

## **The Hospitality Law Conference: Series 2.0**

### **Summary Paper: Lizard-Proof Your Witnesses**

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#### **Teach them the Game.**

Your witnesses are savvier than you think. We lawyers do inhabit a strange world where logic and reason do not always prevail, and the rules do not always comport with what lay people would call common sense. However, give your witnesses credit. Most of them can understand the manipulation game being employed with the Reptile Theory, and in my experience, they can play that game pretty well. Reptile is not an appeal to the law. It is an appeal to human emotion, and an attempt to “play” the witness. Your witnesses have dealt with this kind of tactic before in their normal life, and they don’t like it.

Even though your witnesses will be able to play well, a deposition is tiresome and tedious. Suffering through numerous, repetitive, and manipulative questions wears on even the best witness. To help the witness catch a breath or fend off a troubling question, give them a “safe space.” This is a “safe space”, a blurb or phrase made up of their own words that is a safe answer to any question. For example, “I am not sure what you are getting at, but all I can tell you is that we took all reasonable precautions to keep our premises safe. No one can keep any place completely safe all the time.” Another example for criminal assault cases would be, “We have reasonable security measures. Not even the police can stop criminals who are intent on harming someone.”

Reptile only works when the safety rules are rigid. Plaintiff’s counsel will try to make every issue black and white. To combat that, you and your witness need to identify the grey areas. Look for situations when the rules have to be flexible. Identify the problems that can occur if there is not some flexibility in the rules, and have your witness be ready to qualify her answers with such examples. For example, “we have to have rules in place, but those rules have to be flexible enough to allow our employees to use common sense when the rule doesn’t fit the “situation.” You will have to identify the particular grey areas and the corresponding qualifications in your particular case, but you get the idea.

Words matter. And they matter even more when the Reptile theory is being used because the Reptile theory relies on the specific wording to create rigid safety rules so that the Plaintiff’s attorney can scare the jury by proving that your client didn’t follow them. A Reptile lawyer will use words like, “always,” and “never,” when the real world is never so clear cut and is always subjective. The Reptile lawyer wants your client to agree that she should never do “X,” and because X happened on her watch, your client is a threat to the community.

Of course, words matter in every lawsuit, but in Reptile cases word craft is essential both the Reptile lawyer and those trying to defeat it. Teach your witnesses to pay attention to every word

in the actual question. Have them repeat the question to themselves before answering, and have them be wary of absolutes. Words like “always,” and “never” should be red flags. Teach them to use qualifying phrases such as “it depends on the situation,” or “within reason,” or have them resort to their “safe space.”

### **Identify the Triggers.**

While your witnesses probably won't know the law, they usually do know their business. Even a fairly low level fact witness knows the in's and out's of his/her job better than you do. While you may never teach them enough law to act as a lawyer or paralegal, you can teach them the basic elements of the law related to premises liability. Knowledge is power, and if you give your witnesses credit and a brief primer on the law, they will surprise you with their ability to figure out what safety rules the Plaintiff's attorney will key on, or try to fabricate, in order to trigger the Reptile response.

This is especially true if you have explained the game as mentioned above. Talk to them about the law and discuss what the “triggers” might be. When they identify the triggers and rules likely to be used against them, they are more invested in the fight, and it helps them learn to think about Reptile “on the fly.” Once you get them invested, help them identify additional safety rules and triggers, and then fill in the holes based on what you know about the case and the law. Engaging them in the process makes it possible for them to handle the triggers you identify, and respond to unanticipated questions or triggers because they will have practiced this with you before deposition.

### **Practice and Film it.**

As we all know, testifying is not something that comes naturally to most people. It is a communication skill just like giving a speech, singing a song, or reciting poetry. Like all skills testifying takes practice. When you are facing the Reptile, you cannot just preach to your witness about what it takes to survive 6 hours in a deposition or on the witness stand, and then hope for the best.

We all have a pretty good camera in our pocket or purse these days. Prepare a mock deposition outline based on what the Plaintiff's attorney is likely to try to do. Hammer your witness with it after you have gone through the steps we have talked about. And film it. If a picture is worth a thousand words, a video is worth a million. Watch the video with your witness, and then ask them how they could have done it better. Your witness is probably very similar to most of the jurors. Thus, if they don't like the way they answered a question, the jurors probably won't either. Asking your witness to correct her own testimony serves two purposes. It again makes them invested in the process, and it teaches them to correct their own thought patterns on the fly. This is a skill too, and they are going to need it while testifying. Of course, you should always help if they are struggling, and fill in any holes you are aware of based on your knowledge of the case and the applicable law.

Those of us who have played team sports are no doubt familiar with the phrase, “run it again.” When you have a play and executing it takes skill, you have to run the play numerous times to make it automatic. Testifying, especially against the Reptile theory, is no different. For some reason, there is a natural inclination to want to “hurry up and get through this” when it comes to deposition preparation. With trial, it seems easier to invest a lot of time. Perhaps this is because trial is so scary to most people that the witnesses want all the prep they can get. However, with depositions, there seems to be a natural tendency for the witness to want to get back to work or their daily routine. Resist this, and “run it again.” And again.

The last bit of advice I have for you is to have fun. We have to remain professional, and we need to remember the seriousness of the task at hand. However, a game is being played, and you are good at it. Don’t forget to enjoy being a good lawyer!