



ALFA International
THE GLOBAL LEGAL NETWORK

2022 Transportation Seminar

May 4-6, 2022

HOW TO BE A MONGOOSE IN A REPTILIAN WORLD

Using Plaintiff's Mindgame to Defense's Advantage

Joseph R. Farris

Moderator

FRANDEN | FARRIS | QUILLIN | GOODNIGHT | ROBERTS + WARD

Tulsa, Oklahoma

jfarris@tulsalawyer.com

Larry D. Warren

NAMAN HOWELL SMITH & LEE

San Antonio, Texas

lwarren@namanhowell.com

WHAT IS THE “REPTILE THEORY”?

“On the exterior, the Reptile theory is an in-vogue strategy, designed to produce greater income for plaintiff’s counsel. At its core, it is nothing beyond an attempt to impose a deceptive con on the human mind.”¹

- The Reptile theory is a nationwide phenomenon in which plaintiff’s counsel – the Reptile questioners – begin a deposition by asking the witness to acknowledge basic propositions of safety with the ultimate goal of using such alleged admissions to put subtle, psychological pressure on jurors to find fault in the company’s conduct without regard to the evidence presented at trial.²
 - The theory arose after the publication of David Ball and Don C. Keenan’s book *Reptile: The 2009 Manual of the Plaintiff’s Revolution*.

A. How Does It Work?

- Reptile questions are used to trigger the part of the juror’s brain that is inherently programmed to evaluate safety and respond in a defensive way.
 - Once a juror feels his/her personal safety is threatened as a result of the wording and effect of Reptile questions, the juror will desire to keep himself safe by “sending a message” with the verdict.
 - To be effective, Reptile questions need to do 6 things:³
 - (1) Prevent danger
 - (2) Cover a variety of situations
 - (3) Be in clear, understandable English
 - (4) Focus explicitly on “must” and “must not”
 - (5) Be practical and easy to follow
 - (6) The Defendant should agree

B. Can It Be Beat?

- **From Defense Counsel’s Perspective:**
 - Asking Mongoose questions is a strategic way for defense counsel to *offensively* combat plaintiff’s approach.
 - Successful Mongoose questions undermine more common Reptilian conduct by disputing and neutralizing points raised by plaintiff’s counsel.
 - Mirror Reptile questioning by starting with soft, non-controversial Mongoose questions.
 - Sample Mongoose Questions:
 - (1)
 - (2)

¹ Bryan E. Stanton, *Proven Strategies to Outsmart the Reptile Theory*, TRUCKING LAW, December 2017.

² Kasey M. Adams & Chad R. Hutchinson, *The Mongoose Strikes Back: How to Thwart a Reptilian Attack*, BUTLER SNOW, October 2, 2019.

³ Ken Broda-Bahm, *The Reptile Question: Give a Good Answer*, PERSUASION STRATEGIES, August 27, 2020.

How To Be a Mongoose in a Reptilian World

- (3)
- Be prepared at the *beginning* of redirect (so jury will remember it) to relate back to plaintiff's questions and then start with Mongoose questions.
 - Too harsh a treatment of the plaintiff may be off-putting for jurors, but striking an effective balance in tone and approach may convince plaintiff's counsel to abandon the Reptile theory.
- **From Witness's Perspective:**
 - When asked Reptile-theory question in medical liability cases, it helps most witnesses to know what is coming, why the plaintiff's counsel is asking it that way, and what can be done to answer it well.
 - Less effective responses such as "I am not sure what you mean" or "The question is too vague" will likely lead a jury to think the witness is trying to dodge the question.
 - The defense attorney stating "My client isn't going to answer that, next question" is a more formal approach but also less effective.
 - There are three general principles witnesses need to adhere to in crafting more effective answers:⁴
 - **(1) Break out of the "Yes/No"**
 - Answering in the witness's own words gives the witness more control.
 - **(2) Demand Precision**
 - Replace broad terms, such as "safety" or "necessity," with terms that better reflect the witness's field.
 - **(3) Avoid Absolutes**
 - Where there is ambiguity or uncertainty, answer with words like "not necessarily" or "it depends."

HOW DOES ONE BECOME A MONGOOSE?

- While the Reptile theory remains prominent thanks to its ability to simplify a case and effectively present a plaintiff's version of events, the solution is to have a safety director do three things:⁵
 - (1) Generally understand the "reptile theory,"
 - (2) Prepare, and
 - (3) Follow four rules
 - **The Four Rules:**
 - i. Never say "Yes"
 - ii. The "Safety Rule" is never simple
 - iii. The Defendant's conduct was reasonable
 - iv. Do not answer questions on damages
- 1. **Never Say "Yes"**
 - a. There are two major differences between regular questions and reptile-theory questions:
 - i. (1) Reptile-theory questions do not have anything to do with what a safety director knows about a particular accident, and

⁴ *Id.*

⁵ John R. Crawford & Benjamin A. Johnson, *Strategies for Responding to Reptile Theory Questions*, TRUCKING LAW, December 2015.

- ii. (2) Responding to reptile-theory questions involves violating a common rule – sticking with “yes” or “no” whenever possible
 - A defense witness should never answer “yes” – always offer a complete sentence response that at least restates the question
 - If plaintiff’s counsel insists on a “yes” or “no,” the witness should be prepared to answer with “It depends. May I explain why?”

2. The “Safety Rule” Is Never Simple

- a. A safety director needs to understand that attorneys applying the reptile theory are attempting to:
 - i. (1) establish that a safety rule exists that protects a plaintiff and the jurors,
 - ii. (2) prompt a safety director to admit that a driver (or company) violated the rule, putting plaintiff and the jurors in danger, and
 - iii. (3) admit that people and companies should be responsible for their actions, allowing the jury to punish the defendant for threatening their safety
- b. Establishing the safety rule takes plaintiff the longest because they want to make it crystal clear to the jury, leaving no gray area for doubt.
 - i. Defense counsel needs to anticipate which safety question will likely be asked and how to answer.
 - ii. Deposition preparation should occur at least a day in advance and involve a mock deposition.
 - Safety director needs to know their subject, listen, reflect, and then answer.

3. The Defendant’s Conduct Was Reasonable

- a. If a defense witness can avoid the reptile trap, the questions create an opportunity to law out the defense case.
 - i. *Know your message* and work it into every answer where it might fit
 - Commercial truck drivers are trained and tested; regulations are based on generalizations and do not always apply to each individual situation, and drivers faced with a specific situation must rely on their training and experience to make reasonable decisions

4. Do Not Answer Questions on Damages

- a. If asked about damages, a defense witness should let plaintiff’s counsel know that the question sounds like one that should be answered by lawyers.

THE BATTLE BETWEEN THE REPTILE AND THE MONGOOSE

- While some courts encourage the practice of reptiling jurors, there are five notable cases in which each defense counsel filed a pretrial motion to limit or exclude the reptile arguments that ultimately ended with a defense verdict after all five trials.⁶
 - (1) *Turner v. Salem and U.S.A. Logistics, Inc.*, 14-CV-289-DCK (W.D. N.C. 2016)
 - The case concerned a disputed liability trucking accident.
 - Defense filed a short and concise motion in limine, seeking to exclude the Golden Rule (i.e., “put yourself in the plaintiff’s shoes”) or reptile arguments.

⁶ *Supra*, note 1.

- The court prohibited Gold Rule arguments and “discouraged” Reptile theory arguments.
- When objections to plaintiff’s reptilian attempts, court ruled for defense.
- (2) ***Botey v. Green*, 12-CV-1520 (M.D. PA 2017)**
 - The case involved a disputed liability trucking accident.
 - Defense filed a detailed motion in limine, seeking to preclude improper reptile theory tactics.
 - Court ruled the motion was premature as no reptile questions had been heard; the motion was denied without prejudice to object at trial.
 - A verdict for the defense was entered at trial, and there is a pending motion for new trial.
- (3) ***Hensley v. Methodist*, 13-2436-STA-CGC (W.D. Tenn. 2015)**
 - The case concerned medical malpractice.
 - Defense filed a succinct motion in limine specific to the reptile theory and educated the court on the theory’s history and why it was not the law in Tennessee.
 - Motion was denied because the defendant had not identified specific evidence of its use.
 - The court also stated that it would be cognizant of appeals to the jurors’ prejudice.
 - A verdict for the defense was entered.
- (4) ***Randolph v. QuickTrip*, 16-cv-01063-JPO (D. Kan. 2017)**
 - The case involved premise liability allegations for a slip and fall.
 - Defense filed motion in limine against use of reptile arguments.
 - Plaintiff argued that the standard Kansas jury charge caused QuickTrip’s self-imposed safety rules to be relevant and a mandatory consideration.
 - The court excluded the introduction of safety rules to the jury but noted the ruling was without prejudice for defense to object at trial.
 - A verdict for the defense was entered at trial.
- (5) ***Melott v. SSM Healthcare of Oklahoma* (2016)**
 - The case concerned medical malpractice.
 - Defense successfully argued a pretrial motion in limine that any phrases beginning with the words “patient safety” would be prohibited at trial.
 - The trial resulted in a defense verdict for the multiple medical providers.
 - An appeal is pending. One of the issues on appeal is whether the ruling disallowing plaintiff’s counsel from using the phrases denied the plaintiff’s right to a fair trial.
- Five suggestions to level the playing field maybe reverse the trend of nuclear verdicts:
 1. Learn about the Reptile theory as knowledge is always power.
 2. Educate the judge, early and often.
 3. Prepare a motion in limine to exclude the Reptile theory.
 - a. Include the issue and specific examples of its use.
 4. Prepare all witness for Reptile questioning.
 5. Prepare your oral argument to the judge either at the hearing or at trial.
- It generally appears that most courts discourage the Reptile theory, but nearly all defer the decision regarding its use to the time of trial.