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Recognizing and Defeating the Reptile: A Step-by-Step Guide

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I. What is the Reptile Theory?

29. The Reptile Theory is attributed to a former professional theatrical director, David Ball (“Ball”), and a plaintiff attorney, Don Keenan (“Keenan”). These two gentlemen co-authored a book titled, *Reptile: the 2009 Manual of the Plaintiff’s Revolution*, that embarks to set forth a novel way to have a juror place themselves in

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the position of the plaintiff. Undoubtedly, some of you are thinking back to your law school days and shouting, “But wait! This is a violation of the ‘Golden Rule!’” And you would be right, except the methodology behind exposing a juror’s Reptilian mind begins long before the trial phase and disguises a “Golden Rule” violation by invoking a juror’s sense of fear. Safety Rule + Danger = Reptile.

30. The Reptile mind was first created in the “Triune Brain” theory as developed by neuroscientist Paul MacLean.² Dr. MacLean labeled the R-Complex part of our brains the “Reptilian” brain because it is identical in function to the brain of reptiles.³ The Reptile theory focuses on this “Triune Brain” by evoking and awaking thoughts of safety and security within the reptilian complex, which in turn controls other thoughts.⁴ However, this is not an article on the anatomy of the human brain. As succinctly put by Los Angeles plaintiff attorney Sonia Perez Chaisson in *The Jury Expert*, “we care not at all about brain anatomy and solely about whether the Reptile works.”⁵

31. Jurors are people, just like you and me. And just like you or me, if a juror is placed in a position where he or she feels threatened, anxious, or potentially at risk of harm, that juror is likely to react. This is, at its most basic core, the underlying mechanic behind the Reptile. Instead of employing jurors with reason and logic to reach the desired conclusion, the Reptile takes a linear path directly to a juror’s emotions by showing a juror the end result and providing a prism through which all evidence presented at trial may be viewed.

32. As pointed out in Messrs. Ball and Keenan’s book, the focus in using the Reptile effectively is spotlighting safety and security issues, as compared to more traditional methods of establishing a breach of the standard of care or necessary elements of a cause of action.⁶ If effective, the jury will connect the dots between the violation of a plaintiff-crafted safety rule that, if not followed by the community at large, will place the jury and their families in danger, compelling a need to return a high verdict to prevent the danger. So first things first: How can you tell when a plaintiff is embarking on utilization of the Reptile?

2 DAVID BALL & DON KEENAN, [REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION 13](#) (2009).

3 DAVID BALL & DON KEENAN, [REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION 13](#) (2009).

4 DAVID BALL & DON KEENAN, [REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION 18](#) (2009).

5 Stephanie West Allen, Jeffrey Schwartz, and Diane Wyzga, *Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea*, [THE JURY EXPERT](#) (AMERICAN SOCIETY OF TRIAL CONSULTANTS), Volume 22, Issue 3, May 2010, at 11.

6 DAVID BALL & DON KEENAN, [REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION 52](#) (2009).

II. Reptile Pleadings

33. The best defense to the Reptile is simple: see it coming before it bites you. In some instances, the Reptile will be born during the pleadings phase, and in others it will be born during the discovery phase. Typically, a plaintiff intending to employ the Reptile will utilize the complaint as his or her de facto first discovery request. This is true because in most jurisdictions the scope of disclosures and discovery requests are dictated by the claims and defenses of the parties. Thus, if you see pleadings referencing “violations of safety rules” or “unnecessarily endangering the public or community,” you should respond with denials and begin preparing your witnesses for likely Reptilian-themed deposition questions.

34. If a plaintiff brings claims such as negligent hiring, retention, training, supervision, or entrustment, and these claims are permitted to stand, these claims oftentimes render evidence of prior incidents or accidents discoverable and sometimes admissible based upon knowledge or absence of mistake.⁷ As Messrs. Ball and Keenan point out, a juror’s sense of fear and threat is not evoked by a rare occurrence or accident. Instead, it is the systematic violation of a safety rule that compels a juror to act.⁸ Therefore, the first step towards thwarting the Reptile is to limit evidence to only the accident or incident at issue. This can be accomplished through motions to dismiss or motions to strike. Oftentimes, motions of this nature are successful because many corporate negligence and punitive damages claims lack factual support and simply recast boilerplate elements and legal conclusions. The plaintiff’s burden at the pleading stage in defending such a motion is establishing that the complaint contains sufficient facts “to state a claim to relief that is plausible on its face.”⁹ Assuming your jurisdiction follows this pleading standard, motions to dismiss punitive damages and direct corporate negligence claims should always be filed in each and every instance where the complaint lacks adequate factual allegations. Moreover, once these claims have been dismissed, other incidents and accidents become far less likely to be relevant to the claims at hand, and, therefore, less likely to be admitted as evidence. The narrower the scope of pleading, the easier it will be to defend against the Reptile.

⁷ See FED. R. EVID. 404(b).

⁸ DAVID BALL & DON KEENAN, [REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION](#) 53–54 (2009).

⁹ See *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009)).

III. Reptile During Discovery

35. Generally, the Reptile begins to gain traction during the deposition of the defendant's corporate representative. This is the point in time when the plaintiff's attorney begins establishing safety rules, at times even referencing the pleadings, and these rules will later serve as the basis for invoking a sense of fear into jurors at trial. During your client's corporate representative's deposition, you can key in on your opponent's use of the Reptile because the safety rules are almost always accompanied by the words "needlessly" or "unnecessarily."

36. For example, let's assume you are defending a company against various torts related to a motor vehicle accident involving the company driver. Your antenna must be up when your opponent asks the company driver a question similar to, "You would agree with me that failing to look both ways before pulling into an intersection needlessly endangers the public and community?" Remember, questions that relate to "needlessly" or "unnecessarily" endangering the "public" or "community" are the buzzwords to signal that the Reptile is in play.

37. Understand too that the Reptile is premised upon hypothetical questions. When being put to use, you will see these broad hypotheticals being asked during the depositions of corporate representatives, expert witnesses, and even at times fact witnesses. Because lay witness testimony must always be rationally based upon his or her perceptions, any hypothetical posed to a fact witness should be followed with an immediate objection. This is not a novel concept as jurisdictions throughout the country have held that hypotheticals, while proper for expert witnesses, are not proper for lay witnesses. The rationale is simple: "the ability to answer a hypothetical question is the essential difference between expert and lay witnesses."¹⁰ Point being, under most circumstances a corporate representative witness is still a lay witness. So if a hypothetical is posed to either a lay witness or a corporate representative, at a minimum an immediate objection should be made and consideration should be given to instructing the witness not to answer.

38. Putting this into practice, let's assume your witness is asked the following question: "You would agree with me that the failure to continually scan the roadway while driving needlessly endangers the public?" Assuming you make an objection but allow the driver to answer, an informed, prepared witness should respond, "While I do not agree with your characterization of 'needlessly endangering the public,' to answer your question, I am trained to make every effort to continually scan the road when possible and did so prior to the accident." This response qualifies the witness's answer and limits the use of the question, rendering it meaningless.

¹⁰ See *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (quoting *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005)).

39. The key difference between a lay witness and an expert witness is that an expert witness may be asked hypothetical questions; however, this does not mean that parameters do not exist. The fact remains that most hypothetical questions, even when asked of expert witnesses, remain improper because they are overbroad and are not likely to lead to the discovery of admissible evidence. Remember, any opinion offered by an expert must be based upon facts or data.¹¹ A question whether the failure of a company driver to scan the roadway prior to proceeding through an intersection unnecessarily endangers the public at large is not only overbroad, but also, and more importantly, contains no facts or data. For example, let's assume your expert witness was asked the same hypothetical question as your driver, a lay witness: "You would agree with me that the failure to continuously scan the roadway while driving needlessly endangers the public?" While now being asked of an expert, this question is still improper because it does not incorporate or rely upon any facts or data. An ideal expert witness response would be: "I base opinions on facts and data. I am not comfortable providing opinions in the absence of facts or data." This effectively eliminates the opportunity for plaintiff's counsel to establish a safety rule while still providing a responsive answer.

40. As you can see, the Reptile relies heavily upon the improper use of hypothetical questions. When witnesses are properly prepared, their responses can easily dispel the plaintiff-created safety problem and reduce the probability that the Reptile will rear its head at trial.

IV. Motions in Limine to Keep Reptile Out

41. The pleadings are now closed and the discovery deadline has come and gone. You are now beginning the early stages of trial preparation and consideration must be given to motions in limine. When used properly, motions in limine can cut the Reptile down to size.

42. First, an argument to inflame a jury is generally prohibited by the courts. This is especially true when a plaintiff is attempting to utilize the Reptile because the inflammatory remarks are really nothing more than an attack on the character of a defendant.¹² The use of the Reptile should always be objected to upon this basis; however, this basis is not the only arrow in your quiver.

¹¹ FED. R. EVID. 702(b); FLA. STAT. § 90.702.

¹² See, e.g., *Las Palmas Assoc. v. Las Palmas Ctr. Assoc.*, 1 Cal. Rptr. 2d 301, 315 (Cal. Ct. App. 1991) (explaining that "[p]ersonal attacks on opposing parties . . . whether outright or by insinuation, constitute misconduct" and that such "behavior only serves to inflame the passion and prejudice of the jury, distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial").

43. Another basis for a motion in limine is that the use of the Reptile is nothing more than requesting the jury to act as the conscience of the community, which is generally prohibited.¹³ Appealing to the conscience of the community generally occurs during final summations and therefore must be anticipated beforehand.¹⁴ Any statements along these lines are red flags that the plaintiff is trying to use the Reptile and a proper motion must be made. Too often, practitioners determine success based upon whether the motion in limine is granted or denied. Even if your motion is denied, you have now put the issue in play and the court will hopefully be more receptive to your objection once you make your objection at the time the evidence is being presented. Oftentimes, a judge will simply defer and determine the permissibility of any Reptile references as they occur.¹⁵

44. An additional basis to file a motion in limine is that the Reptile is nothing more than an attempt to circumvent the 'Golden Rule.' Courts have defined 'Golden Rule' arguments as an argument that asks a jury not "to decide according to the evidence, [but] according to how its members might wish to be treated,"¹⁶ and as an argument that asks "the jurors to put themselves in the plaintiff's shoes."¹⁷ Therefore, any argument that even insinuates that a juror place themselves in the place of the plaintiff is patently improper. Every attempt to preclude the Reptile from tiptoeing its claws around the 'Golden Rule' must be made.

45. While these three bases for bringing a motion in limine are not exclusive, experience dictates that they are the most successful. Other arguments linked to precluding the Reptile include the plaintiff stating his or her personal beliefs and misrepresenting the evidence as presented. Point being, do not be limited in the arguments you raise within your motions in limine. Be creative in trying to actively limit your opponent's ability to include Reptile-related information because chances are this may be the first time the court has been presented with the issue.

46. For example, one manner to present your argument is to first educate the court as to the Reptile theory. Discuss the psychology behind the theory and creation of safety rules through the use of hypothetical questions. While you do not want the judge to be weighed down with the science behind the theory, it is important that

13 *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984); *Haberstroh v. State*, 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989).

14 See, e.g., *Sechrest v. Baker*, 816 F. Supp. 2d 1017, 1054 (D. Nev. 2011) (prosecutor stated during closing argument "[I]n this one instance in your lifetime, you are the conscience of the community. It is you and only you who will set the standard in this community for this type of act.")

15 See, e.g., *Palmer v. Virginia Orthopaedic, P.C.*, No. CL14000665-00, 2015 WL 5311560 (Va. Cir. Ct.) (June 19, 2015).

16 *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 585 S.E.2d 557, 565 (Va. 2003) (quoting *Seymour v. Richardson*, 75 S.E.2d 77, 81 (Va. 1953))

17 *Rose v. Jacques*, 597 S.E.2d 64, 76 n.10 (2003).

the judge properly understands the theory and how it is used. Next, link the Reptile to its impermissible use. That is, raise your arguments that the Reptile is a 'Golden Rule' violation, the underlying safety questions are irrelevant, and that the plaintiff is engaging in a character assassination of your client. In order to provide substance to your argument, identify specific *voir dire* questions and closing argument statements that are anticipated and evidence the Reptile theory in use.¹⁸ It can also be helpful to cite prior deposition questions in your motion to establish the plaintiff's long-standing strategy and intent of evoking the Reptile at trial.

47. In order to obtain the highest likelihood of success, your motions in limine should explain what the Reptile is, state with specificity the questions or testimony that is anticipated, and cite controlling case law to support the Reptile exclusion. Failure to adequately identify the specific evidence a movant is seeking to exclude can be fatal.¹⁹ Thus, it is paramount to the success of your motion that you state the questions or testimony you anticipate and desire to exclude.

V. Trial with the Reptile

48. Despite all of the above efforts, and depending upon your jurisdiction and judge, the possibility remains that you may still be confronted with the Reptile at the time of trial. However, this does not mean you are left with no recourse. Instead of trying to prevent the utilization of the Reptile at this stage of litigation, it is now time to embrace the Reptile and use it to your advantage. In other words, sometimes the best defense is a good offense. The best way to defeat the Reptile at trial is not to counteract it with your own safety rule — that is, do not attempt to counteract the anxiety and fear the plaintiff is trying to create within the jury with anxiety and fear of your own. Some defendants take this ill-advised path by trying to create reverse safety rules. A classic example is a defendant arguing that if a jury returns a high verdict, consumers such as themselves will realize the effect through higher insurance premiums and higher costs of goods. Best practices would be to avoid this counter defense. It is likely that if you try to omit the use of the Reptile by your opponent and then conversely attempt to use Reptile tactics of your own, you may lose credibility with both the judge and jury. Instead, you want to always project the image of a consummate professional. Your first chance to do this will be by dismantling the Reptile during *voir dire*.

18 See, e.g., *Orlovsky v. Lake Charleston Main Tenance Association, Inc.*, No. 502012CA023082, [2015 WL 3537155](#), (Fla. 15th Cir. Ct.) (Jan. 29, 2015); *Hardy v. Byrd*, No. 012011CA006694, [2014 WL 6608246](#), (Fla. 8th Cir. Ct.) (April 14, 2014).

19 See, e.g., *Hensley v. Methodist Healthcare Hospitals*, No. 13-2436-STA-CGC at *4-5 (W.D. Tenn.) (August 27, 2015).

49. While some judges will not allow an attorney to perform *voir dire*, choosing to instead conduct *voir dire* from the bench, many do. Assuming you are permitted to conduct *voir dire*, begin by asking polling questions. Polling questions are an extremely effective tool to gain depth of information without exhausting time and frustrating the court with the seemingly unending peppering of questions. For instance, you may ask the jury:

Some of you may feel that your decision in this case should be based only on what actually took place and what damages the plaintiff actually suffered. On the other hand, some of you may feel that while it is important to consider what actually took place and what harm was actually suffered, it is also equally important to evaluate and weigh the loss that could have occurred in this case or in a future case. Who feels that the potential harm and possibility of future harm must be considered in this case?

50. By asking this polling question, you can now gauge whom you want to peremptorily strike and whom you want to be sitting in the jury box once deliberations begin.

51. You may also ask: “Who here believes the jury’s duty is to act as the conscience of the community?” or “Who feels if the jury finds the defendant was responsible for the accident, that the jury must then issue a verdict that ‘sends a message’ to other prospective defendants?” Admittedly, the answers to these questions likely will not be enough to have a juror struck for cause, but the answers will nonetheless provide insight as to who warrants the use of a preemptory strike. The most effective *voir dire* is not when the attorney is the center of attention. Instead, you ideally want jurors discussing your question among themselves and bantering back and forth. This is the best method of obtaining the information you need in order to pick your optimal jury.

52. The jury has now been chosen and it is time for the testimonial phase of trial. Here, consider using the door the Reptile has opened to present your own evidence. In theory, if a plaintiff is permitted to plant Reptilian themes during trial that do little more than act as a character assassination of your client, you should be permitted to present rebuttal evidence.²⁰ This can be done through past customers testifying about their positive experiences with the defendant, experts testifying about how your corporate client has the proper practices and procedures in place to make the company as safe as possible, or through company employee testimony that his or her employer is caring and diligent in its practices and procedures. You see, the Reptile can be a double-edged sword without attempting to invoke the same jury

²⁰ See FED. R. EVID. 404(b).

fear and anxiety as the plaintiff. By presenting rebuttal evidence, you are not utilizing the same strategy as the Reptile, but instead are presenting evidence that will permit a jury to reach the conclusion you desire. A judge should recognize that because the Reptile has previously opened the door, you too are entitled to refute these contentions with testimonial evidence of your own. If not, this is a potential appealable issue.

53. Finally, it is time for closing arguments. It is at this final stage of trial where you can perhaps levy your most potent attack. First, do not be afraid to tell the jury about the Reptile. Call a spade a spade. Pull a copy of Messrs. Ball and Keenan's book and show it to the jury.²¹ Highlight some of the more salient points that suggest plaintiff's counsel is utilizing the Reptile in an effort to manipulate the jury's mind. While you may be limited by what a judge will permit, educating the jury that the plaintiff is using psychological methods in an effort to obtain a higher verdict is likely to create some distrust and, hopefully, anger. Paint the plaintiff's attorney as a puppeteer trying to control the minds and wills of the jurors, and you have accomplished your objective. No one likes to think that they are not in control of their own decisions. Use this primal instinct to your advantage.

VI. Conclusion

54. The Reptile is not a new invention. Messrs. Ball and Keenan's book is essentially the presentation of age-old tactics that are being recast in a creative and new way. Their book reorganizes approaches that have, in reality, been in existence since the birth of the American jurisprudence system. Unfortunately for defendants, the Reptile, while not new, can be a very effective and deadly adversary. All defense attorneys must be able to recognize the Reptile once it begins to slither into a case. Once recognized, you can morph into a wise owl or fearless mongoose whose acumen levels the playing field to defeat the coy Reptile.

²¹ DAVID BALL & DON KEENAN, [REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION](#) (2009).