is fair game is their encouraging plaintiff's counsel to communicate "the immediate danger of the kind of thing the defendant did, and how fair compensation can diminish that danger within the community." *Id.* at 30.

Ball and Keenan emphasize their thesis throughout their book: "*When 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 17, 19, 73. They boil down their strategy to a simple formula: **Safety Rule + Danger = Reptile.** *Id.* at 51. The foundation of the Reptile program is the alleged violation of a "**safety rule**" by the defendant that creates a danger to people like those on the jury, such as "Truck drivers should follow all rules of the road." Each "safety rule" has to possess the following in order to trigger jurors' sense of self-preservation and, thus, their reptilian brains:

1. The rule must prevent danger;
2. The rule must protect people in a wide variety of situations, not just the plaintiff;
3. The rule must be in clear English;
4. The rule must explicitly state what a person must or must not do;
5. The rule must be practical and easy for someone in the defendant's position to have followed; and
6. The rule must be one that the defendant will either agree with or run the risk of looking stupid, careless or worse yet, dishonest. *Id.* at 52-53.

And every safety rule has an **umbrella rule** that is designed to cast as wide a net as possible in order to be relevant to all jurors. An example of an umbrella safety rule is "The defendant is not allowed to endanger the public needlessly." Thus, Ball and Keenan exhort their colleagues to:

1. Establish your general safety rules;
2. Relate general safety-rules to specific safety-rules;
3. Show the violation of a safety rule could hurt anyone; i.e., someone other than the plaintiff; i.e., you [the juror];
4. Get the witness to agree that the plaintiff was acting like everyone else, doing normal, routine activities of daily living;
5. Emphasize safety first, safety last, safety always;
6. Repeat principles, like "No prudent person needlessly endangers anyone" or "Violating a safety rule is never prudent;"
7. Establish that the defendant did not care about safety to start with;
8. Establish that the defendant did not care about the person he hurt and does not care now;
9. Establish that the defendant did not learn a lesson from the injury event;
10. Establish that the defendant did not know how to do the job safely;
11. Try to make the defendant the least safety-knowledgeable person in the case/courtroom;
12. Make the defendant out to be a liar by showing inconsistencies, gaps in documentation, failure to preserve evidence, and prior bad acts;
13. Show that the defendant did not do his job; and
14. Show that plaintiff did her job. *Id.* at 209-24.

With safety and umbrella rules, which outline themes for the plaintiff, plaintiff's counsel is set to embark on a Reptile strategy.

2. Use of The Reptile Theory of Litigation Is Improper For Any Purpose

A. The Appeal to Emotions Endorsed by the Reptile Theory Cannot Be Used in the Courts.

It is a universal truth in all jurisdictions that juries should not be unfairly biased by appeals to their emotions, and remarks that inflame passions or prejudices of the jury constitute error. Yet this is exactly what the Reptile theory of litigation endorses, as the entire thesis of this theory is to scare the jury into reaching a fear-based, as opposed to a logic-based, verdict. The jury is encouraged to decide a lawsuit in favor of the plaintiff based upon the fear, generated by plaintiff's counsel, that a verdict in favor of the defendant will harm the safety of the juror and his or her community.

The Reptile theory is based upon purported scientific studies of the human "Reptilian brain." *Id.* at 17-19. According to the authors, the Reptile's primary function in the human brain is self-preservation. This impulse, they maintain, drives all life and represents an imperative that will ultimately win out over all other considerations, including the force of logic. The cleverly-worded techniques appeal to: anger; fear; and the herd instinct. These techniques tell jurors they must protect the community, i.e., protect themselves and send a message with their decision.

Reptile is clever camouflage for attorney misconduct. It appeals impermissibly to jurors' anger, to subliminally appeal to jurors' fear, and to focus that fear on personal injury defendants. Reptile emphasizes the importance of extending these fears to the community as a whole, to show that "the tentacles of danger extend throughout the community." *Id.* at 35. For example, in describing a successful trial strategy used by one lawyer in a trial, they emphasize the lawyer in question demonstrated "that this case was not about a unique event or an accident, and that it was not just about his client. He showed that it was a ready and waiting menace to everyone in the community..." *Id.* at 37. The Reptile script is a barely-concealed effort at

subverting the rules of ethical trial practice. It camouflages rank appeals to fear, to emotion, to anger, and repeatedly tells jurors to 'protect the community', essentially by making an example of the defendant, and asking the jury to speculate about the damage the plaintiff cannot prove. These appeals should not pass muster in a courtroom. In most courts, remarks that inflame passions or prejudices of the jury constitute error. While certain "send a message" statements may be permissible in some courts, exhortations to "send a message" by its verdict through an "extended and general denunciation of society's ills" have no bearing upon any case. Further, multiple courts have prohibited arguments that ask a jury to "send a message to a defendant" or to "act as the conscience of the community." Reptile's focus on the jury as 'community guardian' is really no different and must be disallowed. A quote from the *Reptile* script makes the point: "In applying the law from Judge Smith, you act on behalf of everyone in Randolph County. Some say a jury is the community's conscience, the community's guardian. This is because you speak for the community. So the closer you come to providing full compensation, the more important your voice will be--by making clear that Randolph County won't let companies get away with violating safety rules and hurting people." "A jury represents the community," the *Reptile* script continues. And the jurors are told to "consider the effect your verdict has on the community. " *Id.* at 44.

The Eighth Circuit has prohibited unduly inflammatory and prejudicial "conscious of the community" arguments. *U.S. v. Johnson*, 968 F.2d 768 (8th Cir. 1992). Likewise the Fifth Circuit has held that a "conscience of the community" argument constitutes "improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial." *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1268 (5th Cir. 1985). The court continued:

Our condemnation of a "community conscience" argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders.

Id. at 1538-39. *See also U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) (recognizing as improper any "conscience of the community" argument that is designed to inflame or incite the jury, and reversing conviction based on prosecutor's closing argument urging jurors to "send a message" because it appealed to the jurors' emotions, passions and prejudices); *U.S. v. Monaghan*, 741 F.2d 1434 (D.C. Cir. 1984) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future law-breaking."); *U.S. v. Barlin*, 686 F.2d 81 (2d Cir. 1982) (condemning this genre of comments and arguments as designed to divert, rather than focus, the jury upon the evidence).

B. Plaintiff Must Prove Actual Damages Without A "Community Danger" Argument.

In addition to improperly appealing to emotions, *Reptile* instructs lawyers to ignore the actual harm a defendant may have caused and focus instead on hypothetical harm that might have been caused. "To the reptile, the smallest case is not small, because the violation caused [sic] can cause massive harm the next time." *Reptile* at 225. Jurors should be told that "[t]he difference between a minor injury and a fatality is just luck." *Id.*

This inherent abuse in this argument is insidious: focusing on a choice between community safety versus danger, as opposed to the damage actually sustained by a plaintiff, deprives any tort defendant of a fair trial. The prejudice to a defendant is compounded when the plaintiff lawyer reads a manipulative script, suggesting a plaintiff might recover for conduct that

did not harm him. Such argument would be disallowed in any case, even where punitive damages are alleged. The United States Supreme Court has said:

A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual... Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims...

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003) (emphasis added). The *Reptile* script requires adjudication of hypothetical negligence, hypothetical dangers, which themselves caused no harm to the plaintiff. The United States Supreme Court calls this a denial of due process, and it is. Yet the *Reptile* strategy is a veiled golden rule argument, that tells jurors to decide a case not on the actual damages sustained by a plaintiff, but rather on the potential harms and losses that could have occurred to the community, which includes the jurors and their families.

Plaintiffs often contend that evidence of prior conduct is inadmissible to either prove or disprove a plaintiff's conduct in the current case. Assuming that is true, it logically follows that evidence of or arguments about hypothetical "other similar incidents," and the potential harms and losses posed to other members of the community, should never be discussed, as having no relevance to the issues the jury will decide. This alone mandates excluding *Reptile* strategy evidence or arguments.

Similarly, it is rudimentary that a jury cannot base its verdict on matters not in evidence, conjecture, or speculation. Rather, a plaintiff must prove damages to a reasonable degree of certainty, and only those damages proximately caused by a defendant's conduct can be recovered. Any evidence or argument that goes beyond the scope of a plaintiff's damages and includes potential harm posed to the community is irrelevant and unfairly prejudicial.

Further, Reptile emphasizes that counsel must also establish that the jury, through its verdict, can reduce or eliminate the danger. The authors state: "All this lays the groundwork for your primary mission: to show that a proper verdict will make things safer for the community. The Reptile wants to comply. Just remember that the Reptile does not get involved unless she sees that the danger is to her, and can be meliorated." *Id.* at 80. The authors urge plaintiff's attorneys to expressly argue to the jury that a plaintiff's verdict will make the community, and by extension the jurors and their families, safer. This argument is improper. It is a request that the jury consider factors other than the evidence of the case in returning its verdict, and urges the jury to focus on considerations other than finding the facts of the individual case and granting the individual plaintiff fair compensation.

Again, appeals to a jury's emotional or sympathetic tendencies, rather than an appeal to a jury's intellectual ability to evaluate evidence, are improper. Yet this is precisely the stated purpose of Reptile: to appeal to fear, to emotion, by stealth. The Reptile authors boast:

Show the Reptile that a good verdict for you facilitates her survival. Cases are not won by logic...So you need to get the Reptile to tell the logical part of a juror's brain to act on your behalf.
* * *

Today's neuroscience shows that the logical part of the brain is the servant, not the master....It's the primitive part of the brain that controls decision-making....

In fact, emotion works for the Reptile. Emotion makes you want to decide the way the Reptile directs. In fact, as the more primitive part of the brain, emotion has far more to do with the decision-making process than logic.

Id. at 45-46.

C. Reptile Tactics Cannot Be Used At Trial.

i. Voir dire questions which pretend the trial is about safety or community protection are abusive, improper, and must be disallowed.

The control of voir dire is within the sound discretion of the trial court. While courts have wide discretion in the conduct of voir dire, an abuse of discretion will be found if the conduct of the court thwarted the selection of an impartial jury. The trial court abuses its discretion in control of voir dire if the voir dire permitted does not allow for the discovery of bias, prejudice or impartiality. Thus the court must only allow questions which might uncover bias, or which would allow a lawyer to intelligently exercise peremptory challenges.

However, the Reptile playbook for jury selection includes appeals to jurors' fears and anger at personal injury defendants, and the script continually conditions jurors to 'send a message' with their verdict: "Full compensation will tell companies that if they come here and needlessly endanger our community, they will be made to pay in full measure." Or, "it's up to you to decide how badly a company can violate safety rules before this community will rise up and make them meet their responsibility." *Id.* at 42-43. The script indoctrinates the panel during jury selection by suggesting their verdict will protect the community, continually reminding jurors they 'send a message' with their verdict and make the community safer. The questions in the script are repetitive, and follow a theme of insinuating danger, and tasking the jurors with protecting the community.

Appeals to a jury's emotional or sympathetic tendencies, rather than an appeal to a jury's intellectual ability to evaluate evidence, are improper. The Reptile script for jury selection is an exhortation of fear. "In trial, you will start your community safety campaign as early as jury selection." *Id.* at 49. Pages of scripted questions repeat this theme: "How do you feel about trials having an effect on the community?" *Id.* at 124. This is an argument most courts do not

allow. The plaintiff has no right to ask the jury to make an example of the defendant, even if the argument is disguised as 'community safety' measure.

Implying to juries that they should send a message is an argument that appeals to emotion, not to evidence; it is appeals to fear through a plea to make the community safer by publicly punishing a tort defendant: The script continues: "In a civil case, when someone breaks the safety rules, and so causes harm, is held responsible, we are all better protected." *Id.* at 125 (emphasis added). And, "the law requires civil cases to be tried in the community where the act happened. Why do you think it's important to try cases in the community where the act occurred?" And more: "Some folks feel that it's necessary for the community to know what the jury has done in these types of cases..." (In other words, your verdict will send a message.) Worse, these scripted remarks tell jurors that they are 'guardians of the community,' whose function isn't weighing the facts, but policing the jury's turf. These remarks are undisguised directives to send a message. Phrasing the sales pitch as 'guarding the community' or 'public safety' does nothing to conceal its purpose.

ii. *Argument in Opening Statement is Not Permitted.*

The Reptile script for opening statement is saturated with invented 'safety rules' which protect the jurors from dangers created by tort defendants. The jury is repeatedly told, overtly and subtly, to make the community safer by enforcing the safety rules in their verdict. Once again, the jury is told they must 'send a message' with their verdict.

Argument during opening statement is improper. The primary purpose of an opening statement is to inform the judge and jury of the general nature of the case, so they may appreciate the significance of the evidence as it is presented.

Yet Reptile calls for opening statement to begin with argument: First, the lawyer states as fact an argumentative recitation of a safety 'rule', worded thus: "A driver is not allowed to needlessly endanger the public." *Id.* at 131. This is neither evidence nor an outline of evidence, but an improper argument.

The rigid pattern of opening statement continues with a section called "Why we're suing:" "We are suing [name of defendant] for violating six important public safety rules." *Id.* at 135. Lawyers are encouraged to frame an argument about safety, and danger: "in what other circumstances than this case can violations of the rule cause harm? This spreads the tentacles of danger." (Emphasis added.) *Id.* at 136. And, tellingly, "jurors usually gauge the seriousness of the harm (and thus the danger to themselves) not by the level of harm the violation caused in this specific case." So lawyers are encouraged to talk about other cases instead, and the kind of damage rule violations can cause in other situations—thereby "spreading the tentacles of danger." Indeed, lawyers are instructed NOT to discuss the particular facts of the case during this entire section of opening statement. *Id.* at 137. *Reptile* instructs lawyers not to make the "error" of discussing the damage caused in this specific case. Rather, the lawyer should encourage jurors to focus on the "maximum harm the act *could* have caused...The basis is never the harm actually caused; it is always the potential maximum." *Id.* at 33 (emphasis in original). Put differently, lawyers are told to focus on threats, on danger, and manipulating jurors into forming a mob.

iii. *Subversions of the 'Golden Rule' Must Not be Countenanced.*

The Reptile authors make their purpose clear: to make jurors concerned for their own safety, and that of their families. "No Reptile can protect herself alone. She protects herself by

protecting the community." *Id.* at 149. The Reptile authors try to obscure their true purpose by telling jurors to protect the community—the very community to which the jurors belong.

Again, the purpose is to tell the jurors to put their families and communities in the shoes of a tort claimant. The authors make this purpose clear: "... [T]he Reptile is concerned with the Reptile—meaning the individual juror—his world and family, their survival and little else. *Id.* at 169 (emphasis in original).

A case framed in terms of community endangerment is Reptilian. ..[A] case turns Reptilian when jurors see that the victim could have been anyone ... "Anyone" means the community. "Community" includes Juror #3 and her children.

Id. at 170.

Jurors will do what they can to keep their communities (i.e., themselves) safe when they think their efforts will work.

Id. at 227.

This cannot be read as anything but a subversion of the Golden Tule, and a direction to jurors to “send a message.” Likely in recognition of this, and anticipating objections from defense attorneys, Keenan and Ball conveniently include an appendix in *Reptile* outlining golden rule law by jurisdiction. *Id.* at 267-326. Additionally, the appendix describes the boundaries of "community safety" arguments in some venues. *Id.* at 328-30.

As set forth above, references to the "Golden Rule" or any comment that the jury should "do unto others as you would have them to unto you" have been universally condemned by courts. *Joan W. v. City of Chicago*, 771 F.2d 1020,1022 (7th Cir. 1985). Further, generally it is error for counsel to ask a jury to put themselves in the position of a plaintiff or defendant. By clever semantics, *Reptile* in essence specifically asks jurors to put themselves in the shoes of a plaintiff, and the intent is the same: to have jurors base their verdict not on the evidence of the case, but rather on the fear that they or other members of their family or community could be

injured, just as the plaintiff was, by the immediate danger of other similar conduct by the defendant, and to have them view compensating the plaintiff as diminishing the danger within the community and to themselves.

D. Sensing the Reptile Approaching.

Just as clients and witnesses fail to see how question A. leads down the primrose path to zinger question Z., claims professionals and lawyers sometimes have a misdirected reaction to what appear to be irrelevant or even stupid or crazy lines of questioning. In the Reptile world, the more off-base the inquiry, the more one's Reptile radar should sound (surely here Ball and Keenan and their neuro-psychology chums would coin the term "Repdar.") Truth be told, the plaintiff seeking information that is outrageously irrelevant (site inspection focusing on signage), or distantly relevant (focus on broad safety ideas instead of the facts of the case at hand), attempts to get the defendant to agree to safety being guaranteed, and inquiries of potential harm instead of actual harm, are red flags that the Reptile strategy is in play.

i. Discovery and Depositions.

Plaintiff's attorneys that utilize Reptile techniques accomplish high value settlements by manipulating defendants into providing damaging testimony, in either discovery responses, depositions or trial testimony, specifically by coaxing them into agreement with multiple safety rules. Once these damaging admissions are on the record, often on videotape, the defense has to either settle for a high value, or go to trial with impeachment material that can severely damage the defendant's credibility/case. When the defendant agrees to what she thinks is an innocuous safety rule on the witness stand, realizes it after the fact, gets trapped, and then tries to weasel out of it, juror dislike and dis-trust escalates. The paradox here is that the witness goes into survival

mode, not the jurors. Cleaning up such messes during defense counsel's rehabilitation efforts can be lethargic, painful, highlight the issue and even make a bad situation worse.

ii. Witness Time and Training—The Devil is in the Details!

With the Reptiles on the loose, there is but one *antidote: an elixir of time, training, coaching, and the schooling on Reptile techniques and how to deal with them.* Old-fashioned deposition preparation is not sufficient anymore. The problem of damaging concessions and admissions re umbrella and safety rules is caused by inadequate pre-deposition witness preparation that focuses exclusively on the deposition/trial process and substance of the case/defense but disregards the intricacies of the Reptile strategy. If clients and defense witnesses/experts are not specifically schooled in Reptile questions and tactics, the odds of them delivering damaging testimony are high.

There are two (2) prongs of attack against defendants and their witnesses during the Reptile's adverse examination: (1) the safety rule attack and (2) the emotional attack. The emotional attack is like what it sounds; the attacker attempts to force the witness into low level cognitive processing instead of being patient and thoughtful, thus delivering a response that is negatively perceived by the jury. As noted above, the safety rule attack is a "word game;" the Reptile attorney shrewdly plants big picture safety questions that appear to be "no-brainers." Sometimes, especially with experts, hypothetical safety questions are used and frequently take the form of an if-then statement: "Doctor, you would agree that if a patient presents with symptoms A, B and C, then the standard of care requires you to order tests X and Y, correct?" These illusive questions are effective because they provide just enough information to entice defendant witnesses into providing an absolute answer. By definition, the safety rule and hypothetical safety questions are inherently faulty because they lack the proper specificity to

allow for a specific answer. The only honest answer to a vague, general question is a vague, general answer like: "It depends on the circumstances;" "Not necessarily in every situation;" and the like.

The new bottom line in this Age of Reptiles is that training a witness to withstand these attacks goes far beyond traditional "witness preparation." More complex, state-of-the-art witness training, which includes cognitive and communicative restructuring, is the order of the day. Witnesses must develop a revised process of thinking and communicating through intense conditioning.

3. Conclusion.

The antics of Reptile tactics have found their way into the playbook of the Plaintiff's Bar. Aside from their misleading foundations, the reality is that these techniques are being employed at an escalating level, and the Defense Bar and Insurance Industry must tackle this new paradigm head-on. The author has seen these tactics employed in numerous cases in the past few years. Recognizing these methods and pro-actively preparing discovery responses and deposition/trial witnesses, coupled with active protection of the record and motion practice directed at these ploys, is an effective way to blunt their effect.

There is an increasing number of articles and blogs regarding the *Reptile* publications, its nuances and strategies to fight the same. Some which are helpful include: Stephanie West Allen, et al, "Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles is a Bad Idea,"(American Society of Trial Consultants, May 2010); Ryan A. Malphurs, et al, "*Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training*," Georgia Defense Lawyer at 12 (Spring 2014); Teresa M. Beck, "*How to Tell if You Are Getting 'Reptiled' Prior to Trial*," DRI Today Blog (9/24/13); David C. Marshal, "Lizards and Snakes in the Courtroom," DRI For The Defense (April 2013); Minton Mayer, "*Make Boots Out of That Lizard—Defense Strategies to Defeat the Reptile*," DRI, The Voice (9/25/13); Robert D. Minick, Ph.D. and Dorothy K. Kagehiro, Ph.D. "*Understanding Juror Emotions: Anger Management in The Courtroom*," There are others.