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The Reptile and the Mongoose

Protecting a Defendant Witness's Testimony at Deposition and Trial

Tierney M. Chadwick, Esq.

Moderator

WADLEIGH, STARR & PETERS PLLC

Manchester, New Hampshire

tchadwick@wadleighlaw.com

James R. Jarrow, Esq.

Moderator

BAKER STERCHI

Kansas City, Missouri

jarrow@bakersterchi.com

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The Reptile and the Mongoose

Reptile Method: History and Implementation

For the past fifteen years the “Reptile Method” has been one of the most popular trial techniques utilized by plaintiff’s attorneys and is believed to lead to “nuclear” multimillion-dollar jury verdicts in transportation cases.ⁱ The Reptile Method became well known after the publication of “Reptile: The 2009 Manual of the Plaintiff’s Revolution” by trial lawyer Don Keenan and trial consultant Dr. David Ball. While the underlying techniques have existed since the beginning of the American legal system, Don Keenan and Dr. David Ball’s book successfully reorganized these approaches in a way which has proven popular and effective amongst the plaintiff’s bar throughout the country.ⁱⁱ

The goal of the Reptile Method is to access the jurors’ “reptile brain” during trial, which the authors claim is responsible for basic survival instinct, based on the “Triune Brain” theory developed by neuroscientist Paul MacLean.ⁱⁱⁱ The plaintiff attorney does so by strategically framing the defendant (through its witnesses) as a threat to the safety of the community, as opposed to more traditional questioning focused on established a breach of the standard of care.^{iv} This, as claimed by the book, activates the “reptilian complex” of the juror’s brain by evoking thoughts of safety and security, which overrides the juror’s normal rational thought process.^v While the Reptile Method’s supposed psychological underpinnings are not well accepted within modern mainstream neuroscience^{vi}, the strategy has nevertheless proven effective in practice.^{vii} As one plaintiff’s lawyer explained, “we care not at all about brain anatomy and solely about whether the Reptile works.”^{viii}

The plaintiff’s attorney begins by presenting the defendant witness with a series of seemingly inoffensive general safety and/or danger rule questions, such as “safety is your top priority, correct?”^{ix} The defendant witness will often instinctively answer ‘yes.’^x

Next, the plaintiff’s attorney asks increasingly specific, yet still seemingly innocent safety and/or danger rule questions, such as “commercial drivers must maintain daily logbooks, to ensure other drivers on the road are not put in danger, right?”^{xi} Again, the defendant witness will instinctively answer ‘yes,’ not recognizing the trap that the plaintiff attorney is setting.^{xii}

At this point, the defendant witness has unknowingly painted themselves into a corner, by agreeing to inflexible rules of safety, without clarifying the existence of practical nuances that may arise.^{xiii}

The plaintiff attorney then begins asking case specific questions, producing cognitive dissonance in the defendant witness as they begin to realize that their earlier responses to the safety and danger rule questions are inconsistent with the case facts.^{xiv}

Taking advantage of the psychological distress caused by the cognitive dissonance, the plaintiff attorney next seeks to introduce the “hypocrisy paradigm.”^{xv} The plaintiff attorney will ask pointed questions illustrating the disconnect between the safety schema the defendant witness agreed to at the beginning of the questioning, and the facts of the case.^{xvi} They will ask questions such as, “failing to perform a complete vehicle inspection prior to your travel was a safety rule violation, correct?”^{xvii} The defendant witness may then admit fault to escape the shame and embarrassment the plaintiff attorney elicited by illustrating their

allegedly hypocritical behavior.^{xviii} An admission of fault at this point can prove disastrous for the defense of the case. As Nevada Trucking Association President Paul Enos has explained, “[y]ou’re not going to win a case through depositions, but you sure can lose one...”^{xix}

An attentive defense attorney can often spot the Reptile before it strikes.^{xx} For instance, a plaintiff attorney may reveal their strategy during the pleadings phase by emphasizing “violations of safety rules” or “unnecessarily endangering the public or community.”^{xxi} A defendant attorney can often move to keep these Reptile tactics out, by objecting to hypothetical questioning during the deposition or filing Motions in Limine to preclude Reptile tactics which cross the line and violate the “Golden Rule.”^{xxii} While these attempts can be successful on their own, a defendant must also be prepared to implement the Mongoose Method.

The Mongoose Method: History and Implementation

The “Mongoose Method” is a technique used to identify and disarm the Reptile method, developed by Courtroom Sciences, Inc., a litigation consulting firm, and Nevada Trucking Association President Paul Enos.^{xxiii} The essence of the Mongoose Method is to flip the Reptile Method on its head and mirror its technique to illustrate the necessary safety nuances the defendant must take into consideration. The Mongoose Method can be implemented by the defendant witness as well as the defendant attorney, and each approach has its own strengths and weaknesses.

The Mongoose Method Technique 1: Training the Witness to Act as the Mongoose

Preparing the defense witnesses to implement the Mongoose Method requires a two-pronged approach. First, the defense witnesses must be prepared to identify when the plaintiff attorney has begun implementing the Reptile Method, so that they may respond accordingly. Also, the defense witnesses must be prepared to answer the Reptile Questions in a way which effectively neutralizes the Reptile threat.

Each defense witness should take time to think before answering each question and ensure that they do not agree to the plaintiff attorney’s Reptile questioning on absolute terms. For example, if the plaintiff attorney asks the defendant’s corporate representative, “wouldn’t you agree, that a company should ensure that safety to the public is its top priority?” the corporate witness may instinctively want to answer “yes.” The question on its face may seem innocuous and basic. However, the corporate witness must realize the trap being set and be prepared to provide a more realistic and nuanced response, such as:

- “Yes, in ideal circumstances safety is the top priority, but it is not always feasible to predict every potential danger to the public.”
- “Safety is one of many things that are important to our business”^{xxiv}

When implemented well, the corporate witness appears thoughtful, conveying to their audience that they are as equally concerned with safety as the plaintiff attorney, without appearing hypocritical.

The key advantage of training the corporate representative to act as a Mongoose is that it minimizes the need for the defense attorney to step in to assist during deposition. This way, the defense attorney can reserve their Mongoose questioning for the direct examination at trial and avoid broadcasting their trial strategy to the opposing counsel during the deposition. In addition, when the defendant’s truck driver is

deposed, he/she too must be prepared to act in a similar manner. It is equally important to ensure that your driver doesn't become defensive when the case specific questions are asked!

The difficulty of this strategy is that it requires a high degree of trust between the corporate representative witness (and the driver witness) and the defense attorney, along with extensive witness preparation. If the defense witnesses are unable to successfully implement the Mongoose on their own, then it can backfire on the client. When done poorly, defense witnesses may come across as defensive, argumentative, or callous. Defendant attorneys should therefore be mindful of each of the defense witness's personality before asking them to implement the Mongoose Method. This often requires the defense attorney to spend some time getting to know each of their witnesses, asking them difficult questions and

The ideal defense witness to implement the Mongoose Method should be able to speak calmly under pressure, think quickly on their feet, and present themselves as thick-skinned and not overly defensive.^{xxv} Defense attorneys should also be mindful of how much time they have to prepare the witness and ensure that they are ready to implement the Mongoose Method.

The Mongoose Method Technique 2: the Attorney as Mongoose

Another way to implement the Mongoose Method is through redirect questioning of the defense witnesses to neutralize the questions from plaintiff's counsel.^{xxvi} Redirect Mongoose questioning can mirror the structure of Reptile questioning, by beginning with seemingly noncontroversial questions.^{xxvii} For example, if the plaintiff attorney asked the defendant witness to agree that the company has a duty to ensure that their products are safe, then the defendant attorney can ask a similar question to recontextualize the defendant witness's safety obligations. For example, the defendant attorney can ask questions such as:

- "You were asked if a product is unsafe if it causes injury, can you tell the jury which products are 100% risk free?"
- "Is it reasonable or feasible for a company to predict every potential risk?"
- "How does the company address their safety obligations without inhibiting innovation?"

If an attorney is prepared to implement Mongoose questioning during redirect examination, it can also serve as an effective backup if the witness is unable to effectively implement the Mongoose Method on their own.

A potential downside, however, is that if a defense attorney acts as a Mongoose during deposition questioning, then it may effectively broadcast the direct examination questioning strategy that they intend to use at trial. In addition, it does require some preparation by the defense attorney with the witness in advance – making sure that the witness understands that if there are areas of testimony which need to be cleaned up, that their defense attorney will seek to do so. However, one thing to keep in mind is in the event of a deposition that is being videotaped. Often, the damage is already done when the witness answers plaintiff's counsel's questioning poorly because the videotape of their answers will be shown to the jury. The re-direct examination of the witness is less effective during a videotaped deposition to cure the defects of a witness' testimony.

Conclusion

The Mongoose Method is not a rigid formula, but instead requires a defense attorney be flexible and ready to respond to the Reptile Method, as needed. Defendant attorneys should take the time to consider the strengths and weaknesses of the witnesses, opposing counsel, type of deposition and their own strengths and weaknesses, and implement the Mongoose Method in the manner that works best for each situation.

ⁱ Eric Miller, *'Mongoose Method' Helps Carriers Fight 'Reptile Theory' Attorney Tactics*, Transport Topics (June 22, 2022), <https://www.ttnews.com/articles/mongoose-method-helps-carriers-fight-reptile-theory-attorney-tactics>.

ⁱⁱ Tyler J. Derr, *ARTICLE: Recognizing and Defeating the Reptile: A Step-by-Step Guide*, 3 Stetson J. Advoc. & . 29 (2016).

ⁱⁱⁱ *Id.*

^{iv} *Id.*

^v *Id.*

^{vi} Louis J. Sirico, Jr., *Article: the Trial Lawyer and the Reptilian Brain: a Critique*, 65 Clev. St. L. Rev. 411 (2017).

^{vii} Tyler J. Derr, *ARTICLE: Recognizing and Defeating the Reptile: A Step-by-Step Guide*, 3 Stetson J. Advoc. & . 29 (2016).

^{viii} *Id.* (citing Stephanie West Allen, Jeffrey Schwartz, and Diane Wyzga, *Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea*, THE JURY EXPERT (AMERICAN SOCIETY OF TRIAL CONSULTANTS), Volume 22, Issue 3, May 2010, at 11.

^{ix} Bill Kanasky Jr., Ph.D., *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution*, Courtroom Sciences Inc. (2015).

^x *Id.*

^{xi} *Id.*

^{xii} *Id.*

^{xiii} *Id.*

^{xiv} *Id.*

^{xv} *Id.*

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} *Id.*

^{xix} Eric Miller, *'Mongoose Method' Helps Carriers Fight 'Reptile Theory' Attorney Tactics*, Transport Topics (June 22, 2022), <https://www.ttnews.com/articles/mongoose-method-helps-carriers-fight-reptile-theory-attorney-tactics>.

^{xx} Tyler J. Derr, *ARTICLE: Recognizing and Defeating the Reptile: A Step-by-Step Guide*, 3 Stetson J. Advoc. & . 29 (2016).

^{xxi} *Id.*

^{xxii} *Id.*

^{xxiii} Eric Miller, *'Mongoose Method' Helps Carriers Fight 'Reptile Theory' Attorney Tactics*, Transport Topics (June 22, 2022), <https://www.ttnews.com/articles/mongoose-method-helps-carriers-fight-reptile-theory-attorney-tactics>.

^{xxiv} *Id.*

^{xxv} Ken Broda-Bahm, Ph.D., *The Plaintiff is a Reptile, so Turn Your Witness into a Mongoose*, JD SUPRA (May 21, 2018), <https://www.jdsupra.com/legalnews/the-plaintiff-is-a-reptile-so-turn-your-41388/#:~:text=A%20Mongoose%20Witness%20Is%20Fearless,A%20useful%20antidote%20is%20knowledge.>

^{xxvi} *The Mongoose Strikes Back: How to Thwart a Reptilian Attack*, Butler Snow, (Oct. 2, 2019), <https://www.butlersnow.com/news-and-events/the-mongoose-strikes-back-how-to-thwart-a-reptilian-attack>.

^{xxvii} *Id.*