Reptile Theory:
What You Need to Know in 2016
Strategies for Counsel & Clients

_____

The Hospitality Lawyer Conference - 2016
Houston, Texas
February 22-24, 2016

_____

Christian Stegmaier
Collins & Lacy, PC
Columbia, South Carolina
cstegmaier@collinsandlacy.com
803-255-0454

The Reptile Theory: Why is this topic so important?

Dr. Ken Broda-Bahm wrote of being on a panel about the Reptile Theory wherein a plaintiff's lawyer on the panel told those assembled, "If the Reptile is done right," he said, "Defendants simply lose." This nearly religious level of commitment seems to be common in the plaintiffs' bar. "Reptile strategy has taken the plaintiffs' bar by storm," Epstein Green and William Ruskin wrote in a piece appearing in an Association of Corporate Counsel publication. Rather than just being seen as a strategy that may help your chances, the Reptile is promoted and embraced as the way to victory. "The Reptile always wins," Seattle lawyer Patrick Trudell blogged, quoting a line from the marketing guru Clotaire Rapaille.

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—right? Not anymore. Plaintiff attorneys have discovered that there is an approach that gets a better reception than the traditional pull for sympathy. The "Reptile Theory" (Ball and Keenan, 2009) is here and is flourishing in trial courts across the country. These plaintiff techniques focus on the defendants' behavior rather than attempting to engender sympathy for the plaintiff.

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 once jurors, or any other decision makers, know what decision they **want** to reach, then they'll have no problem coming up with reasons to support that conclusion. 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 focus or motivation is on anger, and the idea is to make jurors believe the worst about a defendant, typically a company, and its record of safety.

- A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response, 2015 ABA Litigation

Section Annual Conference (http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015sac/written_materials/4_1_reptile_theory_of_trial_strategy.authcheckdam.pdf)

-

Plaintiff's Strategies

The Reptile Theory can be conceptualized as a planning strategy that gets plaintiff attorneys to focus early in the case on crafting the themes that will be honed through deposition, voir dire, and eventually the opening. This process focuses on utilizing the eventual juror's desire to expose and punish the existence of danger when it exists in the community around them and to place blame on a defendant large enough and powerful enough to "eliminate" that danger.

"Public danger"

The focus is on three main sections of the process:

- the deposition as the key to getting admissions from the company;
- the voir dire to prime the jurors with the themes before the opening; and
- and the opening to capitalize on the groundwork set in each previous stage in steering jurors' responses to the case.

Combatting the Plaintiff's Story or Version

- Constructing the strong case narrative

A central part of Ball and Keenan's argument is that the Reptile approach is a tool that helps one side, not the other. "The Reptile prefers us," meaning plaintiffs, "for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, 'Give danger a pass.' Second, the courtroom is a safety arena," they write, "so when we pursue safety, we are doing what the courtroom was invented and maintained for."

Defendants might justifiably counter that the more 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 level of personal injury, product, and medical malpractice suits, Ball and Keenan do have a point in emphasizing that it is often easier for the plaintiff to invoke safety than the defendant, except in those cases where the defendant's own conduct is the more salient source of the danger.

But remember, the part of the theory that says, "safety is all that matters" is also the part that is based on the dubious "Triune Brain" theory. Security may be a very powerful human motivator, **but once we're freed from the reptile analogy, it is far from the only human motivator**. Smart defendants will tie their own case to a powerful principle that is at stake: responsibility, innovation, or fairness. It can even be a strong appeal to empower jurors to resist the pull of an emotive safety-based verdict, and instead base their decision on **evidence, science, and facts**.

- Emotional connection to jurors
- Establishment of rules and standards: It cuts both ways
- Proper objections to Plaintiff's shenanigans

Psychology

The trial lawyer is just a psychologist directing a Broadway play. Everything about trial, including discovery, is about psychology.

The Reptile Theory can be used to focus on the defendant's failures in any threatening situation, which has allegedly caused the plaintiff's injury in any type of case, but most often, personal injury, product liability, medical malpractice and transportation cases. More recently, commercial and banking cases have been the focus. The theory shifts the jury's thinking to a much broader concept of injury, beyond the injury sustained by the plaintiff, to possible injury to the jurors themselves or the public.

The Reptile Theory works because it takes the emphasis off sympathy for the plaintiff and puts the focus on the failures of the defendant. And, importantly, it also works because it moves the emphasis from the individual to the community—jurors are not just protecting the safety of the individual plaintiff

(again there is resistance to making one person rich), they are protecting the community's safety, a much nobler motivation.

From the defense perspective, the Reptile Theory is attempting to manipulate jurors by fostering fears that are broader than the confines of the case (an individual with a specific injury, for example) and are not part of the case. The defense bar has come up with numerous ways to counter this theory, the most common of which is to dispel the physiological basis for its effectiveness. Defense attorneys believe that the "gut reaction" that is based on the reptilian brain and its primitive responses to fear and pain is not a physiological reality. In addition to being critical of the biological basis for jurors' reactions, defense lawyers and jury psychologists have learned to prepare for and defend against these strategies in a variety of psychological ways, as well as through legal means. For example, attorneys have argued that many of the plays to the jurors' own emotions violate the golden rule constraints of the law, and are not ethical. As such, the defense against the reptile movement is also alive and well.

Moreover, the idea of being manipulated can be very threatening. In one of Don Keenan's Georgia trials in 2010, for example, defense counsel called out the Reptile strategy by name, and previewed what Keenan was likely to do in closing. Just like any other strategy, it becomes less effective when it is known and named.

Safety

Applying the Reptile Theory, 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 jurors can immediately understand and apply to other contexts. In the formula Ball and Keenan advocate, "*Safety Rule + Danger = Reptile*" means that once the advocate is able to identify such a rule, and show fact finders the danger to themselves and the community when it's violated, then they've awakened those jurors' reptile brains, motivating them to equate justice in this case with their own security.

"Black and White" interpretation and application of the rules (Plaintiff) vs. Reality (Defendant)

- Use of Designated Safety Witness (hopefully an in-house one), who is **engaging**, **informative**, and likeable to demonstrate: (1) the defendant has protocols in place; (2) holds its associates accountable for being mindful of safety
- This witness acts as the tour guide for the jury to illustrate that Plaintiff's application of the rules are incorrect, misapplied, or lacking in context - - - "The rest of the story."

Plaintiff's Employment of Strategies in Discovery

Preparing your witnesses re:

- Deposition questions about safety standards and importance
- Deposition questions about industry standards and norms
- Depositions questions about awareness of risk or danger
- Deposition questions about costs

Examples of when things go wrong at depositions, which evince the need for careful preparation

Related: How to defend the deposition of the weakest link a/k/a Plaintiff's conversion of an ordinary fact witness deposition into a Rule 30(b)(6) deposition

Strategies for getting things right

- Thorough preparation of all employee witnesses
- Understandable (i.e., non-legalese) explanation to witnesses of Plaintiff's prospective strategies
- The corollary effect of this kind of preparation on defense costs

Most authors agree that Reptile plaintiff attorneys need to get damaging admissions or contradictions in testimony from key witnesses in order to force settlement early. 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 in the Reptile Theory books. Further, witnesses are attacked at both an emotional and conceptual level, as well

as a case specific level, which means that they are typically unprepared to defend themselves, the basis for their testimony, and their very self-esteem.

Defendant witnesses (based on basic training from their attorneys) 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 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. While it is well known that the more "key" the witness is, the less time he or she will probably make him or herself available for proper preparation, it is a crucial part of the defense to the reptile process to spend adequate time in preparation for deposition.

Defense responses to this questioning process primarily involve training. 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 many practice sessions intended to 1) demonstrate how the safety trap is set and 2) to teach how to come up with alternative answers.

The biggest hurdle in this process is that safety rules just seem so obvious that no one could disagree with them. Teaching witnesses to recognize a dangerous global safety question is job one. Convincing them they are not lying or betraying their professional identity and 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.

As is obvious from the above description, defense witnesses also need to be on the lookout for emotional attacks and to learn to ignore them. Simply put, these attacks are often intended to make the witness respond from the "child" part of themselves, that part that was embarrassed or felt insecure in the face of chastising from a teacher or parent. 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.

How Do Plaintiffs Employ These Strategies at Trial

- At the opening . . . Is it really all won or lost at the opening?
- Question to the Panel and the Audience: Opinion on Whether to Provide a Brief Primer to the Jury on Plaintiff's Use of the Reptile Strategy: "Don't Get Manipulated."
    - Yes or no?
    - How do you do about doing it?
    - Success stories?

Non Economic Damages

- High dollars carry anger/punitive component
- Plaintiffs may dismiss economic damages because of low anchor
- Plaintiffs make "masterpiece," "job application," or component damages (category or day/hour figures)

- Bleak portrait of plaintiff future