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A background image of the Houston skyline, featuring several prominent skyscrapers like the Bank of America Tower and the JP Morgan Chase Tower. The sky is blue with some clouds. In the foreground, there are green trees and a concrete railing.

A Discussion of the Reptile Trial Strategy Through the Lens of the *Erin Andrews v. Marriott International* Lawsuit

THE HOSPITALITY LAW CONFERENCE: SERIES 2.0 - HOUSTON

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I. What is the Reptile Theory/Strategy? An Introduction

- *Reptile: The 2009 Manual of the Plaintiff's Revolution*, authored by Don Keenan and David Ball.
 - Provides a strategy for plaintiff's attorneys in most stages of litigation.
 - Derived from model of the brain created by Paul Maclean, Neuroscientist.
 - Maclean's model is based on the concept that the 3 parts of the brain developed through evolution – "Triune Brain."
 - Reptilian Complex – oldest part of the brain.
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I. What is the Reptile Theory/Strategy? Key Elements

- Reptilian brain controls our basic life functions, such as breathing, hunger and survival.
- Instinctively overpowers the cognitive and emotional parts of the brain when those life functions become threatened.
- Thrives on evolution, and therefore maximizes “survival advantages” and minimizes “survival dangers.”


I. What is the Reptile Theory/Strategy? Method

- Shift each juror's brain into survival mode and motivate each juror to decide a case in a way that will reduce/eliminate the danger - protect himself, his family, and community.
- Verdict that enhances individual and community safety is the antidote to the defendant's dangerous conduct.
- Three major questions in Reptile, which plaintiff's counsel must answer for the jurors, are:
 - A. How likely was it that the act or omission would hurt someone?
 - B. How much harm could it have caused?
 - C. How much harm could it cause in other kinds of situations?

I. What is the Reptile Theory/Strategy? Implementation

- The formula provided is that to employ the reptile strategy: safety rule + danger = reptile.
- The six characteristics that each safety rule must have to promote the reptile strategy is:
 - It must prevent danger.
 - It must protect people in a wide variety of situations, not just someone in the plaintiff's position.
 - It must be in clear English.
 - It must explicitly state what a person must or must not do.
 - It must be practical and easy for someone in the Defendant's position to have followed.
 - It must be one that the defendant will either agree with or reveal him or herself as stupid, careless or dishonest for disagreeing with.

II. *Erin Andrews v. Marriott International, Inc., et al*

- Dec. 2011 - Nationally known sports reporter Erin Andrews sued Marriott International, Michael David Barrett (the stalker), West End Hotel Partners LLC (hotel franchisee), and Windsor Capital Group (hotel management), in Nashville, Davidson County, TN.
 - FACTS: Incident at Nashville Marriott hotel in 2008 while Andrews was in town covering college football game. Barrett targeted Andrews because she was “trending” on the internet. He captured 5 minute video of Andrews in her hotel room while she was nude. Tried selling video to TMZ, which refused. He then posted video online, which was viewed extensively.
 - Reptile Trial Strategy effectively used in discovery, *voir dire*, and at trial.
 - Jury returned a verdict in favor of Andrews with a total award of \$55 million.
 - Jury assigned 51% liability to Barrett. The two hotel companies were jointly responsible for 49% or \$26 million. (Barrett pleaded guilty to stalking charges.)
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III. Defenses to the Reptile Trial Strategy

- Preparing defense witnesses for depositions
- *In limine* motions
- “Re-priming” a jury during *voir dire*
- Jury instructions
- Reverse Reptile tactic in specific situations involving comparative fault

Resources:

- See David C. Marshall, Lizards and Snakes in the Courtroom, For the Defense, April 2013.
- See David Ball & Don Keenan, Reptile: The 2009 Manual of the Plaintiff’s Revolution.