EAGLE INTERNATIONAL ASSOCIATES

Presents

SUCCESSFUL CLAIMS HANDLING: Avoiding the Lions, Tigers, and Bears (or Reptiles), Oh My!

March 21, 2019

The Fontaine Hotel
Kansas City, MO

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

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SUCCESSFUL CLAIMS HANDLING:
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PROGRAM

12:00 pm **Registration/Sign-In**

12:45 pm **Welcoming Remarks**
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Vice Chair, Eagle International Associates, Inc.

Program Introduction
Sean M. Sturdivan, Esq., Sanders Warren Russell & Scheer LLP
Program Chair

1:00 pm **Debunking and Redefining the Plaintiff Reptile Theory**
Dr. Bill Kanasky, Senior Vice President, Courtroom Sciences, Inc.

1:45 pm **Successfully Battling the Reptile: Identifying and Responding to "Reptile" Issues**
Moderators: Nicholas G. Brunette, Esq., Reminger Co., LPA
Tiffaney A. Norton, Esq., Senter Goldfarb & Rice LLC
Panelists:
Briana Ford, Casualty Specialist, AIG
Michael Hermann, Esq., Claims Manager and Litigation Counsel, Ascension Care Management
Dr. Bill Kanasky, Senior Vice President, Courtroom Sciences, Inc.
Paula Letterman, Director-Casualty Claims Examiner & Development, American National

2:30 pm **BREAK**

2:50 pm **Just When You Thought You'd Seen It All … Navigating Bad Faith Risks**
Moderators: Robert A. Anderson, Esq., Anderson Julian & Hull, LLP
Peter A. Miller, Esq., Pozo-Diaz & Pozo, P.A.
Panelists:
Robert A. Ballard, Esq. CPCU, Regional Litigation Manager, Zurich North America
Konrad Hendrickson, Vice President, American National
Robin R. LaFollette, Head of North America Fin Pro Claims, Senior Vice President, Swiss Re Corporate Solutions
Jon Robinson, Assistant Vice President, Sedgwick Claims Management

3:50 pm **Eroding Limits Policies and The Gradual Destruction of Your Claim**
Moderators: John E. Bordeau, Esq., Sanders Warren Russell & Scheer LLP
Theodore J. Waldeck, Esq., Waldeck Law Firm P.A.
Panelists:
Jerry Bedell, President, Tecum, Inc.
Allison Confer, Claims Specialist, Assistant Vice President, Swiss Re Corporate Solutions
Kimberly Kayiwa, Specialty Claims Team Lead, Sedgwick Claims Management

4:50 pm **Closing Remarks**

5:00 pm **Cocktail Reception**

6:00 pm **Dinner**

MODERATORS – PANELISTS - SPEAKER

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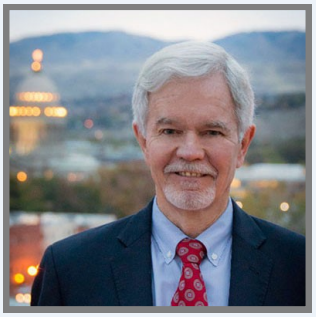

Robert A. Anderson is a founding partner of Anderson, Julian & Hull LLP, and has developed extensive litigation experience, including the defense of architects, engineers, contractors, attorneys, accountants, veterinarians, real estate agents and brokers and other professionals, as well as construction law, complex commercial litigation, bad faith litigation, and appellate practice. He has been an AV rated attorney by Martindale-Hubbell since 1983 and is licensed to practice in Oregon and Idaho. Mr. Anderson has been recognized by his peers in Best Lawyers in America and Mountain States Super Lawyers since 2008 and was selected as Boise Best Lawyers Insurance Law Lawyer of the Year for 2012 and Best Construction Law Lawyer in 2014, 2015, and 2018. He served on the Design Review Committee for the City of Boise and is the Vice President of the Board of Directors for the Boise Consumer Coop, a member of the Idaho Civil Rules Advisory Committee, President-Elect of the Board of the Idaho Association of Defense Counsel, and just finished his term as President of the Idaho Chapter of ABOTA. Mr. Anderson graduated magna cum laude in 1973 from the University of Utah with a Bachelor of Science degree. He obtained his Juris Doctor degree from the University of Colorado in 1977 and was a member of Phi Kappa Phi. Rob enjoys mountain biking, telemark skiing and running to keep his sanity.

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Rob Ballard has been advancing Zurich's interests in various roles for over 30 years. Rob practiced law in the San Francisco Bay area for 11 years, and during that time Rob represented Zurich's insureds as an outside panel lawyer specializing in liability and coverage litigation matters. In 1994, Rob moved from California to Overland Park, Kansas to work for Universal Underwriters Group, a wholly owned Zurich subsidiary, in the role of Western Zone Major Case Claims Professional. In 2001 Rob was promoted to National Litigation Manager for Universal Underwriters Group, and then in 2007 moved to the Regional Litigation Manager position for Zurich. Today Rob is the Southern RLM for standard lines of insurance and in that role has developed and implemented numerous litigation management programs aimed at improving litigation outcomes for Zurich's insureds. Rob is a graduate of the University of California, Santa Cruz, and the University Of Pacific School Of Law and obtained his CPCU designation in 1999. Rob is a member of the California and Missouri Bar Associations.

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Jerry Bedell - In 1994, Jerry Bedell founded his current company, TECUM, which provides a variety of claims and litigation management and related consulting services to insurance companies, self-insured companies and law firms. During his time with TECUM, on behalf of his clients Mr. Bedell has directly handled complex litigation and claims with large exposures. He regularly serves as a consultant on litigation processes and establishing defense counsel guidelines. He also assists clients with managing litigation costs via law firm audits and legal bill analysis. He has testified on several occasions as a claims practices and standards expert, and as an expert on legal fees and litigation cost management. Prior to commencing TECUM, Mr. Bedell served for 22 years in various claims capacities in the insurance industry, including adjuster, supervisor, claims manager, multi-state claims manager and, finally National Litigation Manager for Zurich American Insurance Company. During his career, Mr. Bedell has personally managed over 3,500 lawsuits, involving all insurance lines and including class actions, mass litigation and multi-party suits. He has been a frequent speaker at ABA and defense counsel associations around the country. Among his many accomplishments, Mr. Bedell developed a budget-based electronic legal billing process for which he was granted a United States Patent.

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Briana Ford is a casualty claims adjuster in AIG's Primary Claims office. She is responsible for handling commercial general liability and commercial auto liability claims. Briana began her career in claims in 2008 working for a local TPA. In 2010, she joined AIG as a fast track adjuster on the dedicated JC Penney

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Konrad Hendrickson is Vice President, Claims at American National in Springfield, Missouri. Konrad presents his unique perspective of encouraging good faith and corporate ethics. Where issues do arise, understanding insurance and internal operations reveals opportunity to mitigate claims of bad faith. Konrad attended Missouri State University and earned a B.S. Insurance and B.S. General Business in 1994 and his J.D. from the University of at Kansas City in 1997. He is a member of the American Bar Association, Missouri Bar Association, Illinois Bar Association, CPCU Society, Vice Chair, Property Casualty Insurers Claims Committee and Defense Research Institute.

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Michael Hermann is Claims Manager & Litigation Counsel at Ascension Care Management. Michael manages healthcare professional liability, general liability, and privacy liability claims for Ascension, the largest non-profit health system in the U.S. He directly handles high exposure healthcare liability claims and oversees litigation strategy in multiple states. Prior to joining Ascension, Michael worked in private practice defending a variety of claims and tried several cases to verdict. He received his undergraduate degree from the University of Wisconsin-Madison and J.D. from St. Louis University School of Law. He is a licensed adjuster in Texas and Connecticut and licensed to practice law in Missouri, Illinois and Tennessee.

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Dr. Bill Kanasky is recognized as a national expert, author and speaker in the areas of advanced witness training and jury psychology in civil litigation. He consults on more than 200 cases annually in the areas of defendant witness training, jury decision-making research, and jury selection strategy. Importantly, his empirically-based consulting methods are specially designed to defeat plaintiff "Reptile" strategies, which have resulted in billions of dollars of damage awards across the nation. He earned his B.A. in Psychology from the University of North Carolina at Chapel Hill, and his Ph.D. in Clinical and Health Psychology from the University of Florida.

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Kimberly Kayiwa is a Claims Team Lead at Sedgwick Claims Management, Inc. In this capacity, she is responsible for managing complex and high exposure products liability claims involving drugs, devices and nutraceuticals. She coordinates litigation strategy and manages claim expenses through litigation management. She also supervises other claims examiners, conducts routine reviews/audits of claim files and assesses claim reserves. She is a former practicing attorney with over ten years of experience in the products liability space. In addition to her work at Sedgwick she serves as a volunteer Court Appointed Special Advocate (CASA) for children in foster care and on the National Alumni Association Board at St. Bonaventure University.

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Tiffaney A. Norton is a partner and co-owner at Senter, Goldfarb & Rice LLC, Ms. Norton joined the firm in 1997 after serving as a judicial law clerk to the Honorable Harlan Bockman, Chief Judge of the Seventeenth Judicial District. She attended the University of Denver law school, receiving a J.D. in 1996. She has successfully tried a number of civil jury trials and has published appellate cases. Ms. Norton's practice focuses on defense of civil cases with an emphasis on professional liability, serious and catastrophic injury cases, complex and multi-party cases related to auto, tucking, products and premises liability. She is a lecturer on topics of interest to both her clients and attorneys at the firm including continuing legal education presentations on discovery, case evaluation, medical information, voir dire, claimed brain injuries and nursing home and long term care claims. Ms. Norton has attained an AV Preeminent Rating with Martindale Hubbell. She has been named a Colorado *Super Lawyer* from 2017 – 2019, a *5280* Top Lawyer in Civil Litigation Defense in 2018 and a *Best Lawyer in America* in 2019. Ms. Norton belongs to several professional organizations including the Defense Research Institute (DRI), Colorado Defense Lawyers Association (CLDA), Council on Litigation Management (CLM), Faculty of Federal Advocates (FFA) and the Colorado and Denver Bar Associations. She has served as a trial mentor for the CDLA.

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Mitch Orpett is the Vice-Chair of Eagle and its attorney representative for the State of Illinois. He is a founding member and former managing director of Tribler Orpett & Meyer, P.C., a Chicago law firm serving the insurance and business communities. He was one of six lawyers who formed the firm in 1984. His

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SUCCESSFULLY BATTLING THE REPTILE:

Identifying and Responding to "Reptile" Issues

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Successfully Battling the Reptile: Identifying and Responding to "Reptile" Issues

By

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Overview

A reptile tactic is a subversive strategy attempting to play on alleged subconscious and uncontrollable human emotions with the aim of obtaining compensation based on emotions instead of the facts or the law. The best defense to a reptile theory is anticipating the tactic, taking proactive steps to educate your client and obtaining rulings precluding the tactics. This article will help you identify, respond to and counter reptile tactics in claims and lawsuits.

"Reptile" strategies are aimed at tapping into primal areas of the human brain. The theory is premised on humans being driven by unconscious parts of the brain containing basic life functions including breathing, balance, hunger, safety, freedom from threats and basic survival. Reptile strategies assert the primitive brain unconsciously drives human behavior.

The scientific basis of the "reptile brain" driving behavior is in question. Modern neuroscience has revealed the brain tends to act as a unified whole. Reptile techniques are the most successful when they are not appropriately countered to engage the full brain, including logic and reasoning. Regardless of the basis, reptile theories should be recognized as a potentially effective strategy for presenting questions and arguments during litigation. Attempted reptile arguments should be nipped in bud with appropriate witness preparation, deploying counter reptile measures, seeking a court order before trial or countering the tactics at trial.

Related to the legal field, reptile tactics were formally articulated in a manual for Plaintiff's attorneys called *Reptile: The 2009 Manual of the Plaintiff Revolution*. The book spurred an industry of materials and seminars related to the theory.

The Cornerstone of the Reptile Strategy – Safety Issues

Instead of jurors being private citizens deciding a private dispute, an attorney making a reptile argument asserts the jury is the conscience of the community on the important issues involved in the case where people in the community could have been harmed or will be harmed in the future. As the conscience of the community, the jury must stop the danger created by the defendant by making the defendant pay a large sum of money. Plaintiff's attorney will assert the dangers in the case created by the defendant ripple out to the entire community. The jury must stop the defendant's unsafe and dangerous behavior to protect society.

The foundation of a reptile tactic is establishing a violation of a safety rule creating a danger. Plaintiff will begin by establishing there was a rule, policy, procedure or standard. Plaintiff will characterize the rule as being related to safety, including the safety of plaintiff and the community. The next step is establishing defendant violated the safety rule causing an injury. Plaintiff's attorney will assert the violation of the safety rule caused the plaintiff and the community to be subjected to a needless danger. The danger can only be stopped if a jury sends a message as a voice of the community by making defendant pay a large sum of money.

To establish a "safety rule", plaintiff's attorney will attempt to demonstrate every type of policy, procedure, potential negligence or negligence *per se* is aimed at keeping people safe. Once a defendant buys into "safety" plaintiff's attorney will assert defendant's conduct makes everyone in the community less safe, including the plaintiff. The jury must act as the voice of the community to force the defendant to change behavior.

Asserting the Incident in Question Presents a Safety or Danger Issue for the Entire Community

Plaintiff's attorney attempts to establish what the defendant did, or failed to do, created a dangerous safety issue for everyone in the community, not just the plaintiff in the case. The event forming the basis of the lawsuit is asserted to go well beyond a private dispute between the plaintiff and the defendant related to a particular accident or event.

Instead of focusing on the injuries to the plaintiff in the case, the attorney will assert something terrible could have happened to plaintiff and could happen in the future to anyone in the community if the jury does not stop the dangerous behavior of the defendant. For example, although the plaintiff broke his arm, if the defendant is allowed to persist in the dangerous course of action, people in the community could be seriously injured or even die. It is the obligation of the jury to send a message to the defendant and people like the defendant that the safety issues will not be tolerated by awarding large amounts of money to the plaintiff regardless of plaintiff's relatively minor injury in the case.

Reptile arguments are akin to Golden Rule Arguments but are not as explicit. Golden Rule arguments ask jurors to imagine themselves in the plaintiff's situation and are not permissible. Reptile arguments actually go farther than Golden Rule arguments but are actually more subtle. Reptile arguments not only ask the jurors to put themselves in the plaintiff's situation but also to go a step further by making the jury believe it has a sacred duty to protect the community by sending a message with money that the defendant's unsafe and dangerous conduct will not be tolerated.

Spotting the Reptile Technique

There are several "red flags" related to spotting potential reptile arguments, including the following:

- the attorney does not focus on the facts and the law of the case but instead talks about how the community would respond to the situation to potentially punish the defendant for the allegedly unsafe and dangerous conduct stemming from a "safety rule" violation.

- the attorney seeks information that is ridiculously irrelevant such as policies, procedures, other accidents and incidents that appear far afield of the issues presented in the case as a way to establish a "safety issue" and a danger.

- plaintiff is focused not on the facts and circumstances of the particular case but how the facts and circumstances impact the larger society and what could have potentially happened.

- plaintiff is attempting to establish the defendant must guarantee a person's safety and that any violation of a rule, no matter how slight, is a danger to society. These arguments are typically directly contrary to legal standards premised on reasonableness instead of perfection:

    - seeking information and asking questions about general standards concerning policies or procedures and trying to get the defendant to admit the procedures are to keep everyone safe and must be followed for safety purposes.

    - seeking information related to other accidents or incidents involving the defendant.

    - trying to establish failing to follow policies and procedures can cause injury, including injuries much more severe than the injuries sustained by plaintiff.

    - asserting failing to follow procedures lead to the injury.

    - referencing the defendant's family or the community as potential victims re: is this the way you would want someone in your family to be treated?

    - key words: endanger, harm, safety, policy, procedure, potential harm, community safety.

- plaintiff focuses on what could have happened instead of what did happen.

- the focus is on the defendant's behavior, not plaintiff's behavior or injury.

<u>Responding to the Reptile Technique</u>

There are a number of tactics that can be undertaken to anticipate, diffuse and respond to reptile arguments. Here are some basic tactics for responding to reptile tactics:

- anticipate reptile questions to properly prepare witnesses as outlined below.

- focus on the matter involving a private dispute between two people without larger ramifications for the entire community.

- focus on what did happen, not what could have happened. What could have happened is speculation.

- redirect the focus of the inquiry: the case must be decided based on the standards set forth in the law.

- this is not a community issue, the impact of the decision is limited to the unique facts and circumstances of this case. This is a one-time situation, a freak accident, an aberration.

- a negligence standard is based on reasonableness, not perfection. If the standard was perfection, we would all be failing.

- limit or narrow other incidents that have to be provided and file Motions *in Limine* related to other incidents that are provided.

- assert defendant acted reasonably in accordance with the legal standard.

- assert the defendant has remorse: the community does not need to make an example out of the defendant if the defendant has remorse, acted reasonably or made changes.

- consider admitting liability in appropriate cases.

- use reptile tactics to your advantage by making arguments that may appeal to the jury related to safety and community:

    - lawsuits undermine the quality and availability of health care for your family, lawsuits make things more expensive.

    - it does not serve the community for the defendant to pay related to the actual facts of the case when plaintiff cannot establish the elements of the legal claim, had minor injuries and caused his or her own injury.

Overcoming Reptile Tactics Through Witness Preparation

Here is an example of reptile driven questioning:

Question: You would agree that safety must the company's top priority?

Answer: Yes.

Question: Because safety is your company's top priority, employees who are being unsafe cannot be tolerated?

Answer: Of course, yes.

Question: If you are unsafe and someone is hurt, then the company is to blame?

Answer: Yes.

Example from DRI, 2018 – *The "Reverse Reptile" – Turning the Tables on Plaintiff's Counsel*, Paul Motz, Bill Kanasky Jr. and Melissa Loberg.

Preparing a Witness for Deposition or Trial Related to Potential Reptile Tactics:

A standard may not be a safety rule, may not be the legal standard and may not demonstrate whether reasonable care was used. Using a premises liability example, a defendant may have a procedure to remove all ice and snow after a weather event. The plaintiff will assert the standard

was created to ensure safety. Plaintiff will assert the failure to perfectly follow the procedure created a safety issue that harmed the plaintiff and presents a danger to the community. The fact that plaintiff fell demonstrates not all ice and snow was removed and demonstrates the defendant violated its own policy. Plaintiff asserts the harm and danger will persist unless the jury, as the voice of the community, makes defendant pay for the wrong.

To counter reptile tactics, make sure the defendant is aware of the legal standard when responding to questions both in deposition and at trial. For example, the standard in Colorado in a premises liability case is whether the defendant used reasonable care related to danger on the property that was known or reasonably should have been known. Make sure the client is aware of the key phrases regarding the appropriate standard that should be used when responding to questions. During preparation, ask the client questions using reptile techniques and work with the client regarding how to respond to the questions.

Witness Preparation Can Diffuse Reptile Questioning

Here is an example demonstrating how educating a witness about reptile tactics and the appropriate legal standard can diffuse plaintiff's attempted "safety" questions:

Question: You would agree that safety must the company's top priority?

Answer: The main focus of our company is managing an office building (or whatever the company does). The company takes reasonable steps to related to removing ice and snow but each person also has to watch out for her own safety. (focus on reasonable steps related to the issue at hand instead of agreeing to a "safety" issue).

Question: Because safety is your company's top priority, employees who are being unsafe cannot be tolerated?

Answer: As previously stated, the company takes reasonable steps to remove snow and ice so I don't agree that employees were unsafe.

Question: If you are unsafe and someone is hurt, then the company is to blame?

Answer: Because our company took reasonable steps to remove ice and snow and plaintiff failed to take reasonable steps to watch out for her own safety the company asserts it did not cause the accident.

Turning the Tables on the Reptile

Using Reptile Tactics During Plaintiff's Deposition

In appropriate cases, you may be able to turn the tables on plaintiff if plaintiff violated a safety rule or made dangerous choices. Here is an example of turning the tables on the plaintiff in a premises liability case:

- The most important thing for any person to do is to watch out for her/his own safety?
- You understand you have a responsibility to watch out for your own safety?

- If you don't watch out for your own safety, you can be injured?
- Watching out for your own safety means paying close attention to where you walking?
- Watching where you are walking means avoiding snow and ice because you know ice and snow is slippery and could cause you to fall and be injured?
- Watching out for your own safety means wearing appropriate shoes?
- If you see ice and you chose to walk on it, you are exposing yourself to a danger that you know could injure you?
- You asking the jury to pay you for failing to watch out for your own safety?

Establish What the Defendant Actually Did to Show Defendant Cares About the Situation, Took Reasonable Precautions, is Compassionate and Does Not Need to be Punished

Establish what the defendant did, how the defendant was reasonable and how the defendant was compassionate:

- Defendant took reasonable steps to remove ice and snow on date of the incident by plowing, shoveling and placing ice melt? Detail the steps taken by the defendant.
- Despite the measures taken by the defendant, you understand that ice and snow could still be present on the ground?
- Defendant encourages people to call if they see any ice and snow?
- You have never called to report any ice and snow you thought was dangerous? or when you have called in the past the defendant was responsive?
- You are not asserting defendant should have a heat gun applied to every square inch of the property so no ice and snow could ever form because that would not reasonable would it? (suggest something preposterous to see if plaintiff will agree and appear unreasonable).
- You understand that the defendant only has to use reasonable care because the legal standard is not perfection?
- Defendant's employee was concerned and sympathetic when you reported being injured?
- You have worked at the building for 10 years and you never made a complaint regarding any alleged dangerous condition? (establishing an aberration).

File Motions *in Limine*

Appropriate Motions *in Limine* can be filed to make a record for appeal and to limit or preclude opposing counsel from making Reptile arguments:

- Assert plaintiff should not be permitted to make impermissible arguments:

- no Golden Rule Arguments asking jurors to put themselves in plaintiff's shoes.
- no community standards arguments implying the jury is the voice of the community.
- the lawsuit has no ramifications for the community but is a private dispute between private people based on laws enacted by society.
- educate the judge who may not be familiar with the tactic.

• Assert other accidents are not relevant, not substantially similar and/or prejudicial.

• Assert what could have happened is inadmissible speculation, the case focus is on what actually happened.

• The only focus is on the legal elements of a claim set forth in the jury instructions.

Focus on Plaintiff's Violations of a Safety Rule and the Actual Case Facts

If nothing else, depending on the case facts, you may be able to turn the tables on the plaintiff by asking your own "safety" questions:

• plaintiff violated a safety rule.

• plaintiff did not comply with policies, procedures, medical instructions regarding additional care or returning to work.

• plaintiff made an unreasonable, dangerous decision leading to his or her own injury.

• focus on what happened to the plaintiff, not speculation about other potential outcomes.

• responsibility: it is beneficial for the community when people take responsibility for their own behavior if plaintiff has any comparative or assumed the risk (or other defenses).

• the law does not permit behavior to be measured the way plaintiff is encouraging. Not following the law is detrimental to the community. The law was created by society.

Address Reptile Issues in *Voir Dire*

If Motions *in Limine* have failed or plaintiff makes reptile arguments at trial or during *voir dire*, you can take steps to educate the jury on alternative perspectives supported by the law or the facts:

• what jurors do or have done in a similar circumstance regarding, for example, clearing ice and snow to counter doing "everything possible" when jurors don't do "everything possible" and typically do the bare minimum.

• show plaintiff violated a safety rule.

• focus on the case being private matter without community ramifications.

- focus on how a finding against the defendant does not serve the community when the actual facts of the case are examined in the context of the law and minor injuries.
- talk about lawsuits raising costs and the adverse consequences to the community.
- ask potential jurors if they will follow the law when making a decision in the case.

Conclusion

Armed with the ability to identify reptile red flags, you can take steps to combat the tactics through witness preparation, anti-reptile arguments, turning the tables on the plaintiff, asking the court to enter orders precluding the tactics or addressing the tactics at trial. Countering reptile tactics provides the opportunity for logic, reason and other parts of the human brain to play a role in the decision making process.

Invalid, Yet Potentially Effective

Debunking and Redefining the Plaintiff Reptile Theory

By Bill Kanasky

Defense attorneys need a clearer understanding of how the reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline.

The well-known "reptile revolution" spearheaded by attorney Don Keenan and jury consultant Dr. David Ball is now an ubiquitous threat to defendants across the nation. It is advertised as the most powerful guide available to plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform. Reptile books, DVDs, and seminars instruct plaintiff attorneys on how to implement these strategies during an entire litigation timeline, from discovery to closing argument. Most papers about the reptile theory merely define the theory itself, describe the various tactics, and provide rudimentary advice to defense counsel on how to "tame" or "beat" the reptile. However, few authors have attempted to directly challenge the reptile theory's validity or have attempted to provide alternative explanations to why these reptile tactics often work. This article aims to accomplish both goals, as well as to provide scientifically based solutions for defense attorneys to use at all points of the litigation timeline.

To date, the best attempt at debunking the reptile theory is Allen, Schwartz, and Wyzga's (2010) article "Atticus Finch Would Not Approve: Why a Courtroom Full of Rep-

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tiles is a Bad Idea." First, the authors immediately attack the reptile theory, stating that Ball and Keenan's neuroanatomical assumptions are incorrect. They claim that reptiles can't experience fear, as the reptile brain lacks a limbic system, the emotional center of the mammalian brain. Second, the authors state that fear responses in humans are unpredictable, thus using fear in the courtroom is a risky gamble at best. Finally, they claim that jurors "recoil" when they are treated disrespectfully, that is, as if they are reptiles, and using fear in the courtroom ultimately backfires. They go on to offer a solution to the reptile formula that focuses on constructing an effective narrative to persuade jurors.

This article is important because it is the first to challenge the neuroanatomical foundation of the reptile theory. The authors quickly point out that fear responses in humans are controlled by the higher-level limbic system, not the more primitive "reptile brain." As mentioned, specifically, they state that reptiles cannot respond to fear because they lack a limbic system, which eliminates emotion from the equation. Since the limbic system actually controls survival responses in humans, not the "reptile brain," the authors believe that the theory is fundamentally flawed. While they are partially correct in this analysis, the authors fail to recognize that danger is a threat, while fear is a complex emotion in response to danger. In other words, danger is a stimulus, while fear is an emotion. Ball and Keenan clearly sell danger, not fear. Their goal is to tap into the deepest part of the brain where danger is detected, and the instinctive aspects, often referred to as the "reptile brain." Interestingly, their goal may be to bypass fear altogether and simply go directly to jurors' automatic survival instincts because a juror has the cognitive capacity to decrease a fear, whereas it is impossible for a juror to deactivate an instinct. In sum, Ball and Keenan's neuroanatomical assumptions are accurate as they relate to the arguments that they make about danger, and would only be inaccurate if they made a similar argument about a fear response. As such, the authors' attack on the reptile theory is minimally effective because they have compared apples to oranges to some degree.

Allen, Schwartz, and Wyzga's (2010) article also provides a strategic solution to the reptile approach that is fairly inadequate: the use of narrative. While it is well-known that a persuasive narrative is an effective way to educate and influence jurors in any type of case, it only addresses one of the multiple areas that the reptile approach attacks. Ball and Keenan's tactics begin very early in the litigation timeline with deposition testimony, and extend to other parts of a trial in which narrative is irrelevant, such as voir dire and jury selection. Additionally, while the authors generally define why narratives are so effective, they fail to inform a reader how best to construct the story to derail the reptile story provided by a plaintiff's counsel specifically. Generalized "tips" on how to tell a better story are no match for Ball and Keenan's precision attack methods.

For defense attorneys to succeed persistently against the reptile approach, they need a clearer understanding of how the

reptile tactics really work and a blueprint of how to counter attack, rather than defend, at all points on the litigation timeline. Therefore, this article will focus on three areas: (1) why the overall reptile theory is invalid, (2) why the specific reptile tactics work, despite the invalidity of the overall theory, and (3) scientifically based solutions to defuse these tactics.

While "reptile" is somewhat of a misnomer, it is important for defense attorneys to comprehend how and why the tactics are effective.

Debunking Ball and Keenan's Reptile Theory

The reptile theory is now well-known to the defense bar. The highlights of the theory include the following:

- The "reptile" or "reptile brain" is a primitive, subcortical region of brain that houses survival instincts.
- When the reptile brain senses danger it goes into survival mode to protect itself and the community.
- The courtroom is a safety arena.
- Damages enhance safety and decrease danger.
- Jurors are the guardians of community safety.
- "safety rule + danger = reptile" is the core formula.

The "safety rule + danger = reptile" formula states that the reptile brain "awakens" once jurors perceive that a safety rule has been broken by a defendant, awakening survival instincts, which results in jurors awarding damages to a plaintiff to protect themselves and society. Ball and Keenan claim that use of their reptile strategy has resulted in nearly $5 billion in settlements and damage awards since 2009.

To debunk any theory, someone must show that the theory's core principles and formulas are flawed. The linchpin of Ball and Keenan's reptile theory is the brain's stimulus-response reaction to danger. They claim that exposing a safety rule violation (stimulus = danger) triggers jurors' automatic survival instincts to protect themselves and the community (response = award damages). The fatal flaws of the reptile theory are two-fold. First, a plaintiff's counsel can only "suggest" danger to jurors, rather than actually exposing them to a true threatening stimulus that would trigger survival instincts. In other words, the core foundation of the reptile theory is that danger triggers survival responses, but in reality, jurors are never exposed to any direct danger. Therefore, without an immediate threat, awakening the reptile brain in the manner in which Ball and Keenan describe is physiologically impossible.

Secondly, Ball and Keenan fail to mention that the reptile brain, called the "brainstem" in modern science and medicine, is not the sole brain region responsible for survival behaviors in humans. In fact, the reptile brain only plays a limited role in human survival instincts, whereas higher-level brain structures play a much larger role. Specifically, the reptile brain or brain stem is responsible for multiple automatic and involuntary functions that are necessary for basic physiological survival such as cardiac function, respiration, blood pressure, digestion, and swallowing. It is also responsible for alertness and arousal, key factors for protective survival from dangers. While the reptile brain or brain stem in humans plays a key role in detecting danger, the limbic system actually processes the dangerous information and can activate the sympathetic nervous system to trigger the fight or flight survival response. As such, Ball and Kennan's theory is invalid because true protective survival responses are not even triggered by the human reptile brain or brain stem, but rather by the more advanced limbic system.

Now, Ball and Keenan claim that even a mild threat can trigger the survival reaction. They claim that exposing a safety rule violation is an adequate stimulus powerful enough to shift jurors into survival mode. Again, the suggestion of a danger or potential threat is never enough to activate the brain's survival instincts because the nature of the threat must be intense and immediate. If survival instincts could be tapped so easily, our behavior would be totally irrational throughout the day, which explains why an intense, immediate threat is required to activate these strong instincts. To understand survival responses, it is important to comprehend the different classifications of threats and the types of subsequent survival reactions. Consider the examples below.

Example A: You hear reports of a recent robbery in your neighborhood. This is indeed a potential threat, but survival functions do not take over because the threat is not direct or imminent. Instead, when a potential threat is suggested, people actually become more logical and make an action plan, such as having a family meeting to discuss what occurred, making a plan to check door and window locks, to be more vigilant, and to speak with neighbors. This type of survival reaction is known as "high road" cognitive processing, in which someone carefully assesses many options and makes a careful choice.

Example B: You hear an intruder entering your house. This constitutes a direct threat, which triggers the fight or flight instinctual survival response. In other words, you will either quickly attack the intruder to protect yourself and your family, or you will run and call for help because there is no time to make a logical plan due to the imminent threat. This type of survival reaction is known as "low road" cognitive processing, processing in which cognition is very limited.

Example C: You walk around the corner and your five-year-old jumps out of nowhere and screams "boo!", resulting in you automatically jumping back and dropping the glass that you were holding. This constitutes an intense, immediate threat, which triggers a brain stem reflex that includes jumping backwards, muscle tension, causing the drop of the glass, dilated pupils, and increased heart and respiratory rate. This type of survival reaction is known as a "brain stem reflex" or "startle response," which is automatic, involving no cognition.

In humans, the reptile brain or brainstem only detects danger via attentiveness and alertness, and then the thalamus, the brain's "switchboard," usually takes over

and decides whether the danger is worthy of a survival response or a more thoughtful response. Thus, Example A illustrates high road cognitive processing, which is a slower road because it also travels through the cortical parts of the brain before a thoughtful and logical response is formed. Example B illustrates low road cognitive processing because a neural pathway transmits a signal from a dangerous stimulus to the thalamus, and then directly to the amygdala, triggering the fight or flight response, which then activates a quick survival response. Example C is more of a survival reflex from the reptile brain because the response is almost instantaneous from such an intense and direct threat.

As you can see above, suggested or potential threats simply cannot activate the survival responses in the reptile brain the way that Ball and Keenan suggest. If they could, society would be in survival mode nearly constantly, making logic extinct. The "safety rule + danger = reptile" formula is erroneous and should be replaced with "imminent danger + intensity = reptile" or "suggested danger + logic = planning." In conclusion, Ball and Keenan's reptile theory is invalid because the courtroom is not conducive to the type of threat necessary to awaken the reptile brain. However, disproving the reptile theory in its entirety does not necessarily eliminate the effectiveness of the theory's individual tools and methods. Ball and Keenan's reptile tactics can be very effective, but for a much different theoretical reason than they claim.

Redefining the Reptile Theory

The reptile methodology can indeed influence juror decision making, yet in a different way than advertised by Ball and Keenan. While "reptile" is somewhat of a misnomer, it is important for defense attorneys to comprehend how and why the tactics are effective. Without understanding those reasons, defense attorneys can be outmaneuvered in four primary areas when facing a reptile plaintiff attorney.

Defendant's Deposition Testimony

Plaintiff attorneys have figured out that the fastest way to a profit is to settle a case for much more than its actual economic value. They accomplish this by manipulating defendants into providing damaging testimony, specifically by cajoling them into agreeing with multiple safety rules. Once these admissions are on the record, often on video tape, the defense must either settle the case for an amount over its true value or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility. This problem is caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the reptile strategy. In other words, if defendants are not specifically trained to deal with reptile questions and tactics, the odds of them delivering damaging testimony is high.

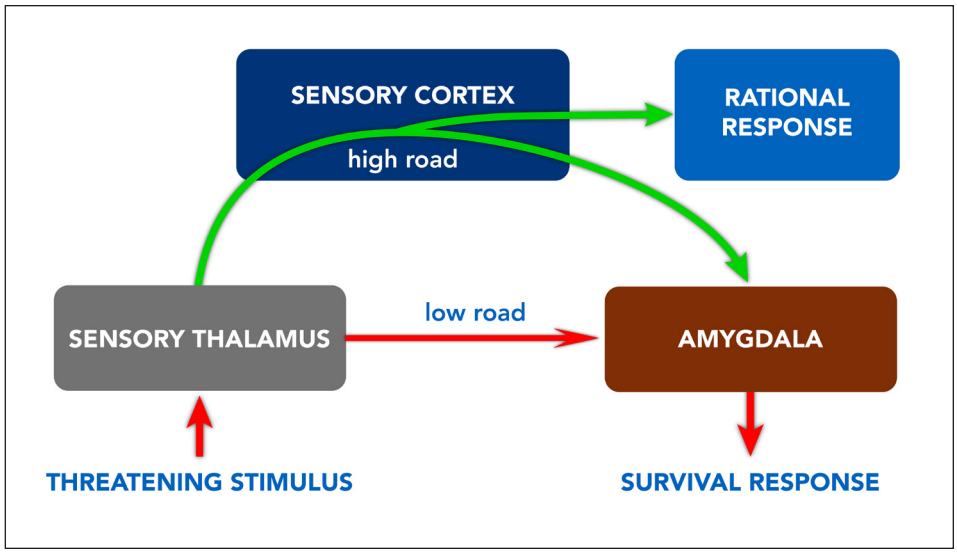
Voir Dire

Plaintiff attorneys use a psychological technique called "priming" during voir dire by establishing terms, language, and definitions early in the process, resulting in those stimuli being processed more quickly by jurors throughout a trial. Rather than fight fire with fire, defense attorneys instead tend to ask questions to identify stereotypical plaintiff jurors. By the end of jury selection, a plaintiff's counsel has "primed" a jury for his or her opening statement, resulting in easier cognitive digestion and acceptance of the plaintiff's story. Asking key questions to identify pro-plaintiff jurors is critically important during voir dire; however, not taking the time to "strip and re-prime" jurors with defense terms, language, and definitions can give a plaintiff a sizable advantage entering opening statements.

Opening Statement

Perhaps the most apparent area of defense attorney weakness is opening statement construction. Know thy enemy: Dr. Ball is a professional story teller with a Ph.D. in Communications and Theater. He is a master of words and themes. Dr. Ball uses strategic ordering of information within a story to place a defendant in the spotlight of blame from the start. Dr. Ball understands that the better story wins, not necessarily the better science or medicine. Defense attorneys don't have Dr. Ball's training, and often resist seeking the assistance of jury consultants to develop their opening statements. The result is often a sim-

Not taking the time to "strip and re-prime" jurors with defense terms, language, and definitions can give a plaintiff a sizable advantage entering opening statements.



ple, understandable plaintiff's story that immediately connects with a jury against a complex, confusing defense chronology that focuses on science rather than jury friendly themes.

Defense Trial Testimony

When a defendant or a defense witness agrees to a safety rule on the witness stand, gets trapped, and then tries to weasel out of it, the obvious contradiction quickly leads to juror dislike and distrust that is often incurable. Again, the main mistake is insufficient witness preparation that focuses on the science or medicine more than the manipulative reptile process. The "gotcha moment," when a defense witness gets boxed in by a plaintiff's counsel and begins to respond emotionally (argumentatively, defensively, or anxiously) typically results in a severe mess that is difficult to clean up during a defense counsel's rehabilitation efforts. The irony here is that it is a *witness* goes into survival mode cognitively, *not a jury*. Ball and Keenan claim that jurors award damages to protect themselves and the community from the dangers posed by the defendant. In reality, jurors award damages to punish a defendant that breaks safety rules, not to protect themselves or the community.

Instead of truly activating jurors' survival instincts, the reptile approach is actually designed to "bait" defense counsel into fighting on a plaintiff's battleground.

These tactics do not work because the jurors' reptile brains are awakened and they strive to protect themselves and the community. Rather, these tactics work because plaintiff attorneys have taken a new strategic approach focusing on defendant conduct rather than sympathy and severity of injuries, and the defense bar has not yet adjusted. What at first appeared to be an innovative neuroscientific plaintiff "revolution" is simply a more aggressive plaintiff strategy that uses reliable and fundamental psychological tools to put defendants truly on trial.

The Solutions

So what solutions does a defense attorney have? A defense attorney can defeat a reptile attack in three ways: defusing a plaintiff's attorney's voir dire priming, delivering a more effective opening statement, and preparing defense witnesses differently.

Defusing Priming in Voir Dire

Priming is a technique used to influence or control attention and memory, and it can affect decision making significantly. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain. For example, if the trait description of "careless" is frequently used, that description tends to be automatically attributed to someone's behavior. In voir dire, a plaintiff's counsel begins the priming process with the goal of exposing jurors to stimuli such as danger, risk, safety, and protection so that those themes will resonate with jurors during the plaintiff's attorney's opening statement. Repetition is a form of priming that can make themes more believable. Therefore, the more jurors are primed with safety claims such as danger, risk, or violation of rules, among others, in voir dire through repetition, the odds of jurors believing those claims during opening statement significantly increases. This occurs because priming creates selective attention, causing jurors to reduce future information intake so they can focus on the safety claims. Priming can essentially blind jurors from processing new information, which can spell deep trouble for defense counsel since they always follow a plaintiff's counsel during a trial.

Defense counsel can defuse plaintiff attorney priming efforts by indoctrinating jurors during voir dire with a cognitive "plan" that can spoil a plaintiff's counsel's priming efforts. For example, a plaintiff attorney may attempt to prime jurors during voir dire with the notion that safety = priority with statements, such as "Who here feels that physicians should always put safety as their top priority? Who feels the community deserves that?", in an effort to later convey in an opening statement that the only way that a physician can be safe is to follow the safety rules of medicine strictly. Many defense attorneys counter with the ineffective response of asking jurors to focus on the law or the science. The more effective strategy would be to strip the original priming and "re-prime" jurors with a different cognitive plan. In a case using the physician example, the plan would focus on the following question: "Who here feels that a physician's *real* priority needs to be to treat every patient as a unique individual?" This tactic would weaken a plaintiff attorney's priming efforts and potentially create a defense priming effect that a defense attorney could build on during an opening statement.

Again, the reptile tactics that plaintiff attorneys use during voir dire have little to do with activating survival instincts. Instead, priming jurors to accept a plaintiff's terms, definitions, and language later on in a trial is the key psychological goal. Ball and Keenan would tell you that the safety language introduced during voir dire would awaken jurors' reptile brain. That claim is inaccurate because this priming effect is more about using fundamental cognitive principles successfully than about triggering survival instincts. Defense attorneys can neutralize these priming tactics by stripping an original primer's power and applying their own.

Delivering the Right Opening Statement

Before 2009, the majority of plaintiff attorneys heavily relied on sympathy-based stories to strike an emotional chord with a jury and drive them toward a high damages award. The classic defense response to such a strategy was to show how a defendant acted reasonably and to defend a defendant's conduct. This plaintiff strategy became ineffective over time as sympathy became a less potent variable as newer, desensitized generations started to fill the jury box, particularly Generation X and Y jurors. In response, the reptile revolution has generated a new story format that is far more effective with today's jurors: immediately putting a defendant's conduct on trial and *not* focusing on injuries and sympathy.

This is where many defense attorneys have fallen behind and have failed to make the proper adjustments to their strategy. The origin of this failure is simple: you must know thy enemy.

Dr. David Ball, co-developer of the reptile theory, is a brilliant scientist of storytelling. When he assists a plaintiff counsel in developing an opening statement, he masterfully uses the tools of emphasis, information ordering and repetition to create a masterpiece of persuasion for a jury. Not only is he an elite expert in opening statement construction, he is also an expert at luring his adversary—defense counsel—into telling an ineffective story to a jury. Specifically, the organization of his reptilian story ironically forces many defense attorneys into "survival" mode rather than adhering to effective defense strategy. As such, the top strategic mistake in response to a reptile opening statement is to go on the defensive immediately, and to deny each of a plaintiff's allegations. This instinctual response makes psychological sense: a plaintiff's counsel has bludgeoned a defendant with safety rules and danger threats for 45 minutes, resulting in great temptation to deny each allegation immediately one-by-one. However, this strategy is notoriously ineffective and is known as the "Hey, we didn't do anything wrong and we are a good or safe person or company" approach. Addressing each claim immediately is a deadly mistake because it highlights and repeats the reptile safety themes, thus validating them.

Instead of truly activating jurors' survival instincts, the reptile approach is actually designed to "bait" defense counsel into fighting on a plaintiff's battleground. By reacting to a plaintiff's story immediately, the defense plays right into the Dr. Ball's hands and actually reinforces the plaintiff's arguments to the jury. This effect is called the "availability bias," meaning that jurors tend to blame the party that is most "available" or in the spotlight. If defense counsel takes the bait and illuminates safety issues relating to a client early in an opening statement, the reptile attorney has won the opening round. Avoiding this tempting "availability bias" trap is essential to developing a persuasive opening statement that will neutralize the reptile opening. Jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame besides your client is imperative to derailing the reptile attack. Defense counsel needs to arm jurors with the "real" story and immediately put a plaintiff or alternative causation on trial.

During the "opening" of an opening statement, meaning the first three minutes, jurors form a working hypothesis that affects how they interpret the rest of the information presented to them. Therefore, attorneys can inadvertently stack the deck against themselves by beginning their opening statement with the wrong information, such as information highlighting safety issues, which will taint a jury's perceptions from that point forward. Information presented early in an opening statement acts as a cognitive "lens" of sorts through which all subsequent information flows. This cognitive lens can drastically affect how jurors perceive information as a presentation progresses, so one must choose this lens very carefully. Dr. Ball specializes in creating a safety-danger lens through which jurors perceive a case, so defense counsel must provide jurors with an alternative lens immediately. Without this alternative lens, then an entire case will revolve around safety and danger, which drastically increases the odds of a plaintiff verdict with damages.

It is essential to emphasize key themes related to a plaintiff's culpability, alternative causation, or both, depending on the case, immediately because this is the time when jurors' brains are the most malleable. The defense story should only proceed after the "lens" has been placed, which should significantly influence jurors' perceptions and working hypotheses of a case. As Dr. Ball knows, this powerful starting strategy was adopted from the cinema big screen and is referred to as the "flash forward" start. Many movies don't begin at the "start" of a story, but rather begin at some other point in the story that no one expects. This creates immediate curiosity, suspense, and intrigue. This technique is often used by Dr. Ball to illuminate safety issues early in an opening statement. Unfortunately, few defense attorneys know the proper way to defuse it and to counterattack.

The best way to counterattack is by flash-forwarding immediately to culpability, alternative causation or both in an opening statement, and then to begin to tell the defense story. However, many defense attorneys are inclined to start their opening statement by introducing themselves, the legal team, and their client, followed by reminding jurors how important their civic duty is to the judicial system and how much they appreciate the jurors' time. Then, many succumb to the temptation to tell the defense story in chronological order or, even worse, come out of the gate defending a client against each of a plaintiff's allegations. Both methodologies are weak and ineffective, and they certainly won't create any intrigue or curiosity. Instead, it represents a monumental missed opportunity because jurors will value that first three minutes of information more than any other part of an opening statement. Remember, jurors only care about one thing: assigning blame. Therefore, immediately giving jurors something else to blame is imperative to derailing the reptile approach.

Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney's top motivation is creating and fueling the perception of inconsistency.

Defense Trial Testimony

Black box analyses of how and why reptile plaintiffs defeat defendants during depositions and trials reveals that frequently a defense witness is ultimately trapped by an agreement to one or more safety rules, which creates a clear contradiction between a rule and a defendant's conduct in the specific case at hand. The perceptual effect of this dramatic "gotcha moment" is devastating, especially during a trial. A trial is not a battle of science or medicine; it is a battle of *perception*. The party that looks

and sounds correct is usually perceived as being more correct by a jury, regardless of the substance of a case. Therefore, when a defendant's witness is on the stand and it appears that a defendant broke safety rules in relation to the plaintiff, the perception of behavioral inconsistency has a powerful effect on jurors' decision making. Behavioral consistency is highly correlated with honesty and truthfulness, so a reptile plaintiff attorney's top motivation is creating and fueling the perception of inconsistency. For this reason, witnesses require special cognitive training to prevent the "gotcha moment" from ever occurring.

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest.

To create the perception of inconsistency, a reptile attorney has two tiers of attack against defendants during adverse examination: (1) the safety rule attack and (2) the emotional attack. The safety rule attack is a "word game" in which a witness needs to decide whether to accept or to reject the plaintiff attorney's language. Baseball provides an excellent analogy to illustrate this process. An effective hitter carefully analyses each pitch coming in and classifies it, and that classification—fastball, curveball, off-speed, too high, too low—determines the timing of the hitter's swing or whether he even swings at all. A defense witness is the hitter in this analogy, while the plaintiff attorney is the pitcher. In the safety rule attack, the plaintiff attorney (pitcher) attempts to get a defendant's witness (hitter) to swing at a bad pitch that is out of the strike zone. Therefore, a defendant's witnesses need special training to learn how to classify questions properly as they are delivered because their baseline cognitive processing ability is too scattered to be able to detect the elusive "curveballs" effectively without it. Keeping with the analogy, a reptile plaintiff attorney (pitcher) will cleverly set up a defendant's witness (hitter) by repeatedly delivering questions (pitches) that are benign and easy to answer (hit). The repetitive exposure to benign stimuli leads to "cognitive momentum," in which a witness' brain begins to assume that subsequent questions will also be benign, and a tendency of automatic, rhythmic agreement begins to form. At this point a defendant's witness (hitter) has been cognitively "set up" for the safety questions (curve balls), which usually results in continued automatic, rhythmic agreement. Once this occurs, a reptile plaintiff attorney goes in for the kill: he or she begins to ask case-specific questions that are factual and must be agreed with and dramatically points out the contradiction between the agreed upon safety rule and a defendant's conduct in the case. Hence, the "gotcha moment" is brilliantly set up by using a witness' own cognitive patterns against him or her. Advances in technology have caused the brain to evolve so that it can process several stimuli simultaneously rather than isolating attention and concentration on a single stimulus. This cognitive pattern is hardwired and very difficult to reverse and is the top reason why a defendant's witness is highly vulnerable to reptile attorney precision attacks during adverse examination. In society, cognitive multitasking and quick thinking is very important because it leads to effective problem solving and productivity. When testifying, it is a fatal flaw that can result in a defendant's witness becoming trapped in a dangerous contradiction. Therefore, advanced cognitive training in the areas of attention, concentration, focus, and information processing are required so that a witness can avoid being defeated by the survival rule attack.

If a defendant's witness can develop the cognitive skills to survive the safety rule attack, a reptile plaintiff attorney must proceed with the emotional attack strategy. When a witness learns to detect and reject safety rules consistently, it puts a reptile plaintiff attorney in a difficult position because he or she cannot show any contradictions or inconsistencies. Then a reptile plaintiff attorney must use a different strategy to establish the safety rule, otherwise the dramatic contraction is not possible and the case cannot be won. The emotional attack reptile strategy attempts to force a defendant's witness out of patient, thoughtful, meticulous high road cognitive processing and into instinctual, spontaneous, survival low road cognitive processing. By forcing low road cognition, the reptile plaintiff attorney can generate a response that will likely be negatively perceived by jurors, thus hurting a defendant's witness' credibility.

Three emotional attack methods can force a defendant's witnesses into low road cognitive processing: aggression, humiliation, and confusion. All three can represent direct threats to a witness, causing him or her to depart high road cognition and regress into low road cognition, which will result in emotional and protective responses. Aggression occurs when a reptile plaintiff attorney turns hostile towards a defendant's witness and is characterized by a dramatic negative shift in volume, tone, and body language. This tactic is specifically designed to shock a defendant's witness and to activate low road cognitive processing and fight or flight, turning the witness hostile (fight) or instinctually to agree or become passive(flight). Either response will significantly undermine a witness' credibility and believability and will create the perception that a reptile plaintiff attorney is correct. A reptile plaintiff attorney then humiliates a witness by displaying shock, disbelief, and even laughter towards the witness' answers. Low road cognitive processing in this circumstance results in a defensive, survival response, characterized by "wait, wait… let me explain" types of responses that ultimately appear weak excuses in the eyes of a jury. Again, responding in a defensive manner creates the perception that a reptile plaintiff attorney is correct and that a defendant's witness has backpedaled and tried to talk his or her way out of a question. Finally, a reptile plaintiff attorney can attack with a display of confusion or lack of understanding, which threatens a defendant's witness by suggesting that his or her answers do not make sense. This is a very powerful emotional attack because it makes a defendant's witness feel like an inadequate communicator who struggles

to answer questions in a straightforward manner. This type of attack can force low road cognitive processing because a witness fears that his or her answers are insufficient and that he or she should explain more to a reptile plaintiff attorney in an effort to help him or her understand. This results in a jury perceiving a witness as disorganized and unsure of him or herself. Even worse, it allows a reptile plaintiff attorney to extend his or her adverse examination and emotional attack methods.

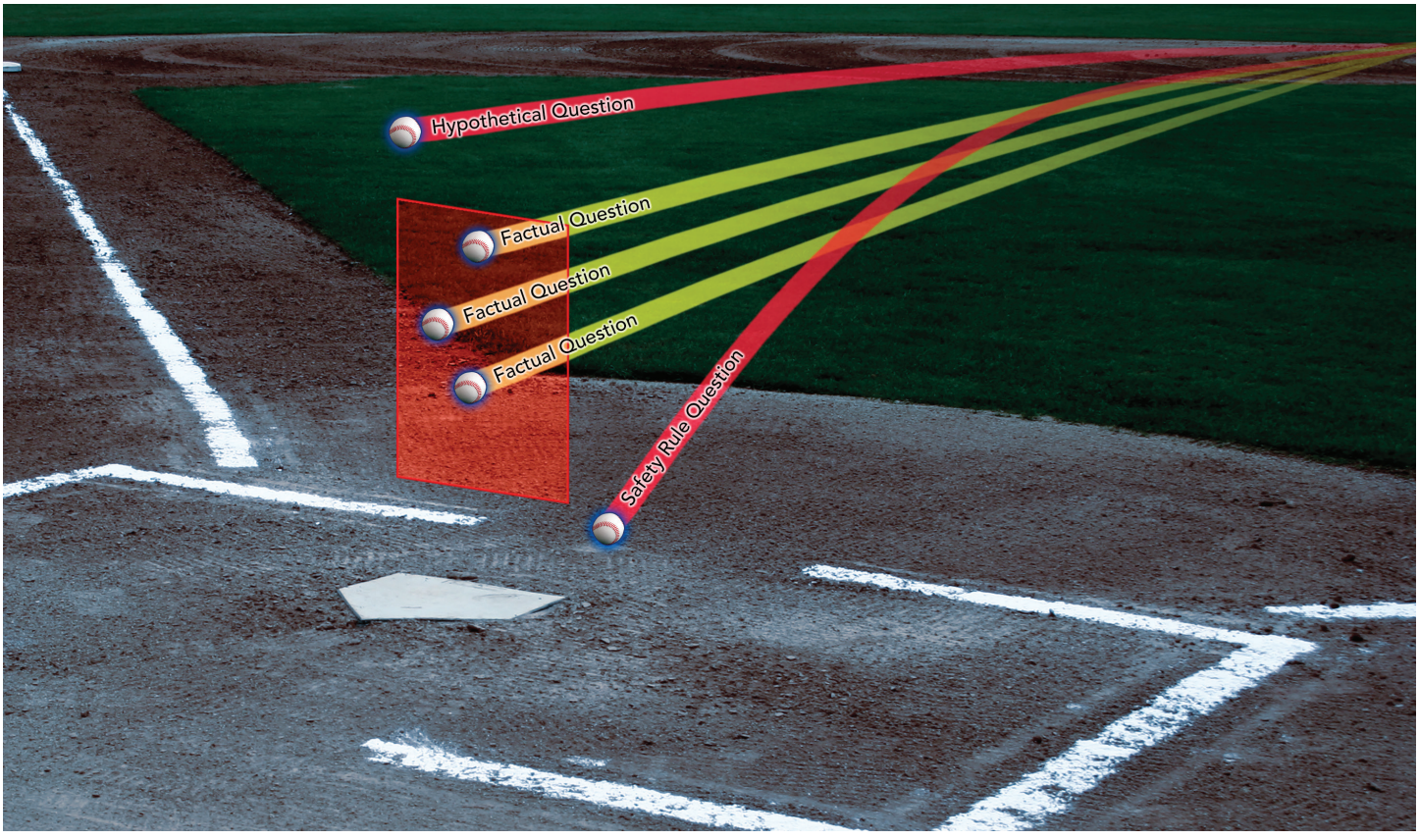
Similar to the safety rule attack, advanced cognitive training is required to desensitize a defense witness to these emotional attacks and to train him or her to remain in high road cognitive processing at all times. High road cognitive processing allows a witness to shoot down safety rule questions persistently, as well as calmly and confidently to repeat effective answers that will become the cornerstones of a subsequent examination by defense counsel. It is important to note that after a defendant's witness persistently rejects safety rule questions, jurors begin starving for information, deeply craving questions that begin with the words "what, why, and how." However, a reptile plaintiff attorney would never ask such questions since they would allow a well-prepared witness to deliver a persuasive narrative answer to a jury. Therefore, it is important that defense witnesses learn the proper responses to reptile plaintiff attorney questions and not force in their explanations during adverse examination.

There are two reasons why defense witnesses agree with safety rule questions: cognitive momentum, as described earlier, and the brain's preprogrammed acceptance that safety is good and danger is bad. Specifically, the brain is preprogrammed to embrace safety and to avoid danger, resulting in instinctual acceptance of these principles when presented in testimony. Safety rule questions are highly manipulative and come in all shapes and sizes. However, effective answers to safety questions are pre-planned and very limited in nature. Before discussing the most effective responses to safety rule questions, it is important to first classify the various types of safety rule questions that exist. There are two general types of safety rule questions: big picture safety questions and hypothetical safety questions. A reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be "no-brainers" in nature. This is precisely why the brain's innate acceptance of safety principles becomes a major vulnerability for a defense witness. These questions focus on the following big picture principles:

- Safety is always top priority.
- Danger is never appropriate.
- Protection is always top priority.
- Reducing risk is always top priority.
- Sooner is always better.
- More is always better.

Hypothetical safety questions are more specific and often take the form of an if-then statement such as "Doctor, you would agree that if you see A, B, and C symptoms, then the standard of care requires you to order tests X and Y, correct?" These questions are especially dangerous because a reptile plaintiff attorney skillfully can cherry-pick symptoms or factors and then suggest the safest course of action to a witness. These deceptive questions are effective because they provide just enough

Reptile, continued on page 76



Reptile, from page 21
information to lure witnesses into providing an absolute answer, thus setting the stage for the "gotcha moment." Therefore, a defense witness' ability to detect these precarious questions persistently is vital to defense counsel's ability to defend a client effectively later in the case.

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest. If a witness can first develop the cognitive skills to understand consistently the true meaning and motivation of a reptile plaintiff attorney's question, the honest answer will always be some form of "it depends on the circumstances." By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer such as the following:

- "It depends on the circumstances."
- "Not necessarily in every situation."
- "Not always."
- "Sometimes that is true, but not all the time."
- "It can be in certain situations."

These answers are highly effective for four reasons. First, they are honest and accurate answers. Again, questions that lack adequate specificity cannot be answered in absolute terms so these "sometimes" type of responses are truthful. Second, these responses put intense pressure on a reptile plaintiff attorney to ask a defendant's witness "what does it depend on?" As stated before, the last thing that a reptile plaintiff attorney wants is to give a defendant's witness an opportunity to deliver persuasive narrative to a jury. When the logical and expected "what" question does not follow these responses, jurors tend to become frustrated with and often suspicious of, a reptile plaintiff attorney if he or she proceeds with an emotional attack. Third, they provide an excellent opportunity for defense counsel to ask a witness to offer explanations to jurors, who are starving for information. This is when a defense witness can really shine, can become a persuasive educator to jurors. Finally, most importantly, jurors widely accept and understand these answers because they perceive them as authentic and reasonable, particularly if defense counsel has properly primed the jurors for these responses during voir dire and opening statement. On the face of it, persistently delivering these answers seems simple. However, it is a very difficult task for defense witnesses because of their multitasking brains, the phenomenon of cognitive momentum, and low road cognitive processing due to emotional attacks. As such, a defense witness must undergo advanced cognitive training to learn to detect trap questions consistently, respond effectively, detect emotional attacks, maintain high road cognitive processing, and repeat answers with emotional poise.

Conclusion

In the end, the reptile theory is simply an aggressive plaintiff strategy that is erroneously packaged in neuroscientific wrapping. The authors are a veteran plaintiff attorney (Don Keenan), and a jury consultant (David Ball),)who have no formal training in neuroscience or neuropsychology, yet take highly complex neuroscientific principles and conveniently apply them to jury decision making. One thing is clear: Ball and Keenan have created a *brilliant* marketing campaign to (1)persuade plaintiff attorneys nationwide to attend their seminars and buy their DVDs, and (2) generate enough angst within the defense bar to get them to start brainstorming solutions.

Despite the theory's invalidity, the individual reptile tools can certainly be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. Defense counsel should do three things when facing a reptile plaintiff attorney. First, rethink your voir dire plan and develop a strategy to strip reptile plaintiff attorney priming and re-prime with defense language and definitions. Priming works, so learn to use it to your advantage during voir dire. Second, work with a qualified consultant to ensure that you will tell the right story in your opening statement, and not inadvertently reinforce a plaintiff's claims. Effectively reordering information can drastically affect jurors' perceptions. Finally, develop a new appreciation for training witnesses before deposition and trial appearances since this is the key area in which reptile plaintiff attorneys are sure to attack fiercely. Find a qualified consultant to provide your defense witnesses with the advanced cognitive training necessary to overcome both safety rule and emotional attacks. Such a consultant should have doctoral level training in cognitive and behavior science, and be intimately familiar with reptile tactics. FD

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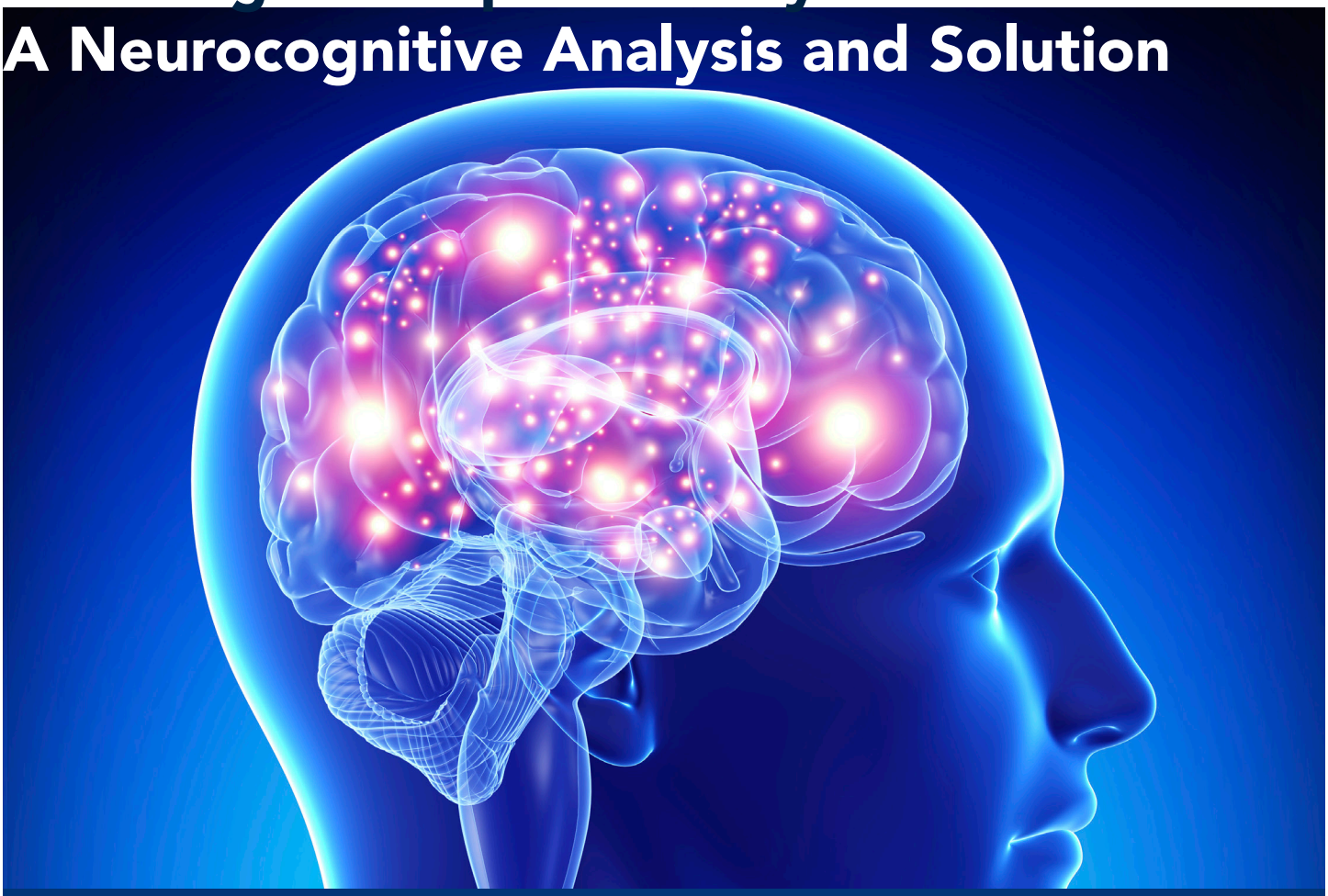
Derailing the Reptile Safety Rule Attack:
A Neurocognitive Analysis and Solution



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Introduction

"What happened?" your client barks over the phone. As you gather the words to impress upon your client the challenges your witness faced, you also wonder and search for an explanation. "I prepared him like any other witness by explaining he should remain calm, deliver confident answers, listen carefully, and only answer the question asked"; but thinking back on the deposition, you cringe. Your objections went unheard. Your "preparation" sessions were useless. Your "Deposition 101" speech had no impact. You then realize that plaintiff's counsel used a new, sophisticated approach that is immune to your standard witness preparation efforts—a form of psychological warfare. You realize the case is now over. "We were Reptiled, weren't we?" the client demands….

As your client asks why the key witness in the case just "gave away the farm," with you defending the deposition right next to them, you flash back to what happened:

- Plaintiff's counsel presents the defendant witness with a series of general safety and/or danger rule questions;
- The witness instinctually agrees to the safety and/or danger rule questions because it supports their highly-reinforced belief that safety is always paramount and that danger should always be avoided;
- The witness then continues to agree to additional safety and/or danger rule questions that link safety and/or danger to specific conduct, as it aligns with their previous agreement to the general safety and/or danger rules;
- The witness begins unknowingly and inadvertently entrenching themselves deeply into an absolute, inflexible stance that omits circumstances and judgment;
- Plaintiff's counsel then presents case facts to the defendant witness that creates internal discomfort, as these facts do not align with the previous safety and/or danger rule agreements;
- Plaintiff's counsel then illuminates that the safety and/or danger rules, which have been repeatedly agreed to under oath, have been violated and that harm has been done as a result;
- The defendant witness regrettably admits to negligence and/or causing harm, as the perception of hypocrisy has been deeply instilled.
- The emotionally-battered defendant witness further admits that if they would have followed the safety and/or danger rules, harm would have certainly been prevented.

Rest assured your witness was not the first, nor will he be the last to fall victim to Reptile manipulation tactics because traditional preparation techniques are not sufficient for the emotional and psychological manipulation witnesses endure during Reptile style questioning. The four devastating psychological weapons that were used against your defendant witness are known as:

- Confirmation Bias
- Anchoring Bias
- Cognitive Dissonance
- The Hypocrisy Paradigm

The combination of these powerful psychological weapons doesn't influence witnesses; rather, it CONTROLS witnesses. These psychological weapons are precisely what the Reptile plaintiff attorney uses to destroy defendant witnesses at deposition.

The well-known "Reptile Revolution" spearheaded by attorney Don Keenan, Esq. and jury consultant David Ball, Ph.D. is now a ubiquitous threat to defendants across the nation.[1] Keenan and Ball advertise their tactics as the most powerful approaches available for plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform, and they boast more than $6 billion in jury awards and settlements.[2] Ball and Keenan's tactics have been called "the greatest development in litigation theory in the past 100 years."[3] Although the theory developed within medical malpractice cases, Ball's and Keenan's seminars, held nationwide, now cover specific topics related to products liability and transportation. While the Reptile theory has been shown to be invalid, the specific Reptile tactics have proven deadly, particularly during defendant depositions.[4]

Generating damaging witness deposition testimony creates the foundation for Reptile attorneys. Reptile attorneys accomplish high value settlements by manipulating defendants into providing damaging deposition testimony, specifically by cajoling them into agreement with multiple safety rules. Once these admissions are on the record, and often on videotape, the defense must either settle the case for an amount over its likely value, or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility. Witnesses cannot be faulted for damaging testimony because Reptile tactics employ emotional and psychological tactics to manipulate witnesses into admitting fault. Witnesses' mistakes are caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the Reptile strategy. In other words, if defendants are not specifically trained to deal with Reptile questions and tactics, the odds of them delivering damaging testimony is high. Preventing Reptile attorneys from gaining leverage through damaging witness deposition testimony is the critical first step in combatting reptile tactics.

"Generating damaging witness deposition testimony creates the foundation for Reptile attorneys. Reptile attorneys accomplish high value settlements by manipulating defendants into providing damaging deposition testimony, specifically by cajoling them into agreement with multiple safety rules."

Most papers and presentations from defense attorneys and jury consultants about the plaintiff Reptile theory merely describe the theory and provide rudimentary suggestions to defense counsel

who may face a Reptile attorney.[5] While these efforts provide basic descriptions of the Reptile Theory, they fall woefully short on providing in-depth analysis and scientifically-based solutions. Suggestions such as "better prepare your witnesses" and "tell a better story during opening" do not provide defense attorneys with the neuropsychological weaponry needed to defeat the plaintiff Reptile approach. The Reptile attack during deposition is specifically designed to exploit the defendant witness' cognitive and emotional vulnerabilities. As such, a neurocognitively-based training system and counter-attack strategy is necessary if defendant witnesses are to defeat the Reptile attorney during deposition. This paper will serve to a) expose the step-by-step psychological attack orchestrated by Reptile attorneys, b) identify and analyze the cognitive breakdowns that lead to witness failure, and c) provide neurocognitive interventions to prevent witness failure.[6] Because Keenan and Ball have recently expanded their Reptile tactics past medical malpractice to target transportation and product liability litigation, we offer examples of Reptile questions commonly found within these three areas of litigation.

Understanding Reptile Safety and Danger Rule Questions

The Reptile attorney uses four primary "rule" questions to lure unsuspecting defendant witnesses into their psychological trap. The four questions are classified as:

1. General Safety Rules (Broad Safety Promotion)
2. General Danger Rules (Broad Danger/Risk Avoidance)
3. Specific Safety Rules (Safe conduct, decisions and interpretations)
4. Specific Danger Rules (Dangerous/Risky conduct, decisions, and interpretations)

"Preventing Reptile attorneys from gaining leverage through damaging witness deposition testimony is the critical first step in combatting reptile tactics."

Manipulating defendant witnesses into agreeing with these four types of questions is the linchpin of the Reptile cross-examination methodology, as the agreement creates intense psychological pressure during subsequent questioning of key case issues. Generating and intensifying this psychological pressure over the course of the questioning is essential to the Reptile attorney's success. Absent this psychological pressure, the Reptile attorney's odds of success drop exponentially. Therefore, the Reptile attack requires painstaking effort to both construct and order the questions in a manner which fully capitalizes on the natural biases and flaws of the witness' brain. The attack plan consists of four phases that build off of each other to ultimately force the defendant witness into admitting fault and accepting blame.

Anatomy of the Reptile Cross-Examination Method

Phase One

Confirmation Bias: Forcing Agreement to General Safety Rule Questions

Confirmation biases are errors in witness' information processing and decision-making. The brain is wired to interpret information in a way that "confirms" an existing cognitive schema (i.e., preconceptions or beliefs), rather than disconfirming information.[7] This means that during testimony, most witnesses quickly accept information which confirms their existing attitudes and beliefs rather than considering possible exceptions and alternative explanations. Essentially, witnesses struggle to say "no," to, or disagree with a line of questioning because of emotional and psychological challenges. Reptile attorneys rely on these cognitive challenges to entice defendant witnesses into a dangerous agreement pattern.

Cognitive schemas, the mental organization of knowledge about a particular concept, are powerful because they often relate to our identity as people.[8] The safety movement in many industries (healthcare, trucking, products, etc.) has strongly conditioned witnesses to *automatically* accept any safety principle as absolute and necessary, while simultaneously rejecting danger and risk. Specifically, years of repeated safety seminars, safety publications, and continuing education classes provided by employers have created powerful and inflexible cognitive schemas about safety. Therefore, when Reptile attorneys ask witnesses about safety issues during deposition, automatic agreement occurs as a function of the brain working to confirm its cognitive safety schema. Reptile attorneys have discovered that they can use a witness' confirmation bias tendency to their advantage, because it virtually guarantees agreement to safety and danger questions.

Here is how it works:

- The Reptile attorney illuminates the defendant witness' cognitive safety schema regarding safety within their question, relying on the psychological principle of confirmation bias to ensure agreement;
- The defendant witness has no choice but to agree to safety questions, as cognitive schemas are strongly related to an individual's self-value and identity. In other words, disagreement with a cognitive schema is burdensome, if not impossible, as deviating from their internal value system proves uncomfortable for witnesses—no one likes to view themselves or their actions as anything but "safe."
- The Reptile attorney asks additional general safety and/or danger rule questions to the defendant witness, which forces further agreement and momentum.

Examples of General Safety and Danger Rule Questions (any case type):

- Safety
  - "Safety is your top priority, correct?"
  - "You have an obligation to ensure safety, right?"
  - "You have a duty to put safety first,

correct?"

- Danger
  - "It would be wrong to needlessly endanger someone, right?"
  - "You would agree that exposing someone to an unnecessary risk is dangerous, correct?"
  - "You always have a duty to decrease risk, right?"

These repeated agreements lock the defendant witnesses into an inflexible stance, allowing the Reptile attorney to move to Phase Two of the attack—linking safety and/or danger issues to specific conduct, decisions, and interpretations.

Phase Two
Anchoring Bias: Linking Safety and/or Danger to Conduct

Anchoring bias refers to the cognitive tendency to rely too heavily on early information that is offered (the "anchor") when making decisions. Anchoring bias occurs during depositions when witnesses use an initial piece of information to answer subsequent questions. Various studies have shown that anchoring bias is very powerful and difficult to avoid. In fact, even when research subjects are expressly aware of anchoring bias and its effect on decision-making, they are still unable to avoid it.[9] The Reptile attorney cleverly uses the initial agreement to general safety and/or danger rule questions to form an "anchor" that forces defendant witnesses to continue to agree to subsequent questions that are designed to link safety and/or danger to specific conduct, decisions, or interpretations. This sophisticated psychological approach manipulates the defendant witness by forcing them to repeatedly focus on their cognitive schema alignment, rather than effectively processing the true substance (and motivation) of the question.

Examples of Specific Safety and Danger Questions (Medical Malpractice Case):

Safety

- "If a patient's status changes, the safest thing to do is call a physician immediately, right?"
- "If a patient is having chest pain and shortness of breath, the safest thing to do is to send them to the ER immediately, correct?"
- "If a patient's oxygen saturation drops to 82%, and you are on-call, the safest thing to do to protect the well-being of the patient is to come to the hospital ASAP, right?"

Danger

- "Documentation in the medical chart must be thorough; otherwise a patient could be put in danger, right?"
- "You would agree with me that when a Troponin value is elevated, that the patient is in imminent danger, correct?"
- "Doctor, when you order a test or labs, you'd agree with me that you should review the results immediately, because any delay would put the patient at risk, right?"

Examples of Specific Safety and Danger Questions (Transportation Case):

Safety

- "To ensure safety, as a commercial truck driver, you must follow the federal rules governing hours of service, correct?"
- "Another safety rule requires daily inspection of the truck and trailer, such as brakes, correct?"
- "And you agree that if someone violates those safety rules and causes an accident, then they should be held responsible for their actions, correct?"

Danger

- "Commercial drivers must maintain daily log books, to ensure other drivers on the road are not put in danger, right?"
- "You would agree with me that when a commercial driver has exceeded the speed limit, other drivers on the road are put in danger, right?"
- "A commercial driver who places others in danger should be held responsible for the harms and losses caused, right?"

Examples of Specific Safety and Danger Questions (Product Liability Case):

Safety

- "Product manufacturers must make consumer products that are safe and free from defects, correct?"
- "To ensure consumer safety, authorized dealers must follow the product manufacturer's policies when selling, servicing, or repairing a product, correct?"
- "A product's operating manual ensures consumers know how to safely use a product, correct?"

Danger

- "Product testing should be thorough; otherwise consumers could be put in danger, right?"
- "When a product is mislabeled, you would agree with me that the consumer is in real danger, correct?"
- "Any defect discovered in the manufacturing process should result in an immediate recall of a product, because any delay could put the consumer in danger, right?"

These subsequent agreements to specific safety and/or danger rule questions accomplish two key Reptile attorney goals: a) it forces the defendant witness to become deeply entrenched in an inflexible stance on safety issues and b) it sets the stage to introduce case facts in a powerful manner to create psychological discomfort.

Phase Three
Cognitive Dissonance: Creating Psychological Distress

Cognitive dissonance is the mental discomfort people experience whenever beliefs or attitudes they hold about reality are inconsistent with their conduct, decisions, or interpretations.[10] Cognitive dissonance can occur in many areas of life, but it is particularly evident in situations where an individual's behavior conflicts with beliefs that are integral to his or her self-identity and profession. The Reptile attorney purposely generates cognitive dissonance

by highlighting case facts which show the defendant witness' conduct, decisions or interpretations contradict his or her cognitive schema regarding safety and danger. Repeated contradictions result in the defendant witness experiencing psychological distress. Importantly, the amount of cognitive dissonance produced depends on the importance of the belief: the more personal value, the greater the magnitude of the cognitive dissonance. Additionally, the pressure to reduce cognitive dissonance is a function of the magnitude of said dissonance. Hence, the Reptile attorney purposely lays out multiple safety and/or danger questions in an effort to increase the magnitude of dissonance between the safety and/or danger admissions and the witness' conduct, decisions, or interpretations in the actual case.

During a deposition, there is a clear transition from general and specific safety and/or danger questions to case specific questions. Once the defendant witness has agreed to the safety and danger rule questions, the Reptile attorney starts to present case facts that do not align with the safety and danger rule answers. Here is how the question sequence works:

- General Safety Rule Question
- General Safety Rule Question
- General Danger Rule Question
- General Danger Rule Question
- Specific Safety Rule Question
- Specific Safety Rule Question
- Specific Danger Rule Question
- Specific Danger Rule Question
- Case Fact Question
- Case Fact Question
- Case Fact Question

As you can see, the Reptile plaintiff attorney strategically places the case fact questions directly behind several safety and danger rule questions. As the case fact questions are delivered to the defendant witness, his or her brain senses the contradiction between the case facts and their previous testimony, leading to cognitive dissonance. The ordering of the questions is crucial, as presenting case fact questions too early in the sequence will not produce cognitive dissonance. Therefore, the Reptile attorney will purposely delay the delivery of case questions to ensure that the safety and danger rule questions have been agreed to first.

Phase Four

The Hypocrisy Paradigm: Forcing an Admission of Fault

By repeatedly introducing case facts that contradict the defendant witness' previous testimony regarding safety and/or danger, the Reptile attorney intensifies the amount of psychological distress the witness experiences. The final and most powerful Reptile attack is the use of the hypocrisy paradigm[11]. By getting people to advocate positions they support but do not always live up to maximizes the level of cognitive dissonance an individual will experience. During a Reptile deposition, when the reptile attorney directly accuses the witness of putting someone else in danger and causing harm, the attorney's questioning generates shame and threatens the witness' sense of integrity. Hypocrisy is an intense threat to one's identity and self-esteem, and creates intense psychological discomfort. Therefore, the Reptile attorney, as a form of manipulation,

repeatedly points out that the defendant witness has failed to live up to his or her own professional standards. The hypocrisy fuels further cognitive dissonance, often generating feelings of shame and embarrassment.

Examples of Hypocrisy Paradigm Questions:

Medical Malpractice Case

- "Failing to call a physician at 4pm was a safety rule violation, correct?"
- "It exposed my client to unnecessary risk and harm, right?"
- "And if you would have called a physician, it would have prevented my client's stroke, right?"
- "Nurse Jones, failing to call a physician immediately at 4pm was a deviation of the standard of care, wasn't it?"

Transportation Case

- "Failing to perform a complete vehicle inspection prior to your travel was a safety rule violation, correct?"
- "It endangered my client and other drivers, correct?"
- "If you would have performed a vehicle inspection, it would have prevented my client's injury, right?"
- "By failing to perform a vehicle inspection prior to your travel, a violation of the safety rule, and endangering other drivers, including my client, you were negligent weren't you?"

Product Liability Case

- "Failing to perform an immediate recall after learning of a product's defect endangered consumers, right?"
- "Recalling the product immediately would have prevented my client's injury, correct?"
- "By failing to order a recall and allowing your product to harm consumers, you were negligent correct?"

After fostering shame and embarrassment through hypocritical behavior, the Reptile attorney has emotionally battered the defendant witness to a point in which he or she understandably concedes defeat and admits negligence. While some defendant witnesses attempt to fight and defend their conduct, the Reptile attorney often aggressively reminds them of their previous testimony about safety and danger rules, typically forcing the witness into submission.

Witnesses generally attempt to decrease intense cognitive dissonance by either admitting to fault or attempting to change previous testimony, neither of which prove successful when a video camera captures a clear admission, or credibility eroding back-pedaling.

1. Admitting Fault – Admitting fault reduces cognitive dissonance and relieves psychological pressure. When the defendant witness realizes that he or she is trapped and has no chance at escape, admitting fault is a fast way to decrease the intense cognitive discomfort that has been created by the Reptile attorney. Admitting fault is a low-road cognitive processing survival response that represents a "flight" (vs. fight) reaction. Specifically, admitting fault is a version of

"playing dead" in an effort to decrease exposure to an aggressive negative stimulus (i.e., a Reptile Attorney). While this flight response may relieve psychological discomfort within the defendant witness, it obviously increases psychological discomfort within the defense attorney since both strategic and economic leverage in the case have been severely compromised.

2. Attempt to Change Previous Testimony – Some witnesses attempt to "back up" and try to change the conflicting belief so that it is consistent with their behaviors. Specifically, the defendant witness can try to explain to the Reptile plaintiff attorney that they were mistaken on their previous answers in an effort to escape the safety and/or danger rule trap. However, this is rarely effective as any attempt to reverse previous testimony is characterized as dishonesty by the Reptile plaintiff attorney, who will remind the defendant witness that he or she was under oath during the previous safety and danger rule questions. Even though the defendant witness may never admit fault in this circumstance, his or her credibility becomes severely damaged.

Regardless of how the defendant witness decides to decrease the psychological distress created from the hypocrisy paradigm questions, they both result in the Reptile plaintiff attorney gaining extraordinary strategic and economic leverage in the case. Table 1 illustrates the tactical use of each psychological weapon against the defendant witness and the subsequent result.

Derailing the Reptile Attack at Deposition: Rebuilding Cognitive Schemas

The foundation of the Reptile attack during testimony is to take advantage of the defendant witness' distorted cognitive schema related to safety and danger issues. Again, the witness' flawed cognitive schema results from years of conditioning and reinforcement regarding workplace safety rules, which foster powerful and inflexible preconceptions absent circumstance and judgment. The Reptile attorney preys upon these cognitive flaws.

Table 1 illustrates how the Reptile attorney heavily relies on the initial agreement to safety and danger rule questions to implement subsequent psychological weapons that will effectively force agreement from the defendant witness. Importantly, without this initial agreement to safety and danger rules, the ensuing questions become impotent and ineffective because confirmation bias and anchoring bias cannot occur. In other words, if a defendant witness can be properly trained to identify safety and danger rule questions and avoid absolute agreement, the powerful effect of cognitive dissonance can be completely neutralized.

Table 1: The Reptile Question Script (Medical Malpractice Case)

QUESTION TYPE	QUESTION FORM	PSYCHOLOGICAL WEAPON	RESULT
General Safety Question	"Nurse Jones, you'd agree with me that ensuring patient safety is your top clinical priority, right?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
General Danger Question	"Because, you wouldn't want to expose your patient to an unnecessary danger, correct?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
Specific Safety Question	"You'd also agree with me that if a patient becomes unstable, the safest thing to do would be to call the physician immediately, right?"	Anchoring Bias to General Safety Agreement	Agreement; Psychological Comfort
Specific Danger Question	"Because hemodynamic instability can be dangerous, and even lead to death, right?"	Anchoring Bias to General Danger Agreement	Agreement; Psychological Comfort
Case Fact Question	"Nurse Jones, isn't it true that my client's blood pressure was 174/105 at 4pm?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"And you could have picked up the phone to call the physician, but you decided not to, correct?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"At 5:30pm, my client suffered a hemorrhagic stroke, correct?"	Cognitive Dissonance	Agreement; Psychological Distress
Hypocrisy Question (Conduct)	"Failing to call a physician at 4pm was a safety rule violation, correct?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"It exposed my client to unnecessary risk and harm, right?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"Nurse Jones, failing to call a physician immediately at 4pm was a deviation of the standard of care, wasn't it?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Prevention)	And if you would have called a physician, it would have prevented my client's stroke, right?	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt

Properly training a witness to withstand Reptile attacks requires a sophisticated reconstruction of the original cognitive schema, followed by a rebuilding of a new, adjusted schema built upon an understanding of the role of circumstance and judgment. Once the new cognitive schema is firmly in place with no signs of regression, the defendant witness will be immune from the Reptile attorney's safety and danger rule attacks (see Table 2).

Table 2: Effective Responses to General and Specific Safety and/or Danger Rule Questions

General Safety Questions	Rebuilt Cognitive Schema Responses
"You have an obligation to ensure safety, right?" "Safety is your top priority?"	Option 1: General Agreement (not absolute) • Safety is certainly an important goal, yes. • We strive for safety, of course. • In general, yes. Option 2: Request Specificity • Safety in what regard? Can you please be more specific? • In what circumstance are you referring? • Safety is a broad term, can you be more precise?

Specific Safety and/or Danger Rule Questions	Rebuilt Cognitive Schema Responses
"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?" "(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"	• It depends on the patient's specific circumstances. • It depends on the full picture. • Not necessarily, as every situation is different. • That is not always true. • I would not agree with the way you stated that. • That is not how I was trained. • That is not how (INDUSTRY) works.

General Danger Rule Questions	Rebuilt Cognitive Schema Responses
"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?" "(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"	• I don't understand what you mean by "needlessly endanger." • That is a confusing question; can you define "needlessly endanger?" • I don't understand what you mean by "unnecessary risk;" can you please be more specific? • That is a very broad question, what specific circumstance are you referring to?

The cognitive schema reconstruction process is no easy task and requires advanced training in neurocognitive science, communication science, personality theory, learning theory and emotional control. As such, the following steps are only intended to provide general knowledge to defense counsel about how to identify and reconstruct a witness' cognitive schema.

10 Steps to Rebuilding the Cognitive Schema

1. Education: scientifically define cognitive schemas and how they work
2. Identification: identify and discuss the witness' personal Safety and Risk schemas
3. Demonstration: demonstrate cognitive flaws regarding safety and danger (live, video, written)
4. Education: scientifically define confirmation bias and anchoring bias
5. Education: scientifically define cognitive dissonance and hypocrisy paradigm
6. Simulation: create cognitive dissonance and force failure (i.e., the witness must fail repeatedly, proving that their current cognitive schema is flawed and ineffective, in order to ingrain successful communication patterns and behavior)
7. Operant Conditioning: positive reinforcement of correct answers (see Table 2)
8. Operant Conditioning: punishment (criticism) of incorrect agreement
9. Repeated Simulation: attempt to force cognitive dissonance and agreement from varying angles
10. Solidify New Cognitive Schema: repeat simulation until cognitive regression is minimal to none

Conclusion

The ultimate goal of the Reptile attorney is simple: create economic leverage. They have no interest in truth, justice, or even prestige in the courtroom. Rather, the Reptile attorney is only interested in fast cash. They strive to force clients to settle a case for far more than the realistic case value by manipulating the defendant witness into delivering damaging testimony. The economic impact of being "Reptiled" is staggering, resulting in millions of dollars of unnecessary payouts to undeserving plaintiffs and their attorneys. The plaintiff Reptile methodology is pure psychological warfare designed to attain the plaintiff attorney's economic goals. As such, defense counsel and clients need to supplement their traditional witness preparation efforts with sophisticated psychological training to specifically derail the perilous Reptile attacks.

"The plaintiff Reptile methodology is pure psychological warfare designed to attain the plaintiff attorney's economic goals."

Advanced neurocognitive witness training can completely stymie a savvy Reptile attorney from controlling a defendant witness' answers and

steering them towards admissions to negligence and causation. The problem is that merely warning a defendant witness about these sophisticated tactics is grossly inadequate. Well-prepared defendant witnesses have repeatedly failed at deposition because the preparation program did not include training to diagnose and repair the neurocognitive vulnerabilities where the Reptile attorney attacks. Proper training can not only protect the defendant witness from Reptile attorney safety rule attacks at deposition, but it can substantially decrease the economic value of the case. To no surprise, many corporate clients, particularly insurance companies, put great emphasis on decreasing annual legal costs and expenses. Claims specialists and corporate counsel routinely question whether they can afford the cost of advanced deposition training for their defendant witnesses. However, as Reptile settlements and damages continue to mount into the billions, the real question becomes: Can they afford the cost of NOT training witnesses?

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Ryan Malphurs, Ph.D contributed to this article.

Endnotes

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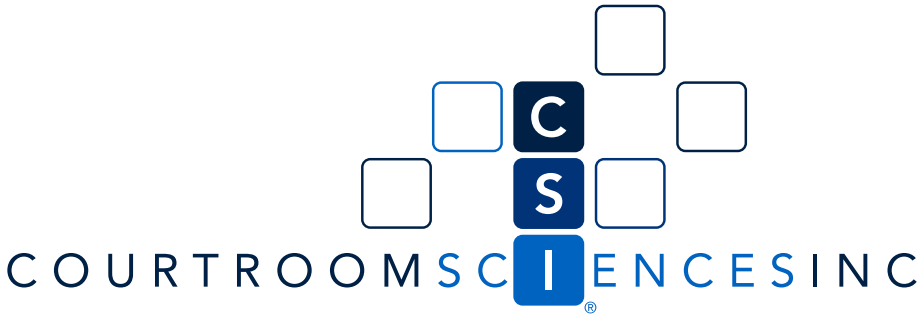

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A Neurocognitive Approach

Rehabilitating the Defendant in the Reptilian Era

By Bill Kanasky Jr. and Melissa Loberg

Defense counsel preparing to combat a reptile plaintiff attorney who is requesting tens of millions of dollars must make the client aware of the increased risk and take the necessary steps to mitigate that risk.

Reptilian adverse examination of defendant witnesses often represents the most stressful, vulnerable time of a trial for both witness and defense counsel. For the witness, surviving the cognitive and emotional chess match of a reptile plaintiff attorney's manipulative pattern of safety and danger questions is often a daunting task. For defense counsel, feelings of helplessness and powerlessness are common, particularly when their witness is getting pounded with textbook reptile attacks on the stand. If the defense witness is well-trained and survives the reptile attack, the ability to rehabilitate the witness is now crucial to ensuring his/her credibility and believability at the jury level. Because so much attention and worry has been directed toward halting or derailing the reptile attack during adverse examination, witness rehabilitation is now (erroneously) perceived as a relieving, non-threatening, "easy" part of the trial for both witness and defense counsel. This is because the witness and attorney now possess total control of the information that is presented to the jury, free of manipulative influence from opposing reptile counsel. Unfortunately, this false sense of security can lead to unbalanced witness preparation efforts that result in ineffective defense testimony at trial. Specifically, the intense focus on defeating the plaintiff's reptile attack during witness preparation has led to an unusual and counter-intuitive phenomenon in civil litigation: defense witnesses performing *better* on adverse examination than they do during rehabilitation.

There is no denying that defense witness performance during rehabilitation testimony has suffered since the rise and spread of Ball and Keenan's reptile trial methodology. Ball, D. and Keenan, D. Reptile: The 2009 Manual of the Plaintiff's Revolution, 2009. After several highly publicized

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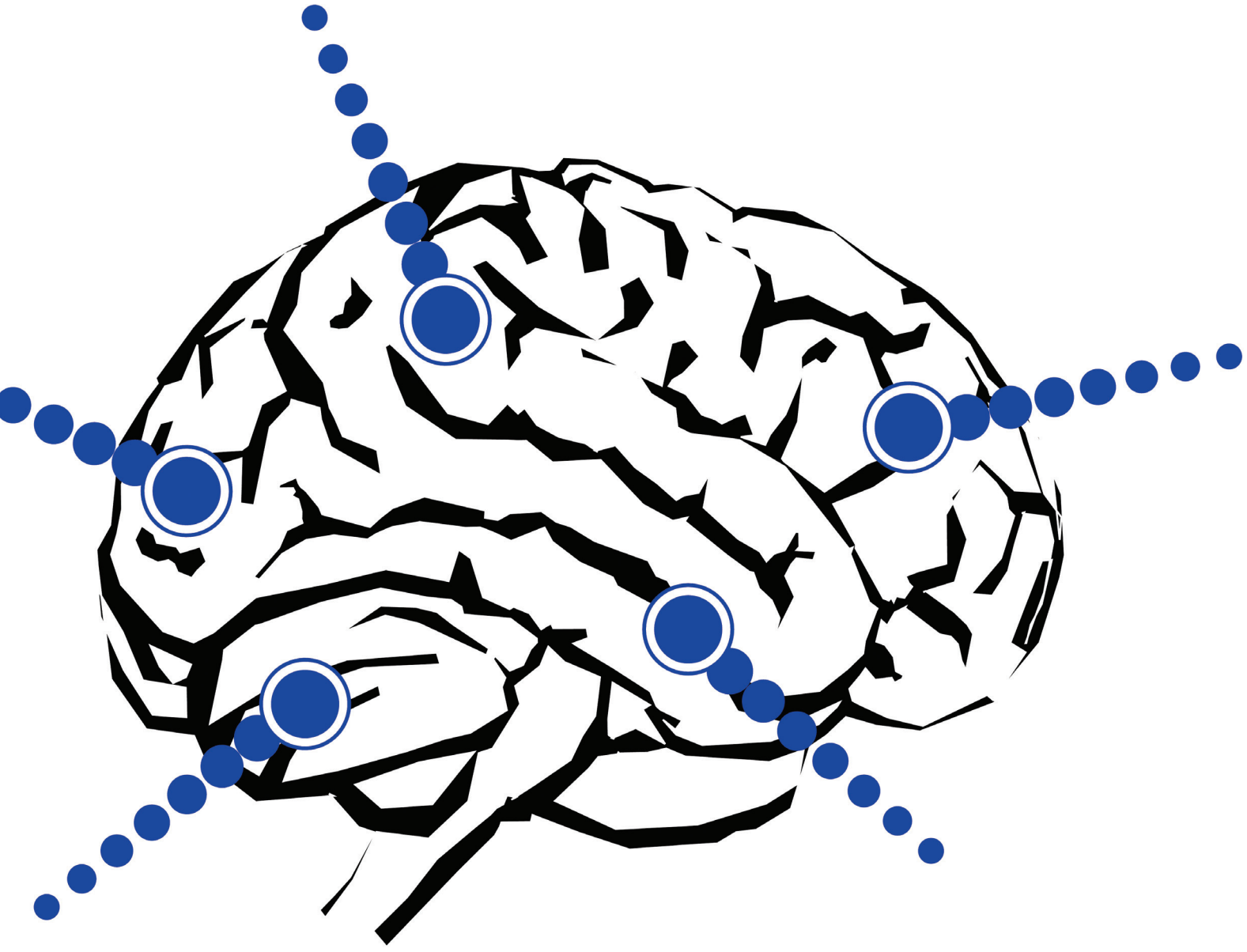


and high-dollar verdicts, the defense bar has finally started to take Ball and Keenan's reptile tactics seriously. Defense attorneys are realizing that witness preparation requires a greater time investment than it has in the past, as teaching witnesses how to avoid falling victim to the reptile attack takes considerable time and effort, even with experienced and highly intelligent witnesses. Unfortunately, by the time the defendant witness is thoroughly prepared for the impending reptile attack, many defense attorneys are running out of time or simply considering the job done. Thus, the needed preparation for rehabilitation of the witness is neglected. This lack of preparation has led defendant witnesses to make avoidable mistakes during what should be the time for the witness to provide critical testimony necessary to combat the plaintiff's themes of safety and danger. Now that a scientifically based counterattack has been constructed to derail the reptile attack on defense witnesses effectively, solutions to new problems with defendant rehabilitation must be discussed.

After intense preparation for reptilian adverse examination, many defense attorneys calmly tell their witness, "Rehabilitation is when I toss you 'softballs' and you crush them out of the park; don't worry, you will be great." What many defense attorneys do not understand is that their witnesses are highly vulnerable during rehabilitation efforts. Witnesses can make dangerous cognitive, emotional, and communication mistakes that can severely hurt their credibility with the jury. This is particularly true after a surviving a reptilian attack on adverse examination, as the witness experiences an overwhelming sense of emotional relief, thus distracting them from meeting their objectives when being questioned by defense counsel. Furthermore, defense attorneys are also highly susceptible to

cognitive and strategic errors during rehabilitation efforts that can inadvertently set up their witness for disaster. Neither witness nor attorney is safe during rehabilitation questioning, as both are vulnerable to committing key errors. This paper is designed to (a) educate defense attorneys about the three common errors that can damage witness credibility during rehabilitation efforts, and (b) provide defense attorneys with a plan to prepare for and conduct rehabilitation questioning more effectively.

Thanks to the persistent growth of portable technological gadgets (PDA's, tablets, etc.) that provide people with constant and near instantaneous information, juror attention span has declined from poor to atrocious.

Rehabilitation Errors

Error #1: Juror Cognitive Saturation

Both defense witnesses and attorneys vastly overestimate how much information jurors can process during testimony. Thanks to the persistent growth of portable technological gadgets (PDA's, tablets, etc.) that provide people with constant and near instantaneous information, juror attention span has declined from poor to atrocious. Specifically, the human brain has become so reliant on technology to provide multiple sources of information that sustained attention and concentration to a single source of information has become difficult for most people. Attentively listening to a witness testify and effectively processing that information now creates a unique neuropsychological challenge for jurors that was absent before the tech age. Therefore, both defense attorneys and witnesses need to understand jurors' neurocognitive limitations and ensure that information is being presented to them in the correct fashion. Otherwise, valuable information may be missed, lost, or forgotten.

Jurors struggle to maintain focus during witness testimony, particularly during long, complex answers. Therefore, the goal of rehabilitation should be to promote juror cognitive digestion and prevent cognitive saturation. Cognitive "digestion" refers to the maximum amount of information that a juror can process without becoming overwhelmed, while cognitive "saturation" refers to information that exceeds the brain's processing limits and is ultimately lost. To avoid cognitive saturation, defense attorneys must ensure that their witnesses are delivering information in a way that does not exceed jurors' cognitive capacity limitations.

Specifically, when information is delivered to a jury, it can either be "chunked" or "streamed." The human brain is designed to process smaller "chunks" of information effectively, rather than long, continuous streams of information. The best examples of chunking include phone numbers, social security numbers, and combination locks. All of them have numbers with dashes between them, resulting in numbers being "chunked" together in groups, rather than one long stream of numbers. This results in enhanced memory capacity as the dash allows the brain to digest before processing the next chunk of information. This pause, even if only for a second, allows the brain to digest the information and prepare for subsequent information. In contrast, serial numbers and product identification numbers are good examples of information streaming, as these numbers are presented as long, continuous strings of data with no dashes or spaces. Trying to memorize such numbers is nearly impossible, as the continuous stream of information causes short term memory (STM) to become quickly saturated.

In testimony, answers can be delivered in digestible chunks if the length of answers persistently stays under five seconds ("the five-second rule"). Answers that exceed five seconds are considered a form of information streaming, and therefore overwhelm short-term memory (cognitive saturation), resulting in information being lost rather than being appropriately processed and transferred into long term memory (LTM) (see Figure 1).

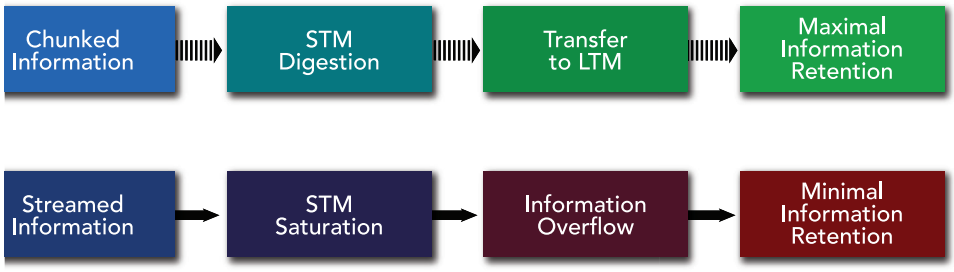
When information is streamed, short-term memory becomes saturated, or "full," preventing subsequent information from being processed and stored. Instead, the overflow information is lost and cannot be recovered. Consider the following examples of information chunking and streaming.

Case Example: Medical Malpractice
"Streaming" Information (ineffective)

Question: Doctor, would you please explain to the jury what Heparin is?

Answer: Heparin is an anticoagulant that prevents the formation of blood clots. It is used to treat and prevent blood clots in the veins, arteries, or lung. Heparin is also used before surgery to reduce the risk of blood clots. You should not use this medication if you are allergic to heparin, or if you have uncontrolled bleeding or a severe lack of platelets in your blood. Heparin may not be appropriate if you have high blood pressure, hemophilia or other bleeding disor-

Figure 1



der, a stomach or intestinal disorder, or liver disease.

"Chunking" Information (effective)

Question 1: Doctor, would you please explain to the jury what Heparin is?
Answer: It is a medication used to thin a patient's blood.

Question 2: How exactly do physicians use Heparin?

Answer: We use it to treat and prevent blood clots in the veins, arteries, or lung, particularly before surgery to reduce the risk of blood clots.

Question 3: Is Heparin safe for all patients?

Answer: No. If a patient has uncontrolled bleeding or a severe lack of platelets in their blood, Heparin can be dangerous.

Question 4: Are there other instances in which the use of Heparin may be inappropriate?

Answer: Yes, Heparin may not be appropriate if a patient has high blood pressure, hemophilia or other bleeding disorder, a stomach or intestinal disorder, or liver disease.

Long, complex answers by witnesses may be authentic, truthful, and important, but they can be highly ineffective at the jury level. This may result in critical information being lost or forgotten, which can have dramatic effects in the deliberation room. However, jurors usually process more concise answers (under five seconds) very effectively, resulting in maximum information retention. Additionally, the slower pacing that is achieved when witnesses provide information to jurors in digestible chunks allows the attorney to work with the witness to ensure defense themes are repeated, further increasing juror retention of the key arguments in support of the defendant's case.

Chunking of testimony is particularly important in courtrooms that allow and encourage note-taking, as this activity can distract jurors from effectively processing information during rehabilitation questioning. If witnesses persistently adhere to the five-second rule, it allows jurors to listen and take notes simultaneously without becoming overwhelmed. Therefore, it is critical for both the witness and defense attorney to undergo juror cognitive training to gain a better understanding of the capabilities and limitations of the juror brain, and how to formulate questions and answers properly to enhance juror comprehension.

Error #2: Emotional Volunteering of Information

A savvy attorney should have his/her questions strategically ordered, providing both the witness and the jury with a road map, or blueprint, to the case. The ability to stick to that plan and present jurors with the proper order of information helps jurors effectively understand the defense story. However, defense witnesses often develop the burning desire to jump ahead of the attorney and bring up important information that has not been asked for yet, particularly after surviving a treacherous reptile attack on adverse examination. This problem is emotionally based, as many witnesses are highly motivated to "win" the case during their testimony.

When a witness jumps ahead of the questioner, it has three detrimental effects on the jury. First, it appears that the witness is over-advocating the defense position, thus potentially damaging credibility. Second, the witness-attorney team appears disorganized, as the witness is not directly answering the actual question the attorney asked. Finally, it can confuse jurors and inhibit proper comprehension of key case information. This ultimately results in frequent interruptions from the attorney to get the witness back on track, which can damage jurors' perceptions of the entire defense team.

An example of how a witness can jump ahead of the questioner and bring in information that the questioner intended to come out later in the questioning is as follows.

Question: How many air traffic controllers are required to be in the tower at any given time?

Answer: In higher traffic situations it is ideal to have more than one, but in this case the traffic had just picked up when the incident occurred and the controller on duty was very experienced, plus another controller was on his way back from a required break.

In this example, while the information about who was in the tower during this incident is indeed very important to the case, the witness has delivered it to the jury at the wrong time. This not only can confuse jurors, but also can create the appearance of disorganization within the attorney-witness team. The attorney's plan was first to educate the jury about laws and requirements for staffing of the tower, then educate them about the experience level of the controller in charge during the incident, and then describe how required breaks affect staffing later on in the questioning. However, the witness deviated from the plan and introduced this information immediately. This is an emotional error on behalf of the witness, as high levels of witness motivation can result in decreased patience and poise.

Therefore, it is critical for both the witness and defense attorney to undergo juror cognitive training to gain a better understanding of the capabilities and limitations of the juror brain, and how to formulate questions and answers properly to enhance juror comprehension.

Some witnesses, particularly named defendants, think they must win the case themselves, and therefore tend to try too hard. To prevent this damaging error at trial, witnesses require emotional-control training from a qualified litigation consultant to ensure they stay on course throughout their examination. Witnesses need to understand that the attorney must be in the driver's seat and guide them down the correct path, as an attorney's carefully developed strategy wins cases, not wit-

nesses. Additionally, witnesses must also understand jurors' cognitive needs, and develop the motivation to improve juror comprehension, rather than fulfilling their own emotional needs during rehabilitation testimony.

Error #3: Failure to Use the Primacy Effect

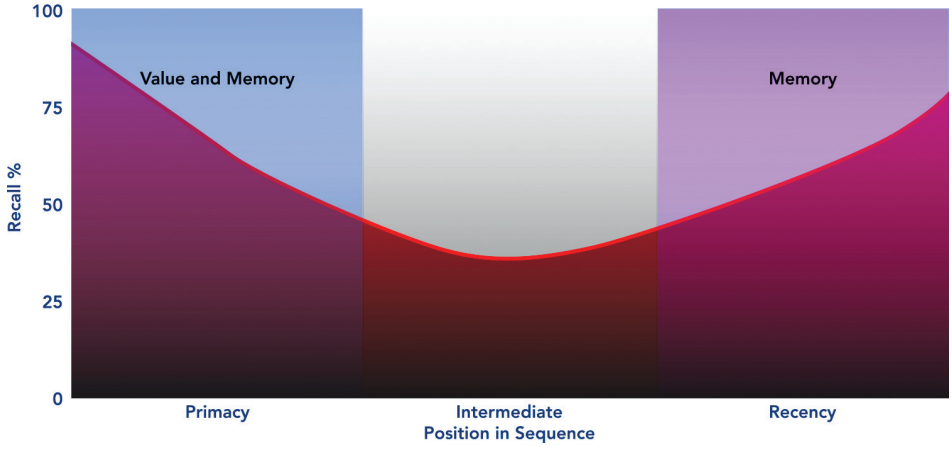
The first three minutes of a witness' testimony is more valuable to jurors than testimony that is delivered toward the middle and end of the examination. This important neuropsychological timing effect is precisely why attorneys should not start their witness rehabilitation by covering the witness's education and work history, as that information is better placed in the middle or end of the testimony. Rather, the most effective way to examine a witness during rehabilitation questioning is to start with questions that go right to the heart of the case, as jurors will value that information more than subsequent information. This is known as the primacy effect, meaning jurors perceive information presented early in an examination as more valuable and meaningful than information presented in the middle or at the end. This is a very powerful neurocognitive tool that few defense attorneys utilize because they erroneously assume that primacy and recency effects are similar. While recent information tends to be better remembered by jurors, it is certainly not valued similarly as the juror brain places great significance on early information (vs. later information). As shown in Figure 2, the recency effect only impacts juror memory recall, while the primacy effect improves both memory and meaningfulness of the information. Kanasky, Jr. B., "The Primacy and Recency effects: The Secret Weapons of Opening Statements," Trial Advocate Quarterly, Summer 2014.

For example, in medical malpractice cases, defense attorneys usually ask the following question at the end of the rehabilitation testimony: "Doctor, was your care of Mr. Smith appropriate and reasonable in this case?" Of course, the physician delivers a firm, confident "YES" to the jury. Most defense attorneys do this because they want to end on a high note, assuming that placing this important information at the end will have a powerful influence on jury decision-making. However, this is not the best strategic approach, as this question is THE pivotal question in the case. Instead, this question should be the very first question out of the gate, with a few follow up questions allowing the witness to explain why the care provided to Mr. Smith was reasonable and within the standard of care. That is what the jury wants and needs immediately, rather than later in the examination. This is especially true in a reptile case, as jurors are starving for explanations after a well-trained witness shuts down multiple reptilian attacks on adverse examination. Defense attorneys often state "I want the jurors to get to know my witness, so I start with the biographical questions; I want to 'wow them' with my client's impressive education and training." In reality, jurors don't care where the witness went to school or what honors they have attained. Jurors' primary concern is about the defendant's conduct and decision making, and asking those key questions immediately in the rehabilitation phase takes full advantage of the primacy effect. Kanasky, Jr. B., "The Primacy and Recency Effects: The Secret Weapons of Opening Statements," Trial Advocate Quarterly, Summer 2014.

Reptilian questioning, characterized by leading, closed-ended questions focusing on safety and danger rules, allows for very little explanation, if any, from the witness. In that circumstance, jurors are craving explanations regarding the defendant's conduct and decisions once the defense attorney approaches the podium to begin rehabilitation efforts. For example, in a lawsuit alleging negligence of a bus driver who was driving in the far left lane of a major highway at the time of the accident, the reptile attorney may spend considerable time asking the bus driver questions about whether it is safer to drive in the far left lane with higher speed traffic or the far right lane with slower traffic. If the witness answers by stating that it depends on the situation, he is unlikely to get the opportunity to explain his statement further. Thus, it would be up to the defense attorney to ask very early in rehabilitation, "Can you tell the jury why it was reasonable for you to be driving in the far left lane at the time of this accident?" By giving jurors what they desire immediately, the defense team can considerably increase the meaningfulness and influence of the defendant's most important testimony.

Figure 2

Primacy Effect in Witness Rehabilitation



Conclusion

Reptile plaintiff attorneys have been increasing the stakes in litigation by boldly requesting extremely high damage numbers and successfully convincing jurors that a high verdict is necessary, not to make the plaintiff whole, but to ensure the safety of the community. Ball, D. and Keenan, D. Reptile: The 2009 Manual of the Plaintiff's Revolution, 2009. Defense counsel preparing to combat a reptile plaintiff attorney who is requesting tens of millions of dollars must make the client aware of the increased risk and take the necessary steps to mitigate that risk. The best way to mitigate the risk is to prepare all witnesses fully prior to testimony, as this must be at the core of

the defense team's effort when large damages are on the line.

The need for advanced, scientifically based preparation of defendant witnesses is especially profound as reptile attorneys have been placing significantly greater attention on the defendant throughout trial. Rather than attempting to evoke sympathy from jurors by emphasizing the injuries of the plaintiff, reptile attorneys strive to anger and motivate jurors by centering the case on the actions and decisions of the defendant. *See* Kanasky, Jr. B., "Debunking and Redefining the Plaintiff Reptile Theory," For The Defense, April 2014. With the plaintiff's focus of the case on the defendant, the defendant's testimony, while it has always been of great importance to jurors, is even more critical during a trial against a reptile attorney. Thus, rigorous preparation of the defendant's testimony, both on adverse examination and rehabilitation is imperative to a successful defense in the reptile era.

Some attorneys who prefer not to prepare their witnesses vigorously for rehabilitation questioning often state that they want to avoid the witness appearing "coached" while on the stand. Some trial attorneys tend to forget what it was like to have never stepped into a courtroom. Most witnesses do not have the litigation experience or the skill of thinking on their feet, like a trial attorney. Thus, nerves and emotion can take over and cause the witness to make numerous mistakes. If witness training is performed appropriately, with the same vigor and attention as adverse examination, the witness will not appear "coached," but rather "confident."

From the jurors' perspective, rehabilitation of a defendant witness is arguably the most important part of a trial, as the party being accused of negligence or causing harm has the opportunity to explain their conduct and decisions. However, the three errors of juror cognitive saturation, emotional volunteering of information, and failure to use the primacy effect can significantly impair juror comprehension of key case issues, as well as negatively impact jurors' perception of the defense team. To prevent these problems, and to enhance the quality of rehabilitation questions and responses, it is imperative that defense attorneys take a step back and reevaluate their trial preparation plans. In the short term, it is wise to retain a qualified litigation consultant to evaluate witness responses to promote juror cognitive digestion, as well as assess the attorney's order of questioning to ensure proper use of the primacy effect. A qualified consultant should have advanced training in the areas of cognition, memory, attention and concentration, communication science, and emotion. In the long term, attorneys should receive training in these areas by attending CLE's from litigation consultants who have expertise in the neurocognition behind jury decision-making.

The "Reverse Reptile"

Turning the Tables on Plaintiff's Counsel

By Paul Motz,
Bill Kanasky Jr.,
and Melissa Loberg

If it is played correctly, defense counsel can lock a plaintiff, a co-defendant, or their experts into unfavorable testimony that will appear hypocritical to any audience.

Q. You would agree that safety must be the company's top priority?
A. Yes.
Q. Because safety is your company's top priority, employees who are being unsafe cannot be tolerated?
A. Of course, yes.
Q. If you are unsafe and someone is hurt, then the company is to blame?
A. Yes.



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Sleep eludes the defense lawyer with an impending trial and a key witness who has fallen victim to the reptile safety rule attack in deposition. The damage is now done and the defense counsel faces an uphill battle in front of any jury. The call to the client after a deposition in which a defendant is "reptiled" usually ends the same way: "I get how simple this is for the plaintiffs. In fact, I am sick of hearing about it. Is there anything that we can use to fight back?"

The answer is a resounding "Yes!" It is called the "reverse reptile." If played correctly, defense counsel can lock a plaintiff, a co-defendant, or their experts into unfavorable testimony that will appear hypocritical to any audience. Such damaging testimony can torpedo a plaintiff attorney's efforts early in a case, and the defense can acquire significant bargaining leverage (assuming that defense witnesses perform well themselves).

The purpose of this article is to provide an outline of the techniques and the skills required for defense counsel to complete a successful reverse reptile attack on plaintiff or co-defendant witnesses. More specifically, the authors of this article will (1) describe the types of cases appropriate for the reverse reptile strategy, (2) provide a tutorial on how to develop effective safety rule questions and when to use them, and (3) explain witnesses' psychological responses to safety rule questions and how to take advantage of witnesses' unconscious cognitive errors.

What makes the reptile approach so damaging is how simple and straightforward it is. A plaintiff's attorney can use it to "define" the critical jury instruction terms that will determine if a case is won or lost. A safety rule violation is a concept that a plaintiff-leaning juror can latch on to and use to sway the defense-leaning jurors during deliberations, even in the most clear-cut cases that favor the defense. Plaintiff-leaning jurors who are convinced that a company has violated safety rules and therefore has created a danger to the community feel empowered to award high damages against the corporation as a means of protecting the community from harm. Importantly, the opposite is also true: the defense can also show that a plaintiff or a co-defendant has violated a safety rule. Defense-leaning jurors who are convinced of safety rule violations committed by a plaintiff or by a co-defendant will have the ammunition that they need to argue against the most strident of plaintiff-leaning jurors.

When to Deploy the Reverse Reptile

The reverse reptile strategy typically requires a matter with comparative fault. The strategy can be deployed when the facts allow you to place the majority of the blame on a plaintiff, a co-defendant, or an empty chair. This is not to say that it cannot be effectively used in matters of contentious litigation. The strategy lends itself well to cases such as medical malpractice, product liability, trucking, premises, and construction matters. The safety rule violations of a plaintiff, a co-defendant, or an empty chair often involve one of the following:

- Non-compliance with medical instructions,
- Misuse of a product,
- Reckless or careless behavior or decision making, or
- Non-adherence to company policies or procedures.

In other situations, reverse "reptiling" a plaintiff, the plaintiff's family, or the plaintiff's expert could be very unwise. This is not a strategy that can be used effectively against a plaintiff who has little to no fault in a case. Additionally, the defense should avoid using the reverse reptile strategy against a plaintiff in matters involving

- Injuries or death from known surgical complications,
- Birth injuries, or
- Injuries to children or adolescents.

Development and Sequencing of Safety Rule Questions

Whether used by plaintiff or defense counsel, an effective reptile attack requires painstaking effort both to construct and order the questions in a manner that fully capitalizes on the natural biases and flaws of the witness's brain (Kanasky 2014, Derail). Plaintiff attorneys spend thousands of dollars for advanced training to learn these skills in an effort to outmaneuver defense counsel who have not undergone such training.

To accomplish a successful reverse reptile attack, defense counsel needs to begin by asking a plaintiff, co-defendant, or plaintiff experts a series of general safety or danger rule questions. However, while blanket safety rules are important (*e.g.*, "Safety is your number one priority, right?"), to use the reverse reptile technique effectively, case-specific rules must be created that tie into the overarching comparative fault theme.

Safe workers must do X, Y, and Z, and coincidentally, the plaintiff (or the co-defendant) violated X, Y, and Z on the day of the incident. Establish with the witness what safety means, establish which hazards exist and then use the simple, straightforward rules to show how the plaintiff (or the co-defendant) was not safe and how they ignored the hazard.

As the sequence of questioning proceeds several things will happen.

- The target witness will instinctually agree to the safety or danger rule questions because agreeing supports the witness' highly reinforced belief that safety is always paramount and that danger should always be avoided.

- The target witness will continue to agree to additional safety or danger rule questions that link safety or danger to specific conduct, because agreeing aligns with the previous agreement to the general safety or danger rules.
- The target witness will unknowingly and inadvertently entrench him- or herself deeply into an absolute, inflexible stance that omits circumstances.
- Defense counsel then can present case facts to the target witness that will create internal discomfort because these facts will not align with the previous safety or danger rule agreements.
- Defense counsel then illuminates that the safety or danger rules, which have been repeatedly agreed to under oath, have been violated and that harm has been done as a result.
- The target witness then will regrettably admit to culpability and fault, because the perception of hypocrisy has been deeply instilled.
- The target witness further will admit that if the plaintiff (or the co-defendant) would have followed the safety or danger rules, the injuries would certainly have been prevented.

Table 1. Reverse "Reptiling" of Co-Defendant's (Crane Operator's) Expert

QUESTION TYPE	QUESTION	RESPONSE	PSYCHOLOGICAL WEAPON
General Safety Question	You would agree that a safe crane operator is a careful crane operator?	Yes.	Confirmation Bias of Cognitive Schema
Specific Safety Question	And that safe crane operators are aware at all times while they are operating the crane?	Yes.	Anchoring Bias to General Safety Agreement
General Safety Question	And you would agree that a safe crane operator is a trained and qualified crane operator?	Yes.	Confirmation Bias of Cognitive Schema
Specific Safety Question	You would agree that a safe crane operator develops a safe lift plan?	Yes	Anchoring Bias to General Safety Agreement
Specific Safety Question	And a safe lift plan will take the individual load configuration into account before beginning the lift?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	Would you agree that a safe crane operator knows what he is lifting before he lifts it?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	And he knows what the load is before he lifts it?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	Would you agree that a safe crane operator inspects the load before beginning a lift?	Yes.	Anchoring Bias to General Safety Agreement
Specific Safety Question	Do you believe that part of the inspection is visualizing the load before and during the actual lift to make sure it stays balanced?	Yes.	Anchoring Bias to General Safety Agreement
Case Fact Question	Mr. Smith was not trained to inspect the subject load prior to unloading, correct?	I don't believe he was.	Cognitive Dissonance
Case Fact Question	Mr. Smith did not know what was on the load prior to unloading, correct?	Correct.	Cognitive Dissonance
Hypocrisy Question (Causation)	Mr. Jones never gets hurt if Mr. Smith takes his time?	Yes.	Regretful Agreement

The four devastating psychological weapons that cause the sequence above are known as the confirmation bias, the anchoring bias, cognitive dissonance, and the hypocrisy paradigm. (See Kanasky, 2014 for a more detailed description of each psychological tactic.) The average witness stands no chance against these potent psychological weapons when they are used effectively.

Importantly, when developing questions to lead a witness into admissions that safety rules have been broken, the sequence of the questions is key. As shown in Table 1, general safety or danger rule questions are asked first to take advantage of a witness's cognitive schema regarding safety. The general rules are followed by more specific safety or danger rules, then case facts, and finally, questions about fault or causation. When using the reverse reptile strategy, asking multiple general safety or danger rules may not be as useful because they could potentially apply to your client as well. Thus, the majority of rules developed often need to be specific safety or danger rules.

For example, Table 1, presents testimony from a reverse reptile tactic deposition of a co-defendant's expert. The matter involved an injury that occurred during the unloading of a truck. The injured plaintiff was the truck driver, who participated in both the loading and the unloading of the truck. Two co-defendants, the crane operator who loaded the truck, and the crane operator who unloaded the truck, were pointing fingers at each other and the plaintiff. The defense attorney using the reverse reptile strategy represented the individual who loaded the truck.

The safety rulebook developed by the defense attorney using the reverse reptile tactic established the many levels of fault that the unloading crane operator co-defendant had while supporting the actions taken by the loading crane operator co-defendant. As shown in Table 1, general safety rule questions set the stage for the multiple, specific safety rule questions that followed. The expert agreed to each of these specific rules and then became uncomfortable when forced to admit that the specific rules were

broken by the crane operator unloading the truck in this case. Finally, the expert regretfully agreed that the injury would not have occurred had the crane operator unloading the truck followed the safety rules.

The actual testimony is shown below in bold. Additional questions were asked between some of the questions presented, but the sequence of the questions has not been changed. Each question type is identified as is the corresponding psychological weapon.

Ultimately, in this case, the reverse reptile strategy was used against the co-defendant's expert to such effect that a motion in limine was filed attempting to bar the questions asked. The motion was denied, and then, at trial, the expert was withdrawn, due to the detrimental nature of his admissions.

Getting Clean Deposition Answers

As shown above, the majority of the expert's responses were "Yes"; he agreed unequivocally with the safety rule after the safety rule was posed by defense counsel. To be effective, just as when a plaintiff's counsel uses the tactic, the questions must be in plain language, simple, easy to understand, and elicit a correspondingly simple answer such as "Yes," "I agree," or "True." If you cannot get these clean answers on the first try, you must be willing to ask the question again (and again, if necessary).

Too often defense depositions are fishing expeditions in banal minutiae that fail to set up the key cross-examination issues during trial. A trial lawyer may get the general gist of a helpful admission, but making sure that the witness is unable to wriggle out of it is another thing entirely. Put another way, the deposing attorney never stops to think how he or she will secure the key admission that the attorney can use to beat the witness over the head with at trial. In depositions such as these, the key testimony often is surrounded by qualification and surplus words that decrease the strength of the would-be impeachment.

An example of a buried admission from an expert's deposition testimony follows:

Q. Do you agree that Mr. Smith was not properly trained to operate the crane on the day of the accident?

A. He knew how to operate the crane, yes. He was taught how to operate the crane, did he miss some steps, did he do some things wrong? Sure.

While the witness gives a little credence to the question, the witness still gets in enough qualification that setting up the impeachment at trial will be more difficult than it needs to be. This cannot be the way that the defense deploys the reverse reptile strategy. You need clean, clear, and simple admissions that will allow brutal cross-examinations. That means that when there is a buried admission, the deposing lawyer must follow up immediately by asking, "You agree that Mr. Smith got some major things wrong?," to which the witness will reply, "Yes."

This is how a deposing lawyer must approach depositions to use the reverse reptile strategy properly. Unfortunately, too many attorneys do not envision how the key questions will play at trial. To use the reverse reptile strategy, (or simply to take an effective deposition), the questioner must work to achieve simple and clean admissions.

Covert Versus Overt Questioning: Letting the Reptile Loose

There is no concrete methodology regarding when to start establishing the safety rulebook with a fact witness or an opposing expert. It should go without saying that the experience and preparedness of the witness must be factored into the strategy. With fact witnesses, safety rule questioning pairs well with inquiries about personal knowledge, experience, and training, as in the following example:

Q. You worked for Smith construction from 1995–2006? *Yes.*

Q. Smith Construction trained you before and during your employment? *Yes.*

Q. Because of your training, you know that safety must be your top priority? *Of course.*

Q. You would agree that if you are not being safe, then you are not doing your job properly? *True.*

Q. Doing your job you never want to needlessly endanger yourself or those working around you? *Yes.*

If the witness is an expert, you can ask these questions during the background, going through prior testimony or attempting to establish the safety rules through the facts of the case. This last method can be the most difficult because an experienced expert will likely be able to identify your strategy after two or three rules.

Case Studies

The research and testing of the reverse reptile strategy is ongoing. So far, the strategy has provided the defense with a better bargaining position. This strategy costs nothing, and it can only aid in the trial preparation process. Below are examples from different types of litigation showing how a defense attorney can adopt a plaintiff attorney tactic to elicit testimony that better positions a case for resolution or trial.

Construction Worksite

The first example is from a premises liability action in which a tradesman fell and suffered severe injuries. In this case, the plaintiff was carrying an excessive amount of material down a ramp. He lost his balance and fell, resulting in injuries that were claimed to have prevented him from continuing to work as a tradesman. The defense focused on the plaintiff's training, knowledge of falls, the employer's and worksite safety plans, and the safety devices available to the plaintiff. The case, venued in a worker-friendly jurisdiction, settled on the eve of trial for an employer-friendly amount.

The defense attorney established the safety rules during questioning regarding the plaintiff's expert's prior testimony history. The questioner used each case in which the expert had been previously retained to establish several safety rules. The rules were then applied to the facts of this case to conclusively show how the plaintiff was contributorily negligent.

The following is from the plaintiff's worksite safety expert's deposition:

Q. And would you agree that a tradesman must never needlessly endanger himself or his coworkers while he's doing his task?

A. Right, never needlessly endanger himself.

Q. And he should never needlessly endanger his coworkers?

A. [H]e should avoid endangering anybody, yes.

***

Q. You would agree that the plaintiff on this job site had a duty to inspect his work area for potential hazards?

A. Yes.
Q. You would agree that if you are aware of a hazard and you encounter it, you're exposing yourself to danger?
A. Somewhat, yes. Sure.
Q. You'd agree that the more dangerous the task is, the more careful the tradesman must be?
A. Yes.
Q. And the tradesman must pay attention to the area that he's working in and around?
A. I agree.
***
Q. And you agree a tradesman should never knowingly put himself in a dangerous situation?
A. I agree, although, he does have a job to do and he has to get his work done.
Q. You can't put the job over your well-being. Do you agree with that?
A. I mean, he knew it was wet. I don't know that he knew he was going to get injured.
Q. He knew he could slip, though?
A. He knew it was a possibility. He'd seen slips, and there were complaints that people were slipping.
Q. And he knowingly decided to continue to work in that condition?
A. Yes.

Each safety rule speaks to the actions of the plaintiff in light of the defendant's case against him. Had this matter not settled, a trial demonstrative with rule after rule that the plaintiff violated would have been used from opening through closing. This approach also allows the defense to "co-opt" the plaintiff's expert, which can neutralize the effect of the expert's testimony.

Transportation

Plaintiff attorneys in trucking commonly use the reptile theory, and the same can be true for the defense application of it. In the following example, the safety rules were adopted to attack a plaintiff whose vehicle collided with a disabled truck at night. The defense focused on the actions of the plaintiff driver and his awareness of his surroundings. The reptile rules establishing what a "safe" driver would do were successful when paired with the accident reconstructionist's testimony; taken together they showed that the plaintiff was legally responsible for his own injuries.

Q. Would you consider that darkness is a hazard for a driver?
A. Sure.
Q. And a driver needs to be more careful when they're driving in the dark?
A. The driver needs to slow down because he can't see. Typically, if he's running too fast, he can't see far enough in his headlights.
Q. Does a safe driver want to overdrive his headlights?
A. No. We see it happen on a regular basis, but, no, you shouldn't.
***
Q. When driving at night, the driver needs to be most aware of the space that he's driving into at night?
A. Sure.
Q. You'd agree that, as a rule, a driver must be aware at all times?
A. Yes.
Q. Okay. And you'd agree with me that, again, that a safe driver is going to stop within the area that is illuminated by his headlights?
A. I would agree that he should, yes.
Q. You'd agree a safe driver must keep his vehicle under control at all times?
A. He should, yes.
***
Q. And you would agree that safety is important in preventing accidents?
A. Yes.
Q. And people should be aware of their surroundings?
A. Yes. We've covered that.
Q. Going too fast for conditions, that's a hazard?
A. Yes.
Q. Construction zones can be a hazard?
A. Yes.
Q. Darkness is a hazard?
A. Certainly.

These questions show that a safe driver needs to be aware at all times (the plaintiff in this case was not); a safe driver must be able to stop in the area illuminated by the headlights (the plaintiff in this case did not); and a safe driver must keep his or her vehicle under control at all times (the plaintiff here did not). The questions also established the "hazards" that the plaintiff ignored, which violate the safety rules: (1) the darkness, (2) going too fast, and (3) the surroundings. All of these will enhance the closing arguments when a defense lawyer requests that a jury send the plaintiff out the door with nothing.

Conclusion

As illustrated in the examples provided above, the reverse reptile tactic can be an effective tool to use to support the comparative fault of a plaintiff, a co-defendant, or a non-party. The safety rules applicable to a plaintiff's own actions can also be applied to the plaintiff's contributory fault. Thus, the additional time spent planning and preparing deposition questions is minimal compared with the advantage that it can provide the defense.

Importantly, though, relying on the reverse reptile strategy in deposing a plaintiff (or a co-defendant) witness alone will not be sufficient to combat a plaintiff attorney skilled in the reptile strategy. Safety rule questioning is one tool among many in a multi-pronged approach to a strong defense. The defense attorney will also need to (1) ensure that his or her own witnesses are able to withstand safety rule questioning cognitively and emotionally during depositions and at trial (see Kanasky, 2014, and Kanasky *et al.*, 2018); (2) carefully plan voir dire questioning as well as opening and closing statements to reduce the effect of the plaintiff attorney's "rules" and emphasize those supporting the defense; and (3) file motions in limine as appropriate. This proactive and cumulative approach gives the defense added ammunition when fighting questionable liability claims and allows the defense to argue that personal responsibility still matters. Ultimately, the use of the reverse reptile strategy provides defense attorneys with greater leverage in defending, resolving, and trying cases.

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JUST WHEN YOU THOUGHT YOU'D SEEN IT ALL … NAVIGATING BAD FAITH RISKS

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JUST WHEN YOU THOUGHT YOU'D SEEN IT ALL …

NAVIGATING BAD FAITH RISKS

I. INTRODUCTION

Modern lawsuits involving the concept of bad faith have been around since the early 1970s, when the California Supreme Court decided, in Gruenberg v. Aetna Inc. Co., 9 Cal.3d 566, 510 P.2d 1032 (1973), that insurance companies owed a tort duty of good faith and fair dealing to their insureds. This underlying premise allows insureds to sue their carriers if they believe their claims have not been properly handled by their insurance company. This basic concept premise has expanded over the years beyond an intentional failure to pay a claim to now include failing to properly settle a claim, inadequate investigations, and even negligent claims handling. Given this broad range of actions that could conceivably form the basis of a bad faith lawsuit, carriers should be keenly aware of the following, non-exclusive, list of bad faith issues:

1. Statutorily created causes of action;
2. The time periods for responding to different types of claims;
3. The Unfair Claims Practices Act of the states in which policies are issued;
4. How settlement offers are to be handled and assessed;
5. What carriers can do when confronted with high demands but not much supporting data; and
6. The need to document every action or conversation involved in the claim.

This paper will provide an overview of the background of bad faith claims, the current trends we see for such claims and how companies can minimize their exposure to such actions.

II. WHAT IS BAD FAITH?

In most states a bad faith cause of action is viewed as an independent tort, which can be filed simultaneously by a policyholder with a separate breach of contract claim against a carrier. In Idaho, the Supreme Court has described such a claim as follows:

> [T]he tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of a duty imposed as a consequence of the relationship established by contract.

See, e.g., ***White v. Unigard Mut. Ins. Co.***, 112 Idaho 94, 97, 730 P.2d 1014, 1017 (1986).

As noted above, the underlying premise of bad faith arises from the duty of good faith and fair dealing implied in every contract:

> The implied covenant is breached, whether the carrier pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance.

Rawlings v. Apodaca, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986).

Some states have held that it arises because of a fiduciary duty owed by the insurer to its insured. (e.g., ***Shobe v. Kelly***, 279 S.W.3d 203, 209 (Mo. Ct. App. 2009) ("An insurer under a liability policy has a fiduciary duty to its insured to evaluate and negotiate third-party claims in good faith.").

The advantage to a policyholder and the corresponding exposure to a carrier is that, while a breach of contract claim does not typically result in the imposition of punitive or exemplary damages, such awards are allowed in tort claims for bad faith.

III. GENERAL TYPES OF BAD FAITH CLAIMS

A. FIRST PARTY BODILY INJURY AND PROPERTY DAMAGE CLAIMS

The most typical bad faith action we have seen involves an insured submitting a first party claim for either property damage or bodily injury. The latter claim usually arises out of an accident involving an uninsured/underinsured (UM/UIM) motorist. Many states impose statutory deadlines for a carrier to respond to such UM/UIM claims and, as is discussed later in this paper, insureds' counsel can be quite skilled in manipulating that process to the detriment of a carrier. In addition, plaintiffs' counsel often utilize a state's Unfair Claim Settlement Practices Act (Idaho Code §41-1329) to support a bad faith claim, even when there is no direct cause of action under such a statute. Instead, courts have recognized Unfair Claim Settlement Practices Acts as the standards of care which insurance companies must meet, and a company which delays responding to a first-party claim faces exposure to some of the following prohibited acts:

> (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
>
> (4) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

> (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
>
> (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
>
> (7) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;
>
> …

Idaho Code § 41-1329.

B. FIRST PARTY CLAIMS – FAILURE TO SETTLE A THIRD PARTY CLAIM WITHIN POLICY LIMITS

Traditionally, many jurisdictions followed the rule that a company was responsible for an excess verdict, when it had failed to take advantage of an opportunity to settle a third party claim against its insured, within policy limits. The elements of such a cause of action involve an insurer which (1) had the opportunity to settle within policy limits, (2) acted in bad faith through its refusal to do so, and (3) such failure caused damage to the insured. ***Shobe v. Kelly***, 279 S.W.3d 203, 209–10 (Mo. Ct. App. 2009).

However, some states have taken a more deliberative and balanced view of this issue. In Idaho, for example, the question of whether an insurer acted in bad faith is resolved using the "equality of consideration" test, which gauges whether the insurer gave "equal consideration" to the interests of its insured in deciding whether to accept an offer of settlement. ***Truck Ins. Exch. v. Bishara***, 128 Idaho 550, 554, 916 P.2d 1275, 1279 (1996).

Some of the interests which the courts are required to review in such a situation include:

> the strength of the injured claimant's case on the issues of liability and damages; attempts by the insurer to induce the insured to contribute to a settlement; failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; the insurer's rejection of advice of its own attorney or agent; failure of the insurer to inform the insured of a compromise offer; the amount of financial risk to which each party is exposed in the event of a refusal to settle; the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to

the facts; and any other factors tending to establish or negate bad faith on the part of the insurer.

Truck Ins. Exch. v. Bishara, 128 Idaho 550, 554, 916 P.2d 1275, 1279 (1996).

C. TRUE THIRD PARTY CLAIMS BY NON-INSUREDS

While such claims are generally not allowed by most jurisdictions, there are a few exceptions:

(1) Example: Montana allows third parties to file suit against an insurer under its unfair claim settlement practices statutes (*see* Mont. Code Ann. § 33-18-242 (West)).

(2) Example: Florida allows a third-party to bring a cause of action against an insurer where an excess verdict was obtained against the insured (*see* ***Perera v. U.S. Fid. & Guar. Co.***, 35 So. 3d 893, 899 (Fla. 2010).

(3) Example: In Florida, an excess carrier may bring a bad-faith claim against a primary insurer by virtue of equitable subrogation under certain circumstances where the primary insurer has not acted in good faith. (*see* ***Perera v. U.S. Fid. & Guar. Co.***, 35 So. 3d 893, 900 (Fla. 2010)).

IV. DEFENSES TO BAD FAITH CLAIMS

Most jurisdictions have established case law setting forth the various requirements that a bad faith claimant must prove in order to prevail on such a claim. In Idaho, for example, the Supreme Court has ruled that the burden is on the plaintiff to show the following: "(1) the insurer intentionally and unreasonably denied or withheld payment; (2) the claim was not fairly debatable; (3) the denial or failure to pay was not the result of a good faith mistake; and (4) the resulting harm is not fully compensable by contract damages." ***Harmon v. State Farm Mut. Auto. Ins. Co.***, 162 Idaho 94, 394 P.3d 796 (2017).

In addition, bad faith causes of action are not recognized in all states. *See, e.g.*, ***Duncan v. Andrew Cty. Mut. Ins. Co.***, 665 S.W.2d 13, 20 (Mo. Ct. App. 1983) (rejecting first party bad faith because adversarial nature of relationship and state law preemption); ***Farris v. U. S. Fid. & Guar. Co.***, 284 Or. 453, 460, 587 P.2d 1015, 1019 (1978) (holding that that there was no tort of bad faith for denial of insurance coverage because of the lack of fiduciary duty between the insurer and the insured). *But see* ***Ivanov v. Farmers Ins. Co. of Oregon***, 344 Or. 421, 430, 185 P.3d 417, 421 (2008) (explaining contractual duty of good faith and fair dealing owed by insurers).

V. EMERGING BAD FAITH TRENDS

Befitting the title of this paper is the recent case of ***Mosley by & Through Weaver v. Progressive Am. Ins. Co.***, No. 14-CV-62850, 2018 WL 6171417 (S.D. Fla. Nov. 25, 2018). This case involved a bad faith claim against an insurer for failing to notify its insured of the possibility

of an excess judgment. Liability coverage was only $10,000, but the judgment recovered was $22,663,058. The facts showed that the plaintiff was willing to settle for policy limits if the insured completed a financial affidavit within 14 days showing that the insured did not have any other collectible insurance. The company sent a copy of the financial affidavit to the insured, and an adjuster discussed it with him over the telephone, but the insured did not complete the affidavit. The insured later claimed that the importance of the affidavit had not been explained to him; specifically, that he had not been told of the consequences of not signing the document .

In rejecting the company's motion for summary judgment, the court was critical of the fact that the company had not sent any letters to insured discussing the important of the affidavit, or notifying him of the deadline to complete the affidavit.

Another interesting example of the lengths to which some insureds' counsel would go to try and create a bad faith claim is the case of ***Parks v. Safeco Ins. Co. of Illinois***, 160 Idaho 556, 376 P.3d 760 (2016). There, the insureds' house was destroyed in fire. The policy provided replacement coverage, including the lessor of the amount necessary to purchase a different house or to rebuild the destroyed structure. Although the insureds were presented with a rebuild estimate, they delayed deciding whether they wanted to rebuild the house or purchase a different house. Eventually they purchased a different house for substantially less than the estimated cost to rebuild their house, but claimed that they were owed the full amount of the rebuild estimate. Their arguments were two-fold: first, that the Company had to promptly pay them for their loss, and so it should have paid the rebuild estimate instead of waiting for the insureds to decide; and, second, that the policy required the Company to reimburse them for the loss they "incurred." The court rejected their claims because the policy only afforded the least of several types of recovery, which in this case was the cost to replace the house by purchasing a different home.

Finally, ***Weinstein v. Prudential Prop. & Cas. Ins. Co.***, 149 Idaho 299, 233 P.3d 1221 (2010), is an example of how resourceful counsel for some insureds actually identified a weakness in the manner in which UM/UIM claims had been traditionally handled. In that case, the insureds' minor daughter was injured in an automobile accident by an uninsured driver. Although the company paid benefits under its medical payment provisions, the company followed the standard industry practice (at that time) of not paying any further benefits under the UM coverage until it had fully evaluated all aspects of the claim, and, only then, would it issue a single payment.

Unfortunately for the company, it relied on the insureds' attorney to collect medical records, which took a considerable amount of time. In the meantime, once the medical payments coverage was exhausted, the insureds had medical bills continue to accrue, some of which resulted in liens being filed or turned over to collections. The insureds claimed that this damaged their credit rating and caused them emotional distress. In addition, although the company's med pay department had collected some of the medical records that could have been used by the UM department, the departments did not share information. The insureds received multiple requests from both the med pay and UM departments to complete medical record authorizations, although

the UM department never actually used the authorizations. In addition, one of the hospital bills had been approved for payment and a partial payment was issued by the med pay department (which exhausted med pay limits), but the UM department would not pay the remainder of the bill until after it had completed its evaluation.

The result was an award of damages, including punitive damages (which award was later significantly reduced by the trial court). The Idaho Supreme Court faulted the company on several grounds, including its practice of not making any payments until the claim was fully evaluated, noting that medical bills could have been paid as they were determined to be related to the accident. The Court also faulted the Company for delays in obtaining medical records, making multiple requests for authorizations to obtain medical records, and not regularly following up with the insureds' attorney.

VI. OTHER TACTICS USED BY INSUREDS AGAINST THEIR CARRIERS

1. Withholding or failing to provide adequate information to complete evaluation:
    i. Examples:
        a. Failure to provide key medical records or opinions to support a bodily injury claim; or failure to provide past medical records or execute an authorization to obtain medical records.
        b. Failure to provide information concerning set-offs or payments from collateral sources.
        c. Failure or delay in providing inventories, receipts or other requested information.
        d. Providing only partial information so that the Company has to make multiple requests for information.
        e. Not allowing or limiting access to inspect property.
2. Providing only portions of requested information—this can easily lead to the Company making what appears to be multiple requests for the same information.
3. Delaying on making decisions.
    i. Examples:
        a. Under a property policy, delaying the decision whether to replace or rebuild a structure.
        b. Under a property policy, delays in selecting or hiring contractors.

3. Time-limited demands.

    i. Time limits may be set by statute or provision in the policy.

    ii. Insured may set unreasonably short time to respond.

4. Making unreasonable demands.

    i. Examples:

        a. Excessive claims of non-economic losses.

        b. Claiming total loss to a structure that is not completely destroyed or to a vehicle that was only involved in a minor incident.

        c. Setting conditions that unreasonably restrict the company's ability to have the insured examined by a doctor, have property examined by experts, etc.

5. Making vague or ambiguous demands.

    i. Examples:

        a. Not setting out a specific dollar amount for non-economic damages.

        b. Not setting out specific claim for future medical expenses.

6. Engaging in communications to set up bad faith (e.g., don't engage in "negotiations" to resolve the claim as this can lead to the trap of the company waiting for a counter-offer and missing a deadline).

7. Stipulation not to execute/collusive settlement with third party.

8. Not mitigating damages; e.g., not paying bills that they believe should be paid by Company and allowing them to go into collection.

VII. WHAT DEFENSES AND COUNTERMEASURES ARE AVAILABLE TO AN INSURER?

1. Document everything.

2. Do not violate your state's Unfair Claim Settlement Practices Act, if it has one. This will likely provide the standard of care against which your actions will be judged.

3. Be aware of any deadlines imposed by state law or in the policy.

    i. If no specific deadline, you must act within a reasonable time.

4. Know what your policy does and does not cover.

5. Avoid any appearance of delay – set internal deadlines in advance of statutorily imposed dates.

6. Do not set deadlines not allowed by or related to state law or the policy terms.

7. Promptly send any requests for information to the insured and include the specific forms required by the Company, if any.

    i. Make sure to communicate to the Insured that you are unable to evaluate their claim without the information.

    ii. Follow up at regular intervals if the Insured has not responded to your requests.

    iii. Be careful of making duplicate requests if more than one claims handler/adjuster is assisting the insured (e.g., duplicate requests by a med pay adjuster and a UIM adjuster for records or requiring the insured to needlessly fill out multiple authorizations to obtain medical records).

8. Use medical record authorizations if you request such a document..

9. Request an examination under oath (EUO) of the insured sooner (i.e., within the allowed time period) rather than later to gather additional information.

10. Once an item or bill is undisputed, pay it promptly, even if other items or elements of the claim are still disputed.

11. If there are genuine disputes, take advantage of arbitration or appraisal provisions that may have been included in the policy.

12. Obtain authorizations to obtain medical records rather than relying on the Insured or his/her counsel to provide records.

13. Do not evaluate a claim to within a range of values, but fix a specific amount—offering the low end of range may be considered evidence of bad faith.

14. Make payment, not just an offer, of the amount justly due under the policy.

VIII. CONCLUSION

While even the best claims handling practices cannot stop an insured from filing a bad faith claim, establishing and then following common sense and well organized guidelines for responding to an insured's proof of loss, can certainly make bad faith claims more difficult to win.

ERODING LIMITS POLICIES:

EXPLANATION AND CONSIDERATIONS FOR CLAIMS HANDLING

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Eroding Limits Policies: Explanation and Considerations for Claims Handling By:
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I. What are Eroding or Cannibalizing Limits Policies

Eroding limits policies represent a fundamental shift in the nature of insurance purchased. Your own Errors and Omissions policy may include such a clause. Insurers commonly refer to these as "Defense Within Limits" policies, however, more descriptive labels include: "cannibalizing limits," "wasting limits," "burning limits," "reducing limits," "Pac-man," "self-consuming" and "self- liquidating" policies. The policies gained popularity in the 1980s and remain in use and common today.

Specifically, in 1986, the Insurance Services Office (ISO) proposed comprehensive general liability policies be offered on a "claims made" basis and include a "diminishing limits" clause. Under this clause claims expenses, including attorney fees incurred in defending a claim or lawsuit, reduce the limits of the policy otherwise available for indemnifying the insured. Around that time, the author, in an article published by the American Bar Association's Tort and Insurance Practice Section (TIPS),1 wrote:

> Because every defense dollar spent brings the insured closer to having his aggregate reduced, that inured would seem to have a clear financial interest in the costs of defense. Given [case law's] clear concern with the competing financial interests of insurer and insured, an argument can be made that, by applying defense costs so as to reduce an insured's available policy limits, insurance companies will completely forfeit the right to control the defense of that insured. . .This possibility is something which insurers should study carefully before blindly accepting the ISO defense cost provisions as a panacea for their legal expense dilemma. Adopting such provisions may cost them more in the short and long term than does any lawyer under the current system.[1]

During this same time period, diminishing limits policies were already being utilized in professional liability policies. The effort to expand their use into the CGL arena has not been as successful or well received as was likely anticipated by ISO, yet they are still frequently utilized to limit exposures of insurers in professional liability and other niche markets.

The issues raised and the conflicts created between insurers and insureds in the eroding limits arena brings with it concerns that a court, at any time, could interpret these policies and issue a ruling that would dramatically alter the landscape for how such policies are enforced. If, for instance, it were determined diminishing limits policies are against

[1] "Controlling the Defense: The Insurer's Hollow Crown" (1986). TIPS is now known as the Tort Trial and Insurance Practice Section

public policy or create an inherent conflict of interest that cannot be waived, the potential consequences for insurers and for the attorneys retained by insurers to represent insureds would be far reaching and profound.

II. Eroding Limits Provisions & Public Policy

The "Hollow Crown" is not the only source to question whether policies with eroding limits create an inherent conflict of interest between insurer and insured and between insurer-retained defense counsel and insured. At least one commentator noted:

> There is an inherent conflict between the insured and the insurer in every case where payment of loss plus payment of defense costs could exceed the limits of liability, since every dollar spent on defense of the claim is a dollar that will not be available for settlement or satisfaction of judgment. This is no problem as long as the insured and insurer are fully agreed (and continue to agree) on the merits of settling versus defending including issues of timing and resources invested in the process.[2]

Courts have also addressed this same concern, some even going so far as to consider whether eroding limits policies might be against public policy altogether. The Supreme Court of Appeals of West Virginia considered the question. The decision was ultimately limited to policies issued pursuant to a statute specifically governing liability policies issued to municipalities.

In *Gibson v. Northfield Ins. Co.,* 219 W.Va. 40, 631 S.E.2d 598 (2005), the estate of someone killed by a city-owned vehicle brought a lawsuit against the insurer of the City after taking an assignment of the City's rights to coverage. The estate claimed that the insurance policy in question was void as against public policy to the extent that it held defense costs to be part of the limits of the policy. The court considered the provision in light of a governing statute and held it was contrary to the legislative intent. The court limited its ruling to policies of insurance issued to municipalities, stating:

> [O]n a more general note, we believe that the inclusion of a defense within limits provision in a governmental entity's insurance policy offends traditional notions of fairness. Governmental entities purchase liability insurance to protect their employees and to protect [public funds]. The quiet inclusion of a defense within limits provision into a governmental entity's liability policy subverts that intent by using the liability coverage to pay the insurance company's litigation expenses and attorney fees, rather than protecting the governmental entity and its employees and making injured third parties whole against their losses.

Despite the narrow scope of this particular decision, the court's analysis is not unique to

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[2] Munro, Defense within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies, 62 Mont.L.Rev. 131, 148 (2001).

municipal insureds and could easily be expanded to insureds under professional liability policies or even insureds generally.

In *Illinois Union Insurance Co. v. North County Ob-Gyn Medical Group,* S.D. California, 2010 U.S. Dist. Lexis 50095, at *6 (S.D. Cal. May 18, 2010), the court held policy language attempting to reduce coverage limits by defense expenses could not be enforced because the insured could not have known that its policy limits would be eroded by defense costs. There are, however, many policy provisions reducing coverage limits that have been upheld by various courts.[3]

One of the most instructive decisions on this issue came in the federal district court in *NIC Ins. Co. v. PFP Consulting, LLC*, CIV.A. 09-0877, 2010 WL 4181767 (E.D. Pa. Oct. 22, 2010), which held that the determination of whether an eroding limits clause in an insurance policy is against public policy is a matter better addressed and resolved by the Pennsylvania state courts and not the federal courts. Attorneys and insurers alike should remain cautious when making general and overly broad pronouncements about the enforceability of eroding limits in policies of insurance. Indeed, it appears a state specific analysis of the issue is required when examining the enforceability of these policies from a public policy standpoint.

III. Reservation of Rights Letters

Insurers should exercise extreme caution when communicating with their Insureds about the terms, conditions and effects of an eroding limits policy. As a lawsuit proceeds and coverage dollars erode, the timing of the reservation of rights letter is critical. In *Lexington Ins. Co. v. Swanson*, 2007 WL 1585099 (W.D.Wash. 2007), an insured sought to invalidate the insurer's coverage defenses based, in part, on the claim the insurer's control of the defense under an eroding limits policy created a conflict of interest. The argument presented was that a conflict arose because, while the insured would likely wish to settle the claim in order to avoid the potential excess and personal exposure, the insurer's interest would be to defend the lawsuit in order to avoid liability entirely, without having to face any exposure beyond its policy limits, thereby paying the same amount whether or not the settlement offer was accepted but saving money if settlement were rejected and the case successfully defended.

The district court agreed with argument and issues a ruling in favor of the moving party based on the fact that the insurer had controlled the defense of the litigation for nearly two years before issuing a reservation of rights. In the eyes of the court, this raised a

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[3] See, e.g., Continental Ins. Co. v. Bangerter, 37 Cal. App. 4th 69 (Cal. App. 1995); California Dairies, Inc. v. RSUI Indemnity Co., 2010 U.S. Dist. Lexis 64049 (E.D. Cal., June 25, 2010) (Loss means damages, settlements, judgments, and defense expenses); Weber v. Indemnity Insurance Co. of North America, 345 F. Supp. 2d 1139 (D. Haw. 2004) (Defense expenses include the attorney's fees, legal costs, and expenses spent to defend the underlying suit).

presumption that the insured was prejudiced. The insurer was therefore precluded from asserting contract defenses to coverage. The court did, however, note that this ruling applied to coverage defenses, not to the limits themselves. Consequently, the insurer was barred from litigating its defenses to coverage, but could still rely on the policy's spend-down provision to dispute the applicable policy limit without a timely reservation of rights.

While the *Swanson* court was willing to enforce the policy's maximum limits as written, insurers face two essential roadblocks when litigating eroding limits clauses. First, they must combat the argument that the clause violates public policy, is ambiguous or otherwise unenforceable. Second, they must address the claim that the insurer, because of its conduct in the face of conflicts of interest created by the eroding nature of its policy, is or should be estopped from contesting coverage in any manner. In the face of these threats, a third possibility, rejected by *Swanson* but easily imagined, is because of the conflict of interest and the conduct of the insurer, the insurer will remain liable for defense fees and expenses in addition to indemnity limits. This is particularly foreseeable where an insured claims that it should be entitled to extra- contractual damages due to a failure to settle and/or an excess verdict.

IV. Settlement Demands and Responses

Public policy leans heavily in favor of resolving cases through settlement. Courts routinely grant motions to approve settlement agreements in cases involving burning limits policies. Cases in which a settlement is threatened or an insured is confronted with personal exposure due to a refusal of an insurer to settle, present a significant incentive for a court to issue a broad ruling against the enforceability of eroding limits clauses generally. These cases would also severely restrict the control an eroding limits insurer may exercise in defending a lawsuit. Moreover, it is just these kinds of claims that make for tempting targets for extra-contractual claims and extra-contractual rulings. Thus, in a decision upholding the Depositors Economic Protection Corporation Act against an equal protection challenge, the Rhode Island Supreme Court noted the likely impact that "defense within limits" policies would have in the absence of settlement given the alternative would allow the policies to deplete by payment of attorney's fees and litigation expenses, thereby leaving no limits left to satisfy a judgment. *Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95 (1995).

A similar decision was reached in a case approving the settlement of a class action alleging fraud, where the court expressly considered the fact that the applicable insurance policy was "self-consuming" and, therefore, defense costs and expenses would continue to reduce the amount of coverage available to satisfy any judgment. *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314 (N.D. Ill. 1993). These issues are legitimately seen as real and not merely vague and horrible hypotheticals. Courts recognize that, when an insurer believes that a claim has little merit, it may wish to defend the claim through trial and, in doing so, the insured's coverage limits will be completely or significantly eroded. The courts further recognize that, in contrast, the insured will want its insurer to make a substantial and early offer to a claimant in order to obtain a dismissal and

protected them from an uninsured excess verdict liability.

In *Biomass One, L.P. v. Imperial Casualty & Indemnity Co*., 968 F.2d 1220 (9th Cir. 1992), an insurer paid $1.9 million in legal fees and costs defending a professional liability claim under a $2 million policy. In that case the court found the policy language of an eroding limits policy to be ambiguous and therefore the legal fees did not erode the available indemnity limits. The decision, however, would not appear to be a significant threat to well-written eroding limits policies. As the *Biomass One* court noted, the policy in question did not contain any single and unambiguous statement that the limits of coverage were subject to defense fees and expenses. The lesson of the decision is that any eroding limits policy must be carefully and precisely drafted to avoid any potential for ambiguity upon review.

IV. Defense Counsel Considerations

All defense lawyers representing insureds will remember that they represent and owe a duty of utmost loyalty to that insured. Accordingly, there are a number of challenges that defense counsel face when presented with an eroding limits policy.

For instance, while defense counsel cannot get involved in a coverage dispute with the insurer they must nevertheless remain attentive to the existence and implications of an eroding limits policy on the defense of their client. An eroding limits policy puts the burden on defense counsel to make certain they communicate early and often with the insured regarding specifically the cost of defense and the impact on the available insurance limits. These issues are readily apparent in cases involving policies where the insured has the right to consent to any settlement. Early and thorough communication should include developing a budget and comprehensive case evaluation at the onset.

Discovery disclosure issues also present unique challenges for defense counsel in the eroding policy limits arena. For example, when preparing answers to interrogatories and initial case disclosures pertaining to applicable insurance, defense counsel must determine how to handle disclosure of available insurance and the potential impact such a disclosure could have on the posturing of the defense.

Furthermore, defense counsel should be aware that governing rules of professional responsibility might require them to continue representing an insured even after the exhaustion of liability insurance limits. In most states, when an attorney seeks to terminate the representation of a client in litigation, that attorney may only do so after taking reasonable steps to avoid foreseeable prejudice to the client. Further, an attorney, after having appeared for a client in court, may only withdraw from such representation in compliance with the applicable rules of that particular court. These ethical obligations apply regardless of who was paying for the defense prior to exhaustion of the policy limits. As such, when the insurance company retaining the defense counsel claims that its policy limits have been exhausted under an eroding limits provision and stops paying for the insured's defense, the defense counsel may find themselves unwittingly providing pro bono services to the insured.

Defense counsel must also consider the inherent conflict of interest that could be found between the attorney and the insured when it comes to the financial self-interest of the attorney. Specifically, an attorney may desire to be paid as much as possible for representation of the insured, while the insured will likely desire maximum insurance protection at all times. Not disclosing this potential conflict and discussing it with the insured from the outset of a claim can put defense counsel at risk.

V. Issues for the Insurer

Insurers issuing eroding limits policies should be careful to make sure their insured are fully appraised of the existence of such provisions and their effect. Identifying the risk as a potential conflict of interest is likely the clearest way to avoid a problem later on. It is important to remember that the duty of the insurer to address this issue is separate and distinct from the obligation of the attorney and therefore the insurer cannot depend on the attorney to explain this potential conflict.

In addition, insurers should communicate with the insured regarding the potential for an excess verdict and the impact that will have on the insured. Because every defense dollar diminishes the insured's protection, the insurer issuing eroding limits policies should make certain that a system is in place both to control litigation costs and the costs incurred by attorneys representing their insureds. Such policies further emphasize the need to keep the insured current on up to date defense costs and the amount of remaining coverage.

VII. Conclusion

Eroding limits policies can create a number of different conflicts between the insurer, insured and defense counsel. These policies are a potential breeding ground for bad faith exposure. One cannot overlook the potential conflicts that arise nor fail to implement planning to protect against them. Recognizing the potential for conflict and developing strategies and protocols to protect against them and effective manage litigation and the insured's expectations are critical. Continued communication directed to the issue of the eroding limits is essential when managing litigation involving eroding limits policies. Failure to address the issues presented by eroding limits policies is a dangerous game that will inevitably lead to problems. Those problems are rarely those of the insured.