Primal Fear: The Reptile Theory
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I. Meet Your Not-So-Friendly Neighborhood Snake

The “Reptile Theory” is advertised as the most powerful tool available to a plaintiff attorney seeking to secure a favorable verdict and a high damage award in favor of his or her client. The Reptile strategy purports to provide a blueprint to succeeding at trial through the use of advanced neuroscientific techniques. The central concept is that jurors have an inherent desire to expose and punish the existence of danger. By framing arguments in terms of the need for safety and security, proponents’ claim that jurors will instinctively choose to protect their families and community from needless danger by rendering a substantial verdict against the defendant. More than $6,372,695,578 dollars in verdicts and settlements have been credited to the Reptile since its introduction.

The genesis of the Reptile Theory dates back to 2009 in a book authored by Don Keenan and David Ball on trial strategy for the plaintiffs' bar entitled: Reptile: The 2009 Manual of the Plaintiff’s Revolution. David Ball is a North Carolina based jury consultant, and Don Keenan is an Atlanta based trial lawyer. Since their book was published, Keenan and Ball have continued to promote the use of the Reptile Theory to plaintiffs’ lawyers across the country through DVDs, manuals, seminars, and workshops offered exclusively to the plaintiffs' bar.

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1 This article was prepared by Mackenzie Monaco, David Ortega and Chris Page.
3 Id.
4 David Ball & Don Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution, Balloon Press (2009) (discussing ways in which plaintiff's attorneys can appeal to juror’s embedded “reptile” in order to counteract negative information previously implanted in their brains by the tort reform movement).
5 Id.
6 http://www.reptilekeenanball.com/
The Reptile Theory purports to rely on the work of Yale Medical School and National Institute of Mental Health physician and neuroscientist Paul MacLean.⁷ MacLean surmised as early as the 1960s that the human brain consists of three parts: the reptilian complex, the paleomammalian complex, and the neomammalian complex.⁸ The reptilian complex controls basic life functions such as breathing, hunger, and survival.⁹ This part of the brain contains the survival mechanism which purportedly will overpower the cognitive and emotional parts when those life functions become threatened.¹⁰ Thus, appealing to a juror’s self-protective instincts will “activate” the reptilian portion of the brain.¹¹

This theory was refined and further advanced by Cloataire Rapaille, a French-born psychologist.¹² Rapaille launched successful marketing campaigns for consumer products such as Folgers coffee and the Hummer SUV by working with focus groups to determine what aspects of a product appealed to the consumers’ reptilian brain.¹³ Rapaille surmised that a person’s final decision is made subconsciously based on certain “codes” embedded within the reptilian portion of the brain.¹⁴ Likewise, Keenan and Ball

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⁹ Id.
¹⁰ Ball & Keenan, supra at 17.
¹¹ Id.
have developed case-specific codes which they suggest plaintiffs’ lawyers should use to connect with the jury.

Keenan and Ball posit that the most powerful thinking occurs when one is protecting one’s life, and thus a lawyer will communicate most effectively by converting every issue into one of self-protection.\textsuperscript{15} Fear and anger is espoused in the mind of the jury through the use of “safety rules” to frame each case so it appears that the defendant chose to violate a safety rule, unnecessarily subjecting the plaintiff and the surrounding community to danger.\textsuperscript{16}

Starting at the defendant’s deposition, the “reptile” attorney induces the defendant to either agree that a certain safety rule exists or reveal him or himself as stupid, careless, or dishonest for disagreeing.\textsuperscript{17} The attorney then establishes that the defendant agrees with the safety rule and that it controls whether to break that rule because a violation would otherwise endanger everyone. After the safety rule is established and the defendant agrees that it controls whether the safety rule is violated, the attorney forces the defendant to admit to the violation of the safety rule. This method of questioning is an easy trap for an unsuspecting or unprepared witness, allowing plaintiffs’ attorneys to secure favorable impeachment testimony which can damage a defendant’s credibility at trial.

\textsuperscript{15} Ball and Keenan supra at 17, 19, 73.
\textsuperscript{16} Id. at 51-54.
\textsuperscript{17} Id. at 54-55; see also David C. Marshall, Legal Herpetology: Lizards and Snakes in the Courtroom, For the Defense: Young Lawyers, 65 (April 2013).
Arguably, the Reptile method is most beneficial to plaintiffs’ attorneys in cases where the plaintiff has suffered significant injuries, but a sound theory of liability is lacking. Through the development of artificial safety rules, plaintiffs’ attorneys are able to direct the juror’s attention to violations of case-specific safety rules rather than the appropriate standard of care in the case. Using this method, plaintiffs are able to create their own framework for liability where it otherwise might not be apparent. This strategy conforms with jurors’ frequent assumptions that a defendant should do more to ensure customer or user’s safety, even if more is not required of them.\textsuperscript{18} In fact, jurors often believe that rules and regulations are the minimum that a company has to follow.\textsuperscript{19} Thus, a crucial part of the defending the Reptile method is to spend adequate time preparing witnesses for deposition and cross-examination so that the witness isn’t trapped into agreeing with the general safety principles which form the basis for the safety rules.\textsuperscript{20}

The reptile strategy places an emphasis on punishing the defendant for endangering the plaintiff and the community at large, rather than focusing on the classic sympathetic plaintiff narrative. The new narrative uses “coding” and fabricated “safety rules” to artificially create a sense of danger in the mind of the jury, empowering jurors to protect themselves and the community from future harm by awarding a substantial verdict in favor of the plaintiff.

\section{Coding: Arousing the Survival Instincts in the Reptile Mind}

\textsuperscript{19} Id.
\textsuperscript{20} Id. at 7-8.
The Reptile Theory encourages the use of specific “codes” to appeal to the deepest part of the brain where danger is detected, noting that it is not the scientific understanding of a particular point that is most important, but rather how the reptile-mind reacts to it.\textsuperscript{21} The use of coding seeks out common fundamental connections that will leave the jurors feeling exposed to a sense of danger so that they react adversely to that danger, regardless of the facts or the law.\textsuperscript{22} The Reptile attorney seeks to implant these subliminal codes into the jury’s psyche starting at jury \textit{voir dire} all the way through summations because it is the “code” that is key to connecting with the jury.\textsuperscript{23}

Ball and Keenan’s theory does not operate purely on emotions, although naturally emotions may be naturally aroused.\textsuperscript{24} Rather, the provocation of the Reptile-mind to action by exposing risks to its survival is based on the idea that appealing to the reptile-mind produces an entirely logical, self-preserving response.\textsuperscript{25} The goal is to “bypass fear altogether and simply go directly to the jurors’ automatic survival instincts because a juror has the cognitive capacity to decrease fear, whereas it is impossible for a juror to deactivate a survival instinct.”\textsuperscript{26}

To be successful, plaintiffs’ attorneys need to know the codes applicable to each case and the persons involved in order to “activate” the reptilian brain.\textsuperscript{27} For instance, in personal injury cases, the primary code is "Good Health" equals "Mobility" because the

\textsuperscript{21} Ball & Keenan supra at 75.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Bill Kanasky, Debunking and Redefining the Plaintiff Reptile Theory, For the Defense 15 (April 2014).
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Ball & Keenan, supra, at 75.
"lack of mobility vastly outweighs the other consequences of injury, such as pain."\textsuperscript{28} Proponents argue that humans associate the ability to move with the ability to survive; therefore, a person’s lack of mobility due to an injury is perceived as a significant consequence of an injury.\textsuperscript{29} Additional codes have been developed through jury research, such as "Order" appeals to a sense of safety, but "Chaos," on the other hand, triggers a sense of danger.\textsuperscript{30}

By continuing to implicitly persuading jurors to make these associations on their own, the jurors are primed to accept the plaintiff’s story, and the Reptile strategy takes full effect.\textsuperscript{31}

**III. “There’s a Snake in my Boot!”: How Not to Get Snake Bit**

Don Keenan’s “Reptile” website claims to espouse “the most powerful tool in the fight against Tort Reform.” The web-site mentions nothing about using Reptile to reach the correct conclusion; it simply highlights more than $6 Billion in verdicts and settlements. Indeed, the enthusiasm of its adherents, as well as its record of application in court, speaks volumes about its effectiveness. Despite what some critics might warn, the Reptile is not some radical new approach introduced into our court system. Instead, it is a detailed way of thinking about some very old ideas in communication and persuasion of the jury. As such, it necessitates a thoughtful response.

\textsuperscript{28} Id. at 78
\textsuperscript{29} Id.
\textsuperscript{31} David C. Marshall, Legal Herpetology: Lizards and Snakes in the Courtroom, For the Defense: Young Lawyers, 66 (April 2013).
A. Junk Science But Effective Nonetheless

A central support for the Reptile approach is the “Triune Brain” theory, as Ball and Keenan acknowledge in the foreword to their book. “The Reptile invented and built the rest of the brain,” Ball and Keenan write, “and now she runs it.” This perspective on brain structure is an important part of what makes Ball and Keenan’s perspective seem new. The message is that since the Reptile is in control of our thinking, our persuasion needs to tap into the only things that waken and motivate the Reptile: safety, security, and freedom from threats. Some defendants have taken note. Attorney Mark Bennett, for example, wrote in a blog post entitled “Lizards Don’t Laugh,” that civil defendants “can try to (a) make a stronger appeal to the reptile brain, or (b) disengage the reptile brain, and engage the dog brain or the ape brain.” He goes on to suggest that laughter, by creating incongruity and relief, gets the jury out of their reptile minds, creating the possibility for at least a “Simian Trial.”

The problem with all of this is that the idea of the “reptile brain” is more figurative than literal. “The theory,” as science writer Ben Thomas notes, “has proven outright insane in light of the latest scientific research.” In a blog piece invited by Scientific American, Thomas highlights the so-called reptile brain as an example of the popularization of dubious science. “The Triune Brain idea holds a certain allegorical appeal: The primal lizard – a sort of ancestral trickster god – lurking within each of us,” Thomas writes, “But today, writers and speakers are dredging up the corpse of this old theory, dressing it with some smart-sounding jargon, and parading it around as if it’s scientific fact.”
The Reptile perspective stands out as illustrating scientific beliefs that persist more because they are useful than because they are valid. It persists and sticks not because there is strong evidence that it is true, but because it feels “complete” and has, as Stephen Colbert would put it, “Truthiness” independent of its truth. The idea that our persuasion is controlled by a reptile mind, as Thomas notes, “makes a weird kind of intuitive sense. We are bundles of instincts and inhibitions and desires that don’t fit neatly together. It’d be comforting, in a way, if we could pin those conflicts on little lizard brains.” But saying that persuasion is not controlled by a reptilian underbelly is not the same as saying that our brains are logical, analytical, and predictable either. They are not. Instead of one neat and simple driver of decisions being found in the survivalist reptile, we need to continue to look at the more complicated picture of behavioral drivers that are nuanced, individual, and situational.

What is the Reptile theory without the theory of the reptile brain? Independent of the alleged neuroscience, the ability to make one’s case stronger by applying Ball and Keenan’s advice is what matters. And by all indications, it works. But it most likely works not because its followers have found a way to communicate directly to the fact finders’ primitive reptile brains, but simply because attorneys have recognized that motivation exists and they are speaking to that motivation, the self-defense mechanism. Instead of applying the rational-legal model of jurors reasoning their way to a conclusion by applying the law to the facts and deducing to a verdict, the Reptile practice forces attorneys to speak to what would make jurors care about the verdict. The principle of motivated reasoning is that the decision comes first and the reasons are filled in later. So, once you
identify the motivation and tie that motivation to your case, you are more than halfway there. The reptile theory simply tells you to speak to the motivating factor. Make it an individual motivator, and make it an important motivator.

The Reptile Theory is almost unavoidable in personal injury cases that occur where company rules or government mandates control the behavior of the defendant. For example, accidents that involve commercial motor vehicles, oil field operations, building codes, product-related injuries, and most commercial and banking situations. The theory remains effective thanks to its ability to simplify a case and effectively present a Plaintiff’s version of events.

B. Pre-Trial Reptilian Strategy

Signs to look for:

The typical Plaintiff’s opening used to begin with a sympathetic explanation of the Plaintiff’s ordeal and injuries, and this emotional plea was followed by a Day in the Life tape making the jurors want to give a damage award, but many Plaintiffs have changed this approach to reflect Reptile strategy. Many plaintiffs’ counsel now focus on the defendant’s behavior rather than attempting to engender sympathy for the plaintiff. The focus is on anger, and the idea is to make jurors believe the worst about a defendant, typically a company, and its record of safety.

1. Complaint
In a number of different legal contexts, plaintiffs who adhere to a Reptile approach believe that by framing legal claims as basic appeals to community and personal safety, they are able to motivate verdicts in their favor. As outlined above, the theory works because it encourages persuaders to put motivation front and center. The key to the plaintiff’s ability to persuade is to ground the case not in a legal standard of care, but in a “safety rule,” or a commonsense principle that jurors can immediately understand and apply to other contexts. The formula, “Safety Rule + Danger = Reptile,” means that once the advocate is able to identify such a rule, and show factfinders the danger to themselves and the community when it is violated, then they are motivated to equate justice in this case with their own security by awarding large verdicts to prevent the danger.

For example, the Federal Motor Vehicle Safety Regulations promulgate certain rules for qualification of commercial motor vehicle drivers. There are eight basic requirements for a person to be qualified to drive a commercial motor vehicle. Plaintiff lawyers routinely find flaws in the hiring system that then become “motivators” to illustrating the danger created by certain trucking companies. When jurors see the apparent failure to follow rules, they will act, not in defense of a legal standard of care or abstract notion of “informed consent” but in order to prevent the trucking company, and others like it, from threatening the safety of law-abiding vehicle operators like the jurors and their loved ones. So the act of identifying a safety rule is key to effectively invoking the theory. The articulation of a simple and widely applicable rule is what frames the conflict and motivates the jury, encouraging them to view the dispute in personal and community terms. For the

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32 49 CFR §391.11.
defense counsel, it is paramount to force the Plaintiff to define, as much as possible, the allegations against your client. The Reptile theory is often hard to spot in pleadings, but any allusion to safety rules should tip off the defense.

2. Written Discovery

A central theme of the Reptile approach is that the case outcome for the plaintiff helps the community. The defense struggles to articulate how the verdict will help community safety. Defendants might justifiably argue that the limited purpose of the court is to resolve the claim before it, and not to broadly enhance society’s safety with each verdict. But at the trial level it is often easier for the plaintiff to invoke safety than for the defendant.

The Plaintiff’s motivation is to obtain as much safety-related information relating to the Defendant, corporate or individual, as early as possible. Defense attorneys must pay attention to what is being sought, what is relevant, and what should be produced. Too often, defense attorneys will produced more than is required or relevant in an effort to avoid costly and potentially dangerous discovery hearings. Yet, the Reptilian position is improved as more safety-related (even if irrelevant or unrelated to the particular accident) is obtained. Pay attention to the specific interrogatories and requests propounded and produce what is responsive and relevant, understanding that you will also have to gain familiarity with the specific rules and regulations produced as you prepare witnesses for deposition.

3. Depositions
Reptilian-focused plaintiffs seek to get damaging admissions or contradictions in testimony from key witnesses in order to force early settlement. The biggest reason for the success of this “focus on the deposition” strategy is that most witnesses are poorly prepared to answer deposition questions posed in the manner taught by the Reptile Theory. Moreover, witnesses are attacked at both an emotional and conceptual level, as well as a case specific level, which means they are typically unprepared to defend themselves, the basis for their testimony, and their very self-esteem. Defendant witnesses are often lulled into believing that their best strategy is just to “listen to the question, answer the question, and don’t volunteer anything unnecessary.” This strategy leads to a series of yes and no answers, with no explanation or caveats provided until the witness is boxed into a corner from which he or she cannot escape. Not only is the Reptile strategy of aggressive questioning good practice on the part of plaintiff attorneys, it takes advantage of the failure to prepare witnesses for video depositions that set the tone of the case. During video depositions, the witness’ answers, and typically their damning non-verbal behavior, are memorialized for the potential jury to see. It is a crucial part of the defense to the reptile process to spend adequate time in preparation for deposition.

The key to the plaintiff’s counsel strategy is exhibiting control over witnesses. The “safety rule” is central to this process, and the idea is (1) to trap witnesses into agreeing with general safety principles and danger avoidance/risk avoidance principles, (2) move into more specific safety rules and danger avoidance rules, and (3) pin witnesses down on specific safety rules or danger avoidance concepts that were broken by this particular witness or company (applies not only to 30(b)(6) witnesses, but also to other fact
witnesses and experts). Inconsistencies are key, and the more inconsistencies within the policies of the company or of the industry (e.g., standard of care, construction rules, driver policies, field operations), the more focus that will be placed on those inconsistencies.

The deposition can be friendly or aggressive, and is often both. There is an attempt by the attorney to unnerve or create a sense of imbalance for the witness, which is not difficult if the witness is ill-prepared or the defense attorney allows it. This creation of imbalance takes place both with regard to the emotional content of the questioning, as well as the content. Vulnerability to the attacks is created by the false belief that the deposition is an attempt to gain the truth of the matter, rather than a “game;” that the Plaintiff attorney will play by reasonable communication rules; and by a lack of understanding of reptile questioning. The ability of the plaintiff’s attorney to detect what will work is key—is it best to be friendly to lull an unsuspecting witness to agree or to disclose too much? Or is an aggressive stance most likely to get a reaction? Combining both by switching from friendly to aggressive is a very common strategy. Plaintiff’s counsel will try to gauge which of the two most common reactions the witness will display: (1) is the witness likely to withdraw from the questioning, or (2) become angry and aggressive in response? The evaluation of the witness’ style can take place during the process, but to the extent that the personality of the witness (and its potential interaction with the attorney’s personality and style) can be known in advance, the Defense counsel should use mock questioning in a similar manner to prepare his/her witness.
For some plaintiffs’ counsel, humiliation and “shaming” are important secondary techniques. While common in many types of depositions, the emotional tenor of this process is highly important to achieving admissions and creating contradictions. Witnesses are asked, “You want the jury to believe that?!” or “You have been working there for 10 years and you don’t know anything about the safety manual?!” These types of questions get witnesses to feel ashamed about their responses when they contradict general safety rules or specific rules involved in the case.

Company employees who have been conditioned to respond to questions about safety consistently in the affirmative (for example, those who receive heavy safety training) are particularly vulnerable to having their ways of thinking and their conditioned responses challenged. The Reptile attorney’s questioning is intended to move from agreement with general safety and danger avoidance rules (confirming these rules) to more specific safety and danger avoidance concepts applicable to best practice in a particular field or with regard to a particular product. General questions begin the process. “Safety is always a top priority, right?” “Any level of danger is never appropriate, correct?” “Reducing risk is always a top priority, wouldn’t you agree?” The plaintiff lawyer ties the general agreement to more specific rules that were violated in the case by the individual or the company.

Perhaps the most dangerous questions are about those hypothetical “safety errors,” such as those that are characterized by, “Wouldn’t it have been safer if [alternative] had happened?” or “The Company could always do more to protect safety and prevent
dangerous situations, right?" Answers to these questions fit neatly into jurors’ predispositions that accidents are always preventable, and companies can always do more to prevent incidents from occurring, regardless of the Plaintiff’s specific role in the accident. These questions also bank on both witnesses’ (and jurors’) use of hindsight, which is the tendency to believe that if something has happened it was probably predictable, just by virtue of it happening. Cognitive dissonance experienced by the witness is essential to this process. Cognitive dissonance represents the psychological discomfort experienced when one is confronted with information or behavior that is in contradiction with their internal beliefs or attitudes. The more strongly held the belief or attitude, the more intense is the experience of dissonance when confronted with the new contradictory information. When a witness whose whole life is based on safe practice, ingrained through early training and company indoctrination, is confronted with his or someone else’s decision or behavior, which the plaintiff attorney suggests does not comport with safe practice, it is overwhelming for the witness. The struggles that most witnesses have with the deposition process comes from this intense dissonance, particularly when the witness has “gone on the record” agreeing with very broad principle of ideal safety practices. When a witness advocates a safety rule that he believes in and it also seems to be obvious, but with which he does not always comply, this situation creates the maximum amount of dissonance, or psychological discomfort for the witness.

This deposition questioning strategy focuses on an admission of fault which decreases the dissonance in the witness’ mind. “Wouldn’t you agree that if someone had violated that rule and an accident occurred, that person would be responsible for the accident?”
When a witness admits fault, he or she is really using the “withdrawal” technique and is hoping to simply be left alone after being psychologically beaten-up. This reaction can also be seen in other withdrawal strategies such as feigning lack of understanding or questions or asking the attorney to repeat the question over and over as a delay. The alternative of aggressively attacking the plaintiff attorney by denying the conclusions he is drawing is usually only a temporary fix and only serves to dig a deeper hole out of which the witness must crawl. The witness has been forced into a corner and only has two main choices: the first choice is to get out of the corner involves “backing up” by offering context to what was previously offered, which automatically decreases credibility. The second choice (if the plaintiff gets his or her way) is to simply admit that the plaintiff attorney is right and thus the company could have done more and could have been responsible. Here is a sample sequence in an asbestos case after a long series of safety questions intended to wear the witness down:

“So, Mr. Smith this is the list of protective equipment the workers were required to wear.”

“Yes. “

“So you were in charge of them wearing this equipment?”

“Well this is the list, but they didn’t necessarily wear it....”

“Well, if you were the supervisor and you were there, wasn’t it your job to make them wear the equipment?”

“Yes, and I should have done that...”

At this point, the hole has been dug.
In order to effectively prepare a witness for “reptilian questioning,” the defense lawyer must know the subject matter and review it thoroughly with the witness. Breaking witnesses of the habit of agreeing with general safety questions, without reservation, involves literally reprogramming years of training. Educating witnesses about the pitfalls of answering every global question in the affirmative is a first step, along with mock deposition sessions intended to (1) demonstrate how the safety trap is set, and (2) to teach how to come up with alternative answers. Teaching witnesses to recognize a dangerous global safety question is job one. Convincing them that they are not lying or betraying their professional identity or training when they offer an answer that provides a caveat is crucial to the process. Next, witnesses need to be trained to think in terms of longer and more effective answers to yes and no questions. In some cases, witnesses can agree with safety questions, but many times they are better off offering caveats or parenthetical phrases, such as “in many cases,” “to a great extent,” or “that is one of the things that is a priority at the company.” Of course there have to be logical reasons for these caveats. Recognizing and using caution when answering questions that involve phrases like, “Wouldn’t you agree with me that…” or “Wouldn’t it be fair to say” is eye opening for many witnesses. In many cases the best strategy is to help witnesses think like politicians, who offer what is important or relevant when asked a difficult question. For example, a witness can say, “Yes, that is sometimes true, but importantly, that was not necessary in this case.” Detecting trap questions and recognizing the appropriate timing for a better, more thorough explanation is a key to reprogramming witnesses.
Defense witnesses also need to be on the lookout for emotional attacks and learn to ignore them. Simply put, these attacks are often intended to make the witness respond as if embarrassed or insecure in the face of chastising from a lawyer who typically does not know the subject matter nearly as well as the witness. Teaching witnesses that the attacks are unfounded (“you are not incompetent if you disagree with this attorney”), training them that this attorney will never be a source of approval (“This attorney will NEVER agree with you), and that the attacks are not personal, even if it sounds like they are (“It is his or her job to attack you in this adversarial context”) are all very important in helping the witness remain solid in the face of personal attacks. In fact, many witnesses we have trained have felt an internal “smile” when they realized that the more the attorney attacked, the more he or she is probably frustrated with answers that do not satisfy the deposition agenda.

C. Defending Against the Reptile at Trial

Motion in Limine
Voir Dire;
   --priming the jury
   --counter-priming
Opening Statement
   --Building narrative
   --your case in a sentence
Witness Examinations
Closing Argument
Jury Instructions