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The Reptile Brain Strategy: Why Lawyers Use It and How to Counter It

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The Reptile Brain Strategy:

Why Lawyers Use It and How to Counter It

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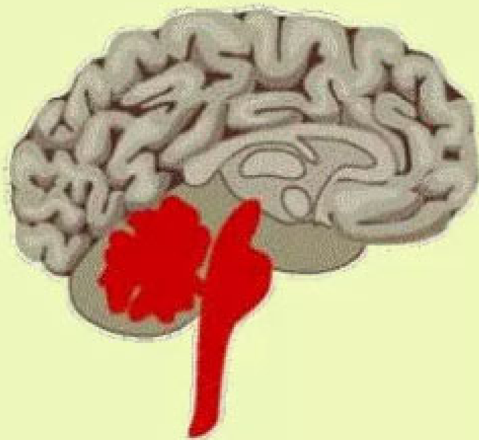
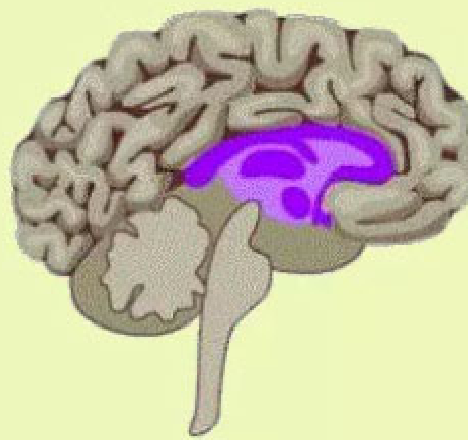
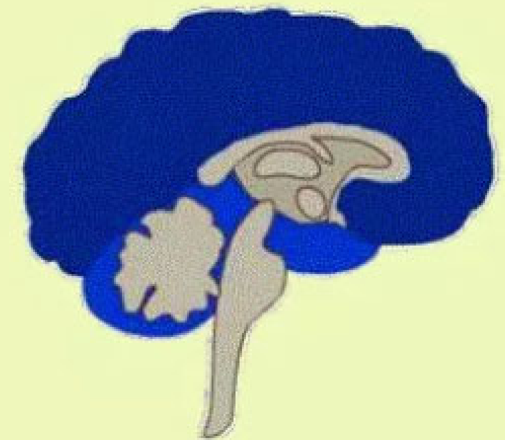
WHAT IS THE REPTILE STRATEGY?

The Three-Parted Brain







Lizard Brain
(Brain stem and cerebellum)
Autopilot
Fight & Flight

Mammal Brain
(Limbic System)
Emotions
Memories
Habits
Attachments

Human Brain
(Neo-Cortex)
Language, abstract thought, imagination, consciousness, reasoning, rationalising

(From Paul D. MacLean's model of the "Triune Brain")

“REPTILE” STRATEGY – THE PSYCHOLOGY

- Reptile brain is primitive subcortical region of brain that houses survival instincts
- When brain senses danger, it goes into survival mode to protect self and the community
- Once in survivor mode, the reptile brain overpowers logic and reason
- The *only* goal is to reduce the threat to self and offspring (“the community”)

"REPTILE" STRATEGY – HOW PLAINTIFFS USE IT

- Instill fear in the jurors by demonstrating:

  (1) the defendant violated a "safety rule" – a basic rule of operating in society that is impossible not to acknowledge;

  (2) the defendant's behavior presents a threat to the entire community; and

  (3) the only way to prevent harm to the entire community is to assess a large damage award against the defendant, which will remove the threat and deter others.

“REPTILE” STRATEGY – HOW DOES IT DIFFER?

- No longer about sympathy
  - No plaintiff in the courtroom
  - Speak in generalities (e.g., consumers, patients, workers)
- Damages are not about making the plaintiff whole
- Not about “this plaintiff”
  - Fill the gallery with spectators, cameras
- Capitalizes on anti-corporate bias
- Preys on desire to make an impact on the world
- Instill power to the jurors
- A run-around of “The Golden Rule”

"SAFETY RULES"

Include terms like: safety, danger, risk, needlessly, unnecessarily, always, never

- Safety is always a top priority
- Manufacturers have an obligation to ensure safety
- You should never put customers/patients in danger
- Supervisors have a duty to enforce safety rules
- You should never sacrifice safety for profits
- Reducing risk is always a top priority
- Businesses shouldn't needlessly endanger the public
- Safety policies are necessary to eliminate hazardous conditions

"REPTILE" IN VOIR DIRE - PRODUCTS

"This is a very important case, and by being a juror on a big case like this, you're taking on a pretty big role; you're basically a guardian of the community. You're the ones that get to decide about when things are wrong or when they're right, or when some change needs to happen. In a civil case, you can send a message if you feel as though there's been wrongful conduct and something needs to be done about it. With your verdict, you can make that choice. You can decide whether a product should have a warning or not, or whether people should be left in the dark about what choices they can make about products they buy. Your decision could determine whether people live or die. And that can be a very big burden. Is there anyone who feels they aren't up for that kind of responsibility?"

“REPTILE” IN VOIR DIRE

- How many of you would agree that safety should always be a top priority?
- How many of you would agree that products should be safe for all consumers?
- How many of you would agree that businesses should not needlessly endanger the public?
- And how many of you would agree that cost shouldn’t be a factor when it comes to increasing safety?
- How many of you would agree that a doctor has a duty to “do no harm?”

"REPTILE" IN VOIR DIRE

- How many of you would agree that a company should never produce a product that could hurt people?
- How many of you would agree that a company should warn of any dangers associated with their products?
- Who would agree that policies and procedures are necessary to ensure people don't get hurt?
- And how many of you would agree that documentation must be thorough to ensure that safety policies are followed?

“REPTILE” IN VOIR DIRE – IMPLIED “FACTS”

- Anyone think it’s okay for a company to save money by using parts that it knows are likely to have defects?
- Does anyone think it’s acceptable for a company to use talc that might be contaminated with asbestos because it’s cheaper to mine?
- Does anyone think it would be appropriate for a doctor to ignore the standards of medical practice and forgo tests just to save time?
- Anyone think it’s okay for a big company like the defendant to try to influence regulatory decisions by agencies that are supposed to be neutral, like the FDA?

"REPTILE" IN CROSS-EXAMINATION

- Goal: Get Witnesses to:
  - Commit to general safety or security rule (and if they don't, they will appear evasive an/or unreasonable)
  - Commit to general consequences of rule violations
  - Demonstrate how the defendant violated the safety/security rule
  - Discuss worst-case consequences

- Result:
  - Appears that witness is admitting fault
  - Forces witnesses to contradict themselves and explain away exceptions, "make excuses"
  - Gets jurors thinking about how bad it could have been
  - Gets jurors thinking that it could have been them

REPTILE IN DEPOSITION OF CORPORATE REPRESENTATIVES

Would you agree that it would be wrong to needlessly endanger your customers?

Would you agree that exposing someone to an unnecessary risk is dangerous?

Would you agree that a dangerous product should be recalled?

What could happen if a defective product isn't recalled? Could people die?

So then would you agree that failure to recall a product after learning about a potential safety defect endangers consumers lives?

And it's true that the company did not immediately recall the product, even after it received complaints of a potential safety defect, correct?

REPTILE THEORY: IS THERE ANY TRUTH TO IT?

TESTING FOUNDATIONS OF THE REPTILE

- Are these verdicts really based in fear, as the Reptile suggests?
- Does fear cause jurors to ignore logic?
- Are the "safety rules" really universal?
- Are jurors more concerned about punishment than compensating injury?
- Are plaintiff jurors inherently more fearful than defense jurors and more susceptible to attorneys' Reptile tactics?

SAFETY RULES ARE UNIVERSAL

- Of the 141 jurors, all but two agreed that “Safety should always be a top priority.”
- Nearly 70% of jurors agreed, “A company should never produce a product that could hurt people.”
- Over 90% of jurors agreed, “Policies and procedures are necessary to ensure people don’t get hurt,” and “Documentation must be thorough to ensure that safety policies are followed.”

VIOLATING SAFETY RULES PUTS THE COMMUNITY AT RISK

- Over 90% of jurors believed, "Companies that get away with breaking the law put us all at risk of getting hurt."

- More than half of the jurors agreed, "By not labeling GMO foods, companies put consumers at risk of cancer."

- 73% of jurors agreed that "Bad behavior should be punished even if it doesn't hurt anyone."

FEAR OUTWEIGHS LOGIC AND PRACTICALITY

- More than 70% of jurors disagreed with "It is okay to produce a potentially harmful product as long as the benefits outweigh the risks."
- Only 26% agreed, "If companies took every safety precaution possible, products would be far too expensive."
- Nearly 75% agreed, "Cost should never be a factor when it comes to increasing safety."
- Fewer than 60% of jurors agreed (and only 28% strongly agreed) that "It is not a manufacturer's fault if someone gets hurt using a product improperly."

DIFFERENCES IN INTENSITY

- Plaintiff jurors tend to agree "strongly" while defense jurors merely "agree."

- On nearly every question, there was a statistical difference in the intensity with which plaintiff and defense jurors agreed or disagreed with Reptilian concepts.

- 27% of **plaintiff** jurors strongly agreed that "A company should not sell a product if there is a safer alternative available." Only 12% of **defense** jurors strongly agreed with that statement.

DIFFERENCES IN INTENSITY – ROLE OF LAWSUITS

- Over 60% of **plaintiff** jurors agreed (20% of them strongly) that "Lawsuits are necessary to keep businesses from putting defective products on the market," while only 35% of **defense** jurors agreed (and only 6% of them strongly).

- While more than a quarter of the **plaintiff** jurors strongly agreed that "Making corporations pay big jury awards is the best way to make them meet safety standards," only 4% of the **defense** jurors strongly agreed with that statement

TRAIT VS. STATE ANXIETY

Trait Anxiety–relatively stable unpleasant emotional arousal

- "I tend to worry about things more than my friends"
- "I often feel anxious."
- **Plaintiff** jurors do not self-report they are more worrisome in general than **defense** jurors

TRAIT VS. STATE ANXIETY

State Anxiety –unpleasant emotional arousal in response to an identified threat

- When tied to specific threats, **plaintiff** jurors were more susceptible to state anxiety
- 27% of **plaintiff** jurors – compared to 15% of **defense** jurors – strongly agreed, "When I hear that something has been linked to cancer, I make sure to avoid using it."
- **Plaintiff** jurors were twice as likely to be concerned about potential health effects resulting from where they work or live.

SO, DOES IT WORK?

- Theory is nothing more than snake oil….BUT
  - Reptile makes the defendant's conduct, rather than plaintiff's injuries, the focus of every case;
  - Reptile changes the standard of care from the conduct of a reasonable person to "as safe as possible."
  - Reptile encourages jury awards based on the harm that could have been caused to the community as opposed to harm that was actually caused to the plaintiff
  - Reptile makes the jury care about the trial outcome

Presenter to read NY Code

This code is required for all attorneys wishing to receive CLE credit in the state of NY and taking the program 'on-demand' at Celesq AttorneysEd Center either online or via CD

Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!

DEFENDING THE REPTILE

DEFENDING THE "REPTILE" IN JURY SELECTION

- Not enough to ask jurors whether they agree or disagree with safety rules

Gauge how *strongly* jurors feel about the rules

Assess fears to specific threats

- ✓ Cancer
- ✓ GMOs
- ✓ Vaccinations
- ✓ Government conspiracies
- ✓ Active shooter
- ✓ Child abductions

~~Strike~~ jurors who most strongly support the safety rules and are susceptible to state anxiety

Object, object, object! (speaking, when possible).

- Thank the judge – act like you won

- "Excuse me, your Honor. It's not appropriate to talk about how big or small the case is in voir dire. We object to that."
- "Every case is important to the people who are litigating it, so counsel's arguments about this being bigger than any other case are not appropriate for voir dire or even for opening statement. We object to that."
- "I'm sorry to interrupt, but this case is only about whether the defendant caused harm to Mrs. Jones. We object to Ms. Plaintiff' Lawyer's attempts to make this about the larger community."

Explain your need to object:

"From time to time this morning, I made objections to opposing counsel's statements. I don't mean to be rude, I just want to make certain that no one is going to hold it against me when I insist that the plaintiff counsel follows the rules and doesn't try to mislead you. If you find my objecting to be rude or interrupting, can you raise your hand and let us know right now whether you're going to have a problem with me doing that? Because I suspect in this case you're going to see that from time to time."

Show Safety-rule Exceptions:

- How many of you think that safety is the ONLY thing a manufacturer should consider?
- What other things should a manufacturer consider when developing a product?
- What about utility? Effectiveness? Ease of use?
- What about creating an economical product that every consumer can afford?

Show Safety-rule Exceptions:

- The plaintiff's attorney got many of you to agree that a product should be safe for ALL consumers, remember that?
- How many of you think a table saw is safe for a 5-year old to use?
- And how many of you think it would be safe for a person who's never driven a boat to operate a cruise ship?
- How many of you think it would be safe to light a candle with a blow torch?
- Okay, so I think we can all agree Mr. Plaintiff Lawyer was over-simplifying things a bit, don't you think?
- So now, how many of you would agree the safety of a product depends on who's using it, what they're using it for, and whether they're using it properly?

DEFENDING THE "REPTILE" IN VOIR DIRE

- Many of you agreed that a company should never produce a product that could hurt people. Anyone ever cut their finger while slicing fruit?
- Anyone think companies should stop making knives?
- Does anyone think it's possible to make a product that could NEVER hurt anyone?
- Alright, so can we agree that Mr. Plaintiff Lawyer might have been simplifying things a bit?

- Many of you also said that cost should never been a factor when it comes to product safety. Let me ask you, how many of you would be willing to pay hundreds of dollars more for a product that has a safety feature that you don't need?

DEFENDING THE "REPTILE" IN VOIR DIRE

- Anyone remember when there was news about teens who were eating laundry detergent pods?
- Does anyone think the detergent companies should have listed "Do not eat these" on the package? Seems a little obvious, right?
- So how many of you would agree it's not necessary for companies to warn about potential dangers that should be obvious to a reasonable consumer

DEFENDING THE "REPTILE" IN VOIR DIRE

- A lot of you said that a doctor should "do no harm." Let me ask you this: Is anyone here afraid of needles?
- Doesn't getting your blood drawn sometimes leave a bruise? Is a bruise harm?
- Alright, so can we agree that in theory, "do no harm" is a good principle, but it's not meant to be taken literally, right?

- Does anyone think it's possible for doctor to save the life of every patient that comes in the door? Why not?

PREPARE WITNESSES FOR REPTILE TACTICS

- Don’t agree to absolutes
  - “Generally, yes”
  - “Sometimes, but not always”
  - “It depends on the circumstances”
  - “That’s one of the things we consider”

- Don’t agree to 100% action 100% of the time
  - “We strive for a welcoming work environment, of course”
  - “Our general policy is equal pay for equal work, but there are other things to consider, such as ability to generate new business.”
- Require context in plaintiff’s questions:
  - “Safety is a broad term, can you be more precise about the procedure you refer to?”
- Answer hypotheticals, but explain how this case is different
  - “If that were the situation, that would be true, but in this case…”

DEFENDING THE "REPTILE" IN TRIAL

- Expose the plaintiffs' oversimplification
- Expose things taken out of context
- Undermine plaintiff's credibility
- Show jurors the plaintiffs' attorney are really the threat
  - -"Feather on the scale of justice"
  - -"Just one more piece of paper."

"Objection, your Honor, Ms. Plaintiff Lawyer has suggested that plaintiffs need only a feather or one more piece of evidence to win, but I don't believe there's anything in the jury instructions about feathers or pieces of paper. I believe your Honor will instruct the jurors on the actual law."

- Paint the absence of context as evidence of deception. In voir dire:
  - "It's possible that the plaintiffs lawyers may take a number of documents out of context. Is everyone willing to be on the lookout for those type of tactics?"
  - "Are there any of you who don't think it's important to know what the history of the conversation was? Or what was said in response? Or what appears elsewhere in an employee's file?"
  - "Any of you not willing to read the entire thing to make sure you aren't being mislead?"

DEFENDING THE "REPTILE" IN TRIAL

- Paint the absence of context as evidence of deception. In closing:
  - Remind jurors they agreed to be on the lookout for evidence taken out of context.
  - Review a few examples of plaintiffs doing just that
  - Call out specific exhibits – write them on an easel

DEFENDING THE "REPTILE" IN TRIAL

- Continually refocus the case back to "This Plaintiff," and only "This Case"
- Turn "Shared Responsibility" theme into "Divided Responsibility" that includes plaintiff's personal responsibility for own safety & security.
- No more Mr. Nice Guy - Inform jurors what the plaintiff attorneys are attempting to do.
- Motion to preclude reptile tactics – "Golden Rule Motion"

FIGHT FIRE WITH FIRE

- Help juror identify with the "wrongfully accused."
- "Why is it important that the plaintiff has the burden of proof?"
- "How many of you here are perfect? I don't think many of us are. That's why the law doesn't require perfect. It requires reasonable."
- Talk about "property owners," "reasonable courses of action at work" "business owners"
- Use expressions like "dragged into court."

FIGHT FIRE WITH FIRE

COURT ROOM

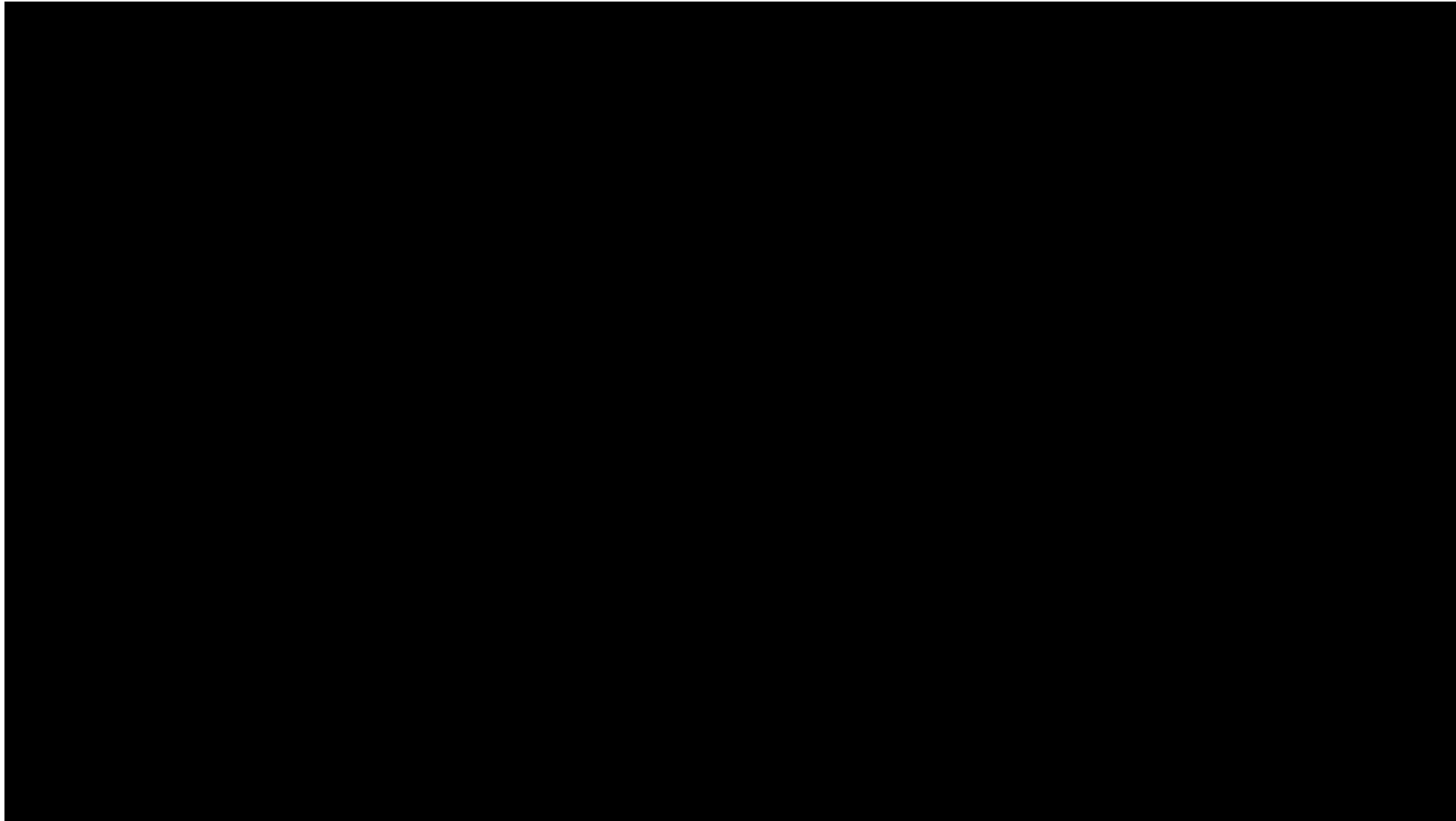
Thank you all for being here today and answering our questions. Without you, our system of laws can't be enforced. The justice system is supposed to work for everyone who gets dragged into court – even unpopular defendants like corporations and large oil companies. The decisions made by jurors are about the facts and the law, and those laws affect how every defendant is treated, no matter who you are. We are here because we believe our client has been wrongly accused and sued in this case, and that it is not responsible for Mr. Smith's unemployment. If the plaintiffs do not prove their case against my client, you could be the last line of defense for a wrongfully-accused defendant. Is there anyone who isn't prepared to do that?

FIGHT FIRE WITH FIRE

- Ask jurors to be defenders of the community's conscious
- Closing, when there's heavy media attention or a strong sympathy factor:

"It takes a courageous jury to return a verdict for a large corporation that might be unpopular with some. It's difficult to not listen to the sentiments outside the courthouse that seem to be almost pounding on the door saying, "This is what you should do." It takes a lot of courage to ignore that and do the right thing. And that's what we're asking you to do."

- **Goal:** Make jurors feel good about a defense verdict.



The Reptile Theory

In the decade since David Ball and Don Keenan published their book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, the "Reptile" strategy they proposed has become a staple of every successful plaintiff attorney's playbook. According to the authors, the "reptilian complex" is the earliest portion of our brains; it contains aspects (e.g., a brainstem, cerebellum, and hypothalamus) that we share with other animals, including reptiles. Portions of the brain in the reptilian complex govern our most basic life functions (e.g., hunger, breathing) and primitive survival instincts (e.g., fight or flight). When survival becomes threatened, this part of the brain takes over and can overpower logic and reason. Keenan and Ball argue that the reptile portion of the brain is the part of the brain that makes decisions when we feel threatened. Ultimately, the reptile approach provides plaintiff attorneys with a framework around which to build their case in a way that will most effectively tap into jurors' implicit fears, helping plaintiff prevail at trial and collect massive damage awards. Briefly, the reptile approach encourages plaintiff attorneys to try to make jurors fear the defendant by demonstrating: 1) the defendant violated a "safety rule" – a basic rule of operating in society that is impossible not to acknowledge; 2) the defendant's behavior presents a threat to the entire community; and 3) the only way to prevent harm to the entire community is to assess a large damage award against the defendant that will deter it and others from acting similarly in the future.

The strategy is founded on the principle of fear – convincing jurors that the defendant is a threat to them and to their community. Attorneys using the Reptile first establish the existence of universal "safety rules" by which every responsible individual or business abides: "Products should be safe." "Businesses shouldn't needlessly endanger the public." They argue that following such rules is the only way to keep the community safe, and that the defendant blatantly violated them. From there, attorneys convince jurors the only way to protect themselves and their community is to find for the plaintiff and award damages that will make the defendant – and others like it – think twice about breaking the rules again. Consequently, the verdicts themselves, including compensatory damages, are meant to punish and deter, even when punitive damages are not a component of the case. Instead of focusing on the injured plaintiff and seeking sympathy from jurors as in years past, plaintiff lawyers using the Reptile speak more about "dangers," "threats," and "safety," and call on jurors to become "guardians of the community." Much of this indoctrination begins in voir dire

Meanwhile, defendants argue lack of causation, misidentification of the defendant's product, or complicated science to convince jurors that the plaintiff could not have been affected by the alleged safety rule violations. Unfortunately, that question becomes largely irrelevant to jurors. Plaintiff verdicts and large damage awards no longer serve the purpose of making the plaintiff whole, but instead become the mechanism for jurors to protect themselves and their families.

Testing the Foundations of the Reptile Theory

With successful implementation of this strategy, we have seen cases with compensatory damage awards in the tens of millions of dollars, even when causation of the plaintiff's injuries is tenuous. Are these verdicts really based in fear, as the Reptile suggests? Does fear cause jurors to ignore logic? Are

the "safety rules" really universal, and are jurors more concerned about punishment than compensating injury? Are plaintiff jurors inherently more fearful than defense jurors and more susceptible to attorneys' Reptile tactics?

To test the foundations of the Reptile theory, in 2018, Litigation Insights surveyed 141 mock jurors across the country following mock trials involving personal injury or wrongful death claims. Jurors were categorized as either "plaintiff jurors" or "defense jurors" based on their ultimate verdicts in those cases. The survey posed questions evaluating jurors' trait (i.e., general disposition) and state (i.e., response to a specific threat) anxieties, as well as their reactions to common defense and plaintiff themes. Here is what we found:

Safety Rules Are Universal

The Reptile relies on safety rules that are universally accepted, and this premise was supported by our survey results. Of the 141 jurors, all but two agreed that "Safety should always be a top priority." But while "safety is important" is an obvious principle, there was also general agreement among plaintiff and defense jurors on more surprising ideas. For instance, nearly 70% of jurors agreed, "A company should never produce a product that could hurt people." Taken literally, this would eliminate the pharmaceutical and automotive industries, as well as many tools and kitchen utensils. Further, over 90% of jurors – plaintiff and defense – agreed, "Policies and procedures are necessary to ensure people don't get hurt," and "Documentation must be thorough to ensure that safety policies are followed." Thus, a company without a written policy or thorough documentation regarding an issue at the heart of litigation is especially vulnerable to allegations that it violated universal safety rules.

Jurors Agree Violating Safety Rules Puts the Community at Risk

Attorneys using the Reptile attempt to capitalize on jurors' fears that breaking safety rules puts the entire community at risk. Our survey supported this principle, as over 90% of jurors believed, "Companies that get away with breaking the law put us all at risk of getting hurt." Even behavior that isn't clearly egregious can be viewed as a threat; more than half of the jurors agreed, "By not labeling GMO foods, companies put consumers at risk of cancer." Alarmingly, there is also general agreement among jurors that violating safety rules alone is worthy of punishment, regardless of whether that violation caused harm; 73% of jurors agreed that "Bad behavior should be punished even if it doesn't hurt anyone."

Fear Outweighs Logic and Practicality

Of concern for defendants, common defense themes are usually inadequate to defeat the Reptile, suggesting that fear can – and often does – outweigh logic and practicality. For instance, more than 70% of jurors disagreed that "It is okay to produce a potentially harmful product as long as the benefits outweigh the risks." This demonstrates that the fear of harm is so poignant in many jurors that they reject the calculation commonly made in business – and under the law – that certain levels of risk are acceptable in light of benefits to the public. Jurors similarly rejected defenses based in practicality; only 26% agreed, "If companies took every safety precaution possible, products would be far too expensive," and nearly 75% agreed, "Cost should never be a factor when it comes to increasing safety." Even legally sound defenses are sometimes rejected by jurors; in our survey, fewer than

60% of jurors agreed (and only 28% strongly agreed) that "It is not a manufacturer's fault if someone gets hurt using a product improperly."

Differences in Intensity Between Plaintiff/Defense Jurors

While both plaintiff and defense jurors largely agree that safety rules exist and should not be violated, that violating them endangers the entire community, and that their violation should be punished irrespective of harm caused, there are still identifiable differences between the two camps. Foremost, though all jurors generally agree with the foundations of the Reptile theory, plaintiff jurors tend to agree "strongly" while defense jurors merely "agree." That is, on nearly every question, there was a statistical difference in intensity with which plaintiff and defense jurors agreed or disagreed with Reptilian concepts. For example, 27% of plaintiff jurors strongly agreed that "A company should not sell a product if there is a safer alternative available." Only 12% of defense jurors strongly agreed with that statement.

Plaintiff and defense jurors also differ in the degree to which they believe lawsuits in general – and large damage awards in particular – are an effective way to ensure safety rule compliance. For instance, over 60% of plaintiff jurors agreed (20% of them strongly) that "Lawsuits are necessary to keep businesses from putting defective products on the market," while only 35% of defense jurors agreed (and only 6% of them strongly). Likewise, while more than a quarter of the plaintiff jurors strongly agreed that "Making corporations pay big jury awards is the best way to make them meet safety standards," only 4% of the defense jurors strongly agreed with that statement.

These findings have important implications for jury selection: It is not enough to ask jurors in voir dire whether they agree or disagree with certain concepts; trial counsel must gauge how strongly jurors feel about them. This is a subtle difference, but effective voir dire and questionnaire development can identify the jurors who are most likely to be persuaded by Reptile tactics.

Differences in State (but Not Trait) Anxiety

Although there are some attitudinal differences between plaintiff and defense jurors, are plaintiff jurors more innately susceptible to fear tactics? Interestingly, plaintiff supporters do not self-report they are more worrisome in general than defense jurors. That is, on survey items measuring trait anxiety (e.g., "I tend to worry about things more than my friends," or "I often feel anxious"), there were no differences between plaintiff and defense responses. However, when tied to specific safety concerns, such as cancer or family members getting injured, plaintiff jurors are more susceptible to state anxiety – unpleasant emotional arousal in response to an identified threat. Although similar percentages of plaintiff and defense jurors were concerned with these dangers, the intensity of plaintiff jurors' worries was much greater. For instance, 27% of plaintiff jurors – compared to 15% of defense jurors – strongly agreed, "When I hear that something has been linked to cancer, I make sure to avoid using it." Likewise, plaintiff jurors were twice as likely to be concerned about potential health effects resulting from where they work or live.

Thus, when prompted by a plaintiff attorney's threats of a specific harm to the community, plaintiff jurors are indeed more prone to become anxious and respond in fear. This may explain the recent verdicts and extreme damage awards that go against the weight of evidence. When jurors respond in fear, logic takes a backseat.

Ultimately, the Reptile strategy is effective because it takes advantage of simple, universal beliefs. Specifically, it plays to jurors' beliefs that safety rules exist and should not be violated, that violating these rules imperils the community, and that violations alone deserve punishment. However, as the survey results suggest, defendants can minimize the effectiveness of the Reptile by identifying and removing from the panel those jurors who are most likely to respond in fear to specific threats, and whose fear responses are the most intense.

Implementing the Reptile in Voir Dire – Plaintiffs

One way to prime jurors to think about the risk that the defendant presents to the community is to remind them how important the case is, thereby implying that their decision will have far-reaching effects. For example, a plaintiff attorney in a recent product liability commenced voir dire with the following:

This is a very important case, and by being a juror on a big case like this, you're taking on a pretty big role; you're basically a guardian of the community. You're the ones that get to decide about when things are wrong or when they're right, or when some change needs to happen. In a civil case, you can send a message if you feel as though there's been wrongful conduct and something needs to be done about it. With your verdict, you can make that choice. You can decide whether a product should have a warning or not, or whether people should be left in the dark about what choices they can make about products they buy. Your decision could determine whether people live or die. And that can be a very big burden."

Introductions like the example above, which are meant to incite fear in jurors and motivate them to punish a defendant in order to protect their community, are a perfect example of the reptile approach.

Plaintiff attorneys also incorporate safety rules into their voir dire to establish them as universally accepted principles. For a question to serve this function, it should be something that most – if not all – jurors would agree with. For instance:

- How many of you would agree that safety should always be a top priority?
- How many of you would agree that products should be safe for all consumers?
- How many of you would agree that businesses should not needlessly endanger the public?
- And how many of you would agree that cost shouldn't be a factor when it comes to increasing safety?
- How many of you would agree that a company should never produce a product that could hurt people?
- How many of you would agree that a company should warn of any dangers associated with their products?
- How many of you would agree that a doctor has a duty to "do no harm?"
- Who would agree that policies and procedures are necessary to ensure people don't get hurt?
- And how many of you would agree that documentation must be thorough to ensure that safety policies are followed?

PRACTICE POINT

Pay attention to those who do not raise their hands in agreement with the "universal safety rules" mentioned above, as they are most likely to be resistant to your Reptile tactics.

Another aspect of the Reptile approach is to use questions to imply that a fact in controversy is true, or to imply a fact that will not be admitted into evidence. These questions are not designed to elicit responses from jurors. In fact, no juror is likely to agree, but it allows plaintiff attorneys to get facts in front of the jury that might not otherwise be admitted. For instance:

- Does anyone think it's acceptable for a company to save money by using parts that it knows are likely to have defects?
- Does anyone think it would be appropriate for a doctor to ignore the standards of medical practice and forgo tests just to save time?
- Does anyone think it's okay for a big company like the defendant to try to influence regulatory decisions by agencies that are supposed to be neutral, like the FDA?

Defending the Reptile in Voir Dire – Defendants

As a theory of human decision-making and brain development, the reptile approach lacks scientific support. However, the strength of the approach lies not in its scientific validity, but in the way that it shifts the focus of the trial from the individual plaintiff to the jurors themselves. The strategy behind the reptile approach appeals to humans' innate selfishness. To the extent that most jurors implicitly ask themselves, "How does this trial affect me?" the Reptile Approach offers them an answer: the defendant's behavior affects the juror by threatening his or her family or community. However, there are several ways the defense can counter the Reptile Approach.

Remember, We Are Not Reptiles.

Even if we accept that the brains of humans evolved in the way the *Reptile* authors contend, the fact remains that human brains have evolved. Our brains have other regions that grant us cognitive abilities far superior to our lizard forbearers. The reptile strategy deliberately ignores these other parts of our brain – the parts that control our logic and reasoning – the parts that make us distinctly human. One of the strategies for countering the reptile approach is to invoke the "non-reptilian" areas of jurors' brains.

***Emphasize the Details of a Case*.**

The reptilian brain, as described by Keenan and Ball, is simple, one-tracked and without nuance. It does not deal well with complexity. The simpler the plaintiff can make the case, and the more clearly the defense's "bad behavior" can be demonstrated, the better for the plaintiff. However, cases are always more complex than the plaintiff would have the jurors believe. Instead of hiding from the complexity, rationally explain it to jurors within your case story. This is not suggesting that you delve into the weeds of complexity, but rather illustrate the areas in which the plaintiff played fast and loose with the

case facts and over-simplified them. Showing the plaintiff was oversimplifying and taking things out of context to do so, means their own strategy will undermine their credibility with the jury. For example, if the plaintiff attorney, explains the burden of proof during voir dire as being "a feather on the scales of justice" or "just one pieces of paper," you should object with, "*Objection, your Honor, Ms. Plaintiff Lawyer has suggested that plaintiffs need only a feather or one more piece of evidence to win, but I don't believe there's anything in the jury instructions about feathers or pieces of paper. I believe your honor will instruct the jurors on the actual law*."

Although many lawyers are hesitant to object too often, for fear it sends a message that you are trying to hide things from the jury, the damages of the Reptile tactics far outweigh any damage that might be caused by frequent objections. Even so, this can be mitigated by previewing in voir dire the need to object often. For instance:

From time to time this morning, I made objections to opposing counsel, and I don't mean to be rude, I just want to make certain that no one is going to hold it against me when I insist that the plaintiff counsel follows the rules and doesn't try to mislead you. If you find my objecting to be rude or interrupting, can you raise your hand and let us know right now whether you're going to have a problem with me doing that? Because I suspect in this case you're going to see that from time to time

Furthermore, as defense cases tend to depend on context and nuance to a greater degree than plaintiff cases, there is an opportunity for you to paint the absence of context in the plaintiff case as evidence of deception on the part of the plaintiff attorney. For example, reminded jurors in voir dire that the plaintiffs may "take a number of documents out of context" and ask if they'd be willing to be on the lookout for that.

PRACTICE POINT

In closing, you should remind jurors that they agreed to be on the lookout for evidence taken out of context. Then, review all the times the plaintiffs' lawyers had done just that. Pointing out all the plaintiffs' deceptions drives home the point that plaintiffs' credibility is highly questionable. It also helps to enlarge these documents for the jurors and keep a list of each instance on an easel. Calling out specific exhibits is important, and writing them up on the easel encourages jurors to write them down as well, making it more likely they will look at the context of the evidence in deliberations.

Refocus to THIS plaintiff and THIS case.

One of the hallmarks of the Reptile Approach is to focus on the defendant's behavior and minimize attention to the plaintiff's harm. Gone are the days when plaintiff attorneys would emphasize the injuries, pain and suffering of their clients; not only were they seeing unsympathetic jurors, but this approach also drew attention to the tenuous connection between a defendant's "bad behavior" and the plaintiff's injuries. Now that plaintiff attorneys are focusing on the overall threat of the danger of defendants' actions, the defense should counter by emphasizing that this trial is only about *this* plaintiff and whether the defendant caused harm in *this* case.

Defense attorneys who encounter Reptile tactics in voir dire should not be

hesitant to object. If a judge is allowing the plaintiff the leeway to talk about the importance of a case and its relevant to the community, then such a judge is likely to allow speaking objections to such tactics. For example, in response to the introduction in the previous section, you should interrupt with objection such as: "*Excuse me, your Honor. It's not appropriate to talk about how big or small the case is in voir dire. We'd object to that,*" "*Every case is important to the people who are litigating it, so counsel's arguments about this being bigger than any other case, that's not appropriate for voir dire or even for opening. We'd object to that,*" and "*I'm sorry to interrupt, but this case is about whether the defendant caused harm to Mrs. Jones, we'd object to Ms. Plaintiff's attempts to make this about the community.*" Even if these objections are overruled, the jury is likely to get the message that the plaintiff's counsel is out of bounds.

Show the Exceptions to the "Safety Rules."

The Reptile theory advocates showing that a defendant's behavior violated a "safety rule," a general norm or standard that most jurors accept. In order to undermine this approach, the defense should show that safety rules are not absolute and that the proper action depends on multiple factors and considerations. The defense may also show how a different safety rule overrides the alleged broken or, or that the rule was not violated. Depending on the circumstances, the defense could establish that it was reasonable to violate the safety rule in the situation, or that the rule was violated inadvertently rather than intentionally.

As a defense attorney, this can be incorporated into the voir dire to draw jurors' attention to the fact that so-called "safety rules" are over-simplified. For example:

- How many of you think that safety is the ONLY thing a manufacturer should consider? [*Not many hands should go up, and if they do, it will identify the likely plaintiff supporters*] What other things should a manufacturer consider when developing a product? [*If jurors don't come up with it on their own:*] What bout utility – ease of use? What about effectiveness? What about creating an economical product that every consumer can afford?
- The plaintiff's attorney got many of you to agree that a product should be safe for ALL consumers, remember that? How many of you think a table saw is safe for a 5-year old to use? And how many of you think it would be safe for a person who's never driven a boat to operate a cruise ship? And how many of you think it would be safe to light a candle with a blow torch? Okay, so I think we can all agree Mr. Plaintiff Lawyer was over-simplifying things a bit, don't you think? So now, how many of you would agree the safety of a product depends on who's using it, what they're using it for, and whether they're using it properly?
- Many of you agreed that a company should never product a product that could hurt people. Anyone ever cut their finger while slicing fruit? Anyone think companies should stop making knives? Does anyone think it's possible to make a product that could NEVER hurt anyone? Alright, so can we agree Mr Plaintiff Lawyer might have been simplifying things a bit?
- Anyone remember when there was news about teens who were

eating laundry detergent pods? Does anyone think the detergent companies should have listed "Do not eat these" on the package? Seems a little obvious, right? So how many of you would agree it's not necessary for companies to warn about potential dangerous that should be obvious to a reasonable consumer?

- Many of you also said that cost should never been a factor when it comes to product safety. Let me ask you, how many of you would be willing to pay hundreds of dollars more for a product that has a safety feature that you don't need?
- A lot of you said that a doctor should "do no harm." Let me ask you, anyone here afraid of needles? Doesn't getting your blood drawn sometimes leave a bruise? Is a bruise harm? Alright, so can we agree that in theory, "do no harm" is a good principle, but it's not meant to be taken literally, right?
- Does anyone think it's possible for doctor to save the life of every patient that comes in the door? [*Few, if any, jurors should raise their hands*] Why not? [*This gets jurors talking about the various factors that could influence patient outcome*]
- Many of you agreed that policies and procedures are necessary so that people don't get hurt. Do you think there needs to be a policy for everything? Does a hospital need to have a policy that you don't let patients walk out the door without any clothes on? Would everyone agree that it's not necessary to have a policy for things that are common sense like that?
- Many of you agreed that documentation must be thorough to ensure safety policies are followed. Does anyone think it's the documentation, and not the doctors and nurses, that save people? What's more important to you – that a doctor provide good care, or that he writes everything down?

PRACTICE POINT

Preface a question with "How many of you agree…" when trying to show that a belief is universally accepted, and preface the question with "Does anyone think…" when attempting to show that a belief is preposterous and unreasonable.

Fight Fire with Fire.

Although the Reptile strategy was developed explicitly to assist plaintiff attorneys, it can also be used by the defense. There are many ways the defense can tap into jurors fears in a similar manner. One of the most notable things about the Reptile approach is that it was developed to counter what its creators identify as an inherent disadvantage held by plaintiffs. According to Keenan and Ball, jurors automatically see plaintiffs and plaintiff's counsel as a "menace to their survival" because they've been convinced by tort reform activists that lawsuits undermine the quality and availability of healthcare for jurors and their families; lawsuits ruin the local economy, costing people jobs; lawsuits drive prices up on just about everything; lawsuits suppress product development and innovation. Thus, defense attorneys can use the reptile strategy in their favor by appealing to any of these fears the authors identify.

The Reptile Approach offers the plaintiff attorney an opportunity to make the case about the juror. This strategy is also available to the defense attorney. Helping jurors to identify with the wrongfully accused is a key aspect to

defending against the Reptile approach. For example, asking jurors to explain in voir dire why it is important that the burden of proof fall on the plaintiff is one way to help jurors step into the shoes of a defendant. Although the court's rules may prevent you from asking the jurors to think of themselves in the defendant's position, you can subtly remind jurors that if they were on trial, they would want an impartial jury that would listen for proof, not just accusations. For example, in premises cases, it may help to talk about "property owners," generally, rather than your client specifically, or in malpractice cases, to speak about "reasonable courses of action at work" rather than particular professional standards. You can subtly imply that jurors may one day find themselves on the side of the wrongfully accused by using broad terms such as "property owners," "business owners," or "taxpayers" and expressions like "being dragged into court." This will put jurors in the place of the defendant and invoke the reptilian fear mentioned by Keenan and Ball. Similarly, jurors who own a business or dream of owning one will find it easier to identify with a "business owner" than a "corporation." Tactics like these keep the focus on jurors and encourages them to identify with the defense and render a verdict that would prevent frivolous lawsuits against people like them.

As previously mentioned, the reptile approach depends on making the jurors feel like the defendant's actions are a threat to the entire community. As such, plaintiff attorneys ask the jurors to be the guardians of the community. This tactic can also be used by the defense by calling on the jurors to be the defenders of the community's conscience. This can be especially effective in cases in which there is a lot of negative media attention about the defendant in a case. You can actually use this coverage to your advantage. In a case with significant media attention, if the plaintiff attorney calls on jurors to protect future generations by holding the defendant accountable, you can flip this around by arguing to jurors that the courageous action is actually for them to "defy the media hype and do the right thing." For instance:

It takes a courageous jury to return a verdict for a large corporation that might be unpopular with some. It's difficult to not listen to the sentiments outside the courthouse that are pounding on the pavement saying, 'This is what you should do.' It takes a lot of courage to ignore that and do the right thing. And that's what we're asking you to do."