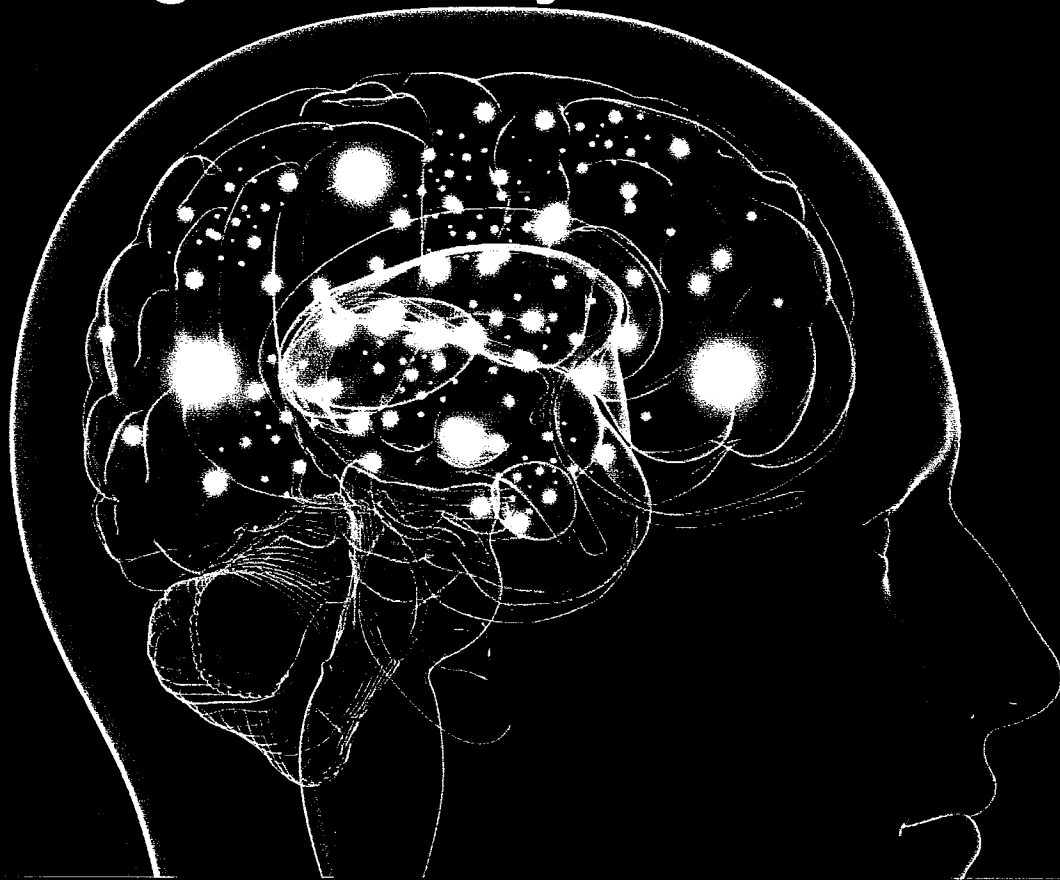


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Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution



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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 paradigm¹¹. 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
<p>"You have an obligation to ensure safety, right?"</p> <p>"Safety is your top priority?"</p>	<p>Option 1: General Agreement (not absolute)</p> <ul style="list-style-type: none"> • Safety is certainly an important goal, yes. • We strive for safety, of course. • In general, yes. <p>Option 2: Request Specificity</p> <ul style="list-style-type: none"> • 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
<p>"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?"</p> <p>"(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"</p>	<ul style="list-style-type: none"> • 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
<p>"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?"</p> <p>"(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"</p>	<ul style="list-style-type: none"> • 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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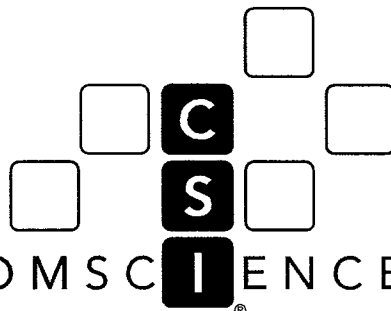
of witness preparation and jury psychology. Dr. Kanasky specializes in a full range of jury research services, including the design and implementation of mock trials and focus groups, venue attitude research, and post trial interviewing. Dr. Kanasky's success with training witnesses for deposition and trial testimony is remarkable. His systematic witness training methodology is efficient and effective, as it is designed to meet each witness's unique needs, while concurrently teaching core principles of persuasive communication. Clients benefit from Dr. Kanasky's ability to transform poor or average witnesses into extraordinary communicators. He can be reached at 312.415.0600 or bkanasky@courtroomsciences.com.



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Endnotes

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11. Eric Stice, "The similarities between cognitive dissonance and guilt. Confession as a relief of dissonance. *Current Psychology Research and Reviews*, 11.1, 69-77, 1992.



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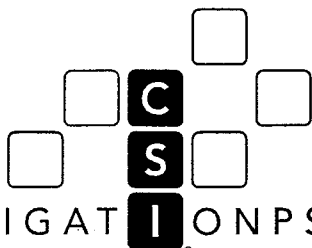
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Confronting the Plaintiff's Reptile Revolution Defusing Reptile Tactics with Advanced Witness Training



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and Bill Kanasky Jr., Ph.D.**

The well-known "Reptile Revolution" spearheaded by attorney Don Keenan, Esq. and jury consultant Dr. David Ball is now a ubiquitous threat to defendants across the nation.¹ It is advertised as the most powerful guide available for plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform.² Ball and Keenan's Reptile Revolution tactics have allowed mediocre plaintiff attorneys to pull off victories that only great plaintiff attorneys could do in the past. Although this article does not permit the space to fully address Reptile³ attorney tactics, this article is part of a larger article and subsequent program that we offer which applies 25 years of scientific litigation psychology data to directly combat "Reptile" tactics.⁴ While ten areas of vulnerability exist within litigation from the filing of a case to a jury's subsequent verdict⁵, this article will address only one, and perhaps the most important area, because it serves as the foundation of the Reptile Theory's success – witness testimony.



It works, BUT...

The Reptile Theory first applied to litigation is the brain-child of Ball and Keenan, who went public with their concept nearly five years ago.⁶ They borrowed the concept of the reptile brain from neuropsychologist Paul MacLean who first espoused the theory in the 60s.⁷ MacLean theorized that three parts of the human brain reflect stages of human evolution: reptilian (primitive survival based), paleomammalian (emotion, reproduction, parenting), and neomammalian (language, logic, planning). Ironically, the Reptile Theory MacLean advanced has long since been revised and critiqued

in neuropsychology scholarship,⁸ but this did not prevent Ball and Keenan from adopting it for their purposes. Where MacLean suggests that the reptilian portion of the brain is responsible for species-typical instinctual behavior, such as aggression, dominance, or territoriality, Ball and Keenan interpret this to mean that reptilian subcortical region of the brain maximizes "survival advantages" and minimizes "survival dangers."⁹ According to Ball and Keenan, "when the Reptile sees a survival danger, even a small one, she protects her genes," which, to the authors, can be correspondingly applied to jurors who may see danger and must "protect [her]self and the community," by awarding damages that punish or deter defendants.¹⁰ If this sounds far-fetched, it is.

Despite the misuse of neuropsychology, what Ball and Keenan get right is encouraging plaintiff attorneys to convey "the immediate danger of the kind of thing the defendant did, and how fair compensation can diminish that danger within the community."¹¹ In order to generate this sense of immediate danger within jurors they "urge plaintiff's lawyers to frame a case so it appears that every defendant chose to violate a safety rule."¹² For Ball and Keenan, "every wrongful defendant act derives from a choice to violate a safety rule," and thus the courtroom becomes a safety arena wherein damage awards enhance safety and decrease the danger posed by the defendant.¹³ According to Ball and Keenan, jurors serve as the guardians of community safety and the author's formula "Safety Rule + Danger = Reptile" theorizes that the reptile brain "awakens" once jurors perceive that a safety rule has been broken by the defendant, resulting in jurors awarding damages to the plaintiff to protect

themselves and society (survival instinct).¹⁴

Novel Tactics

Ball and Keenan's Reptile methodology can indeed influence juror decision-making, but not because of its ability to tap into jurors' survival instincts. Instead, the authors' formulaic approach applies successful techniques long used by great plaintiff's attorneys: reduce a case to its essence and rhetorically focus a case on a critical issue for jurors (e.g. safety). The case reduction and rhetorical tactics simplify decision-making for jurors and persuade them of the plaintiff's case.¹⁵ Large damage awards tend to come from juries who believe a defendant knowingly broke a rule, but is unwilling to admit it or tries to back out of a prior admission. Establishing the case's "rule" or principle early in the case is Ball and Keenan's specialty and lays the foundation for the reptile plaintiff's attorney.

The novelty and effectiveness of Ball and Keenan's approach is two-fold: (1) a long distance perspective to litigation – instead of focusing on framing jury issues as trial approaches, Ball and Keenan are teaching attorneys to focus on jury issues at depositions or as early as possible in a case, so that (v2) defendants naively agree to a seemingly innocuous rule, law, code, or principle that they broke or deviated from and thus must now live with the violation of their own rule or law. The defendant has now been framed in light of knowingly violating a rule or principle or forced to backslide out of it at trial, a tactic which erodes a witness' credibility with jurors. Either instance is a nightmare-come-true for defendants, because a low dollar case

has exponentially increased and the plaintiff has begun to see real opportunities to exploit at trial. Preventing Reptile plaintiff attorneys from gaining leverage by increasing a defendant's exposure is the critical first step in combatting reptile tactics. Other vulnerabilities clearly exist, but witness testimony at deposition and at trial are by far the most important strategic elements where Reptile plaintiff attorneys lay the foundation for their cases and it is why we address this issue in the article.

Witness Testimony

Defendant's Deposition Testimony: Plaintiff attorneys have learned the quickest path to profits involves settling a case in excess of its actual value by forcing a defendant to pay. They accomplish high value settlements by manipulating defendants into providing damaging 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. 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.

Defendant's Trial Testimony: When the defendant 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 primary mistake is insufficient witness preparation that focuses on the science/medicine more than the manipulative Reptile techniques. The "gotcha moment," when the defendant gets boxed in by plaintiff's counsel and begins to respond emotionally (i.e., argumentativeness, defensiveness, or anxiety), typically results in a serious mess that is difficult to clean up during defense counsel's rehabilitation efforts. The irony here is that it is the defendant that goes into survival mode cognitively, not the jury. Ball and Keenan claim that jurors award damages to protect themselves and the community from the dangers of the defendant. In reality, jurors award damages to punish the defendant who breaks safety rules, not to protect themselves or the community.

Witness Training

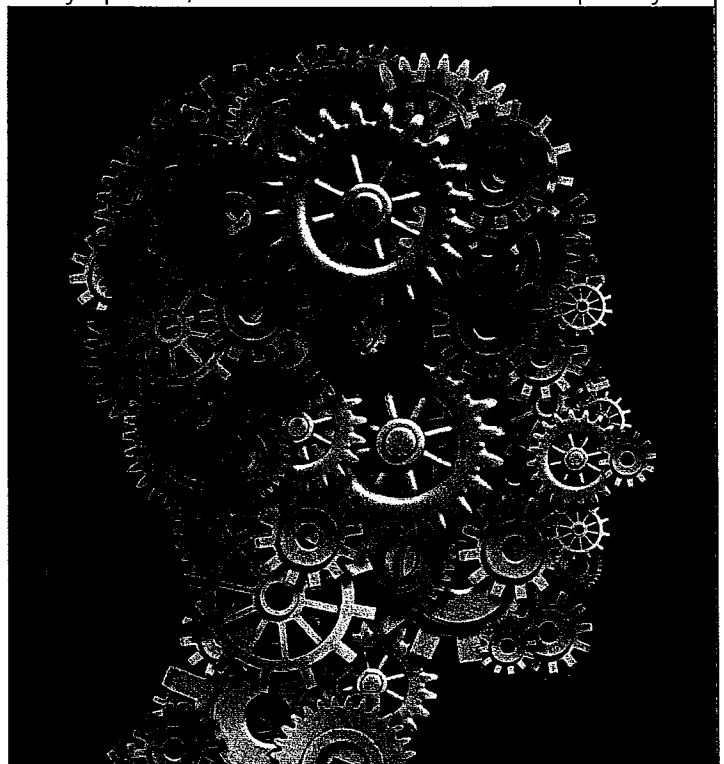
A black box analysis of how and why Reptile plaintiffs defeat defendants at deposition and trial reveals that the defendant witness is ultimately trapped by an agreement to one or more safety rules which creates a clear contradiction between the rule and their conduct in the specific case at hand. The 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 the defendant needs to decide on whether to accept or reject the plaintiff attorney's language. The emotional Reptile attack attempts to force the defendant witness out of high road cognitive processing (patient, thoughtful, meticulous) and into low road cognitive processing (instinctual, spontaneous, survival). By forcing low road cognition, the Reptile plaintiff attorney can

generate a response that will likely be negatively perceived by the jurors, thus hurting the defendant witness' credibility.

The Reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be "no-brainer" in nature. 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, like "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 deceptive questions are effective because they provide just enough information (compared to the big picture safety questions) to lure defendant witnesses into providing an inflexible, absolute answer. By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow for a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer like:

- "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"

Bottom line: training a witness to withstand these reptilian attacks goes far beyond traditional "witness preparation." Instead, more sophisticated witness training is needed, as the witness must undergo cognitive and communicative restructuring. Witnesses must literally develop a new process of thinking and communicating through intense operant conditioning methods to ensure cognitive and communicative changes take place. This type of training requires doctoral level consultants with extensive experience evaluating and training humans in the employment of psychological and communicative strategies.

Nightmare at Trial

Attorney: "Doctor, patient safety is your top priority, isn't it?"

Doctor: "Yes, of course."

Attorney: "And the emergency procedure you chose to perform during Mr. Smith's surgery wasn't very safe because it resulted in his death correct?"

Doctor: "That's true, but you have to understand that I-"

Attorney: (with emphasis) "Doctor you didn't make Mr. Smith's safety your top priority, and because you are ignoring your own rule, you put Mr. Smith and perhaps all of your patients in danger, didn't you?"

It is at this point the Reptile Plaintiff attorney has his or her claws into the witness. Jurors simplify the case to be one in which the doctor knowingly put his patient at risk and violated his own safety rule. While the Reptile theory offers a more aggressive plaintiff strategy erroneously packaged in neuro-psych wrapping, Ball and Keenan's guidance can certainly be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. This article dealt with witness training because it is the first and most potent attack technique employed by the Reptile plaintiff attorney, and we urge you to develop new advanced techniques for witness training prior to deposition and trial. Thwarting reptilian attacks by reinforcing a solid defense foundation ensures protection for your client, minimizes your exposure, and offers you greater leverage in settlement discussions or in preparation for trial.

Ryan Malphurs, Ph.D. is a Senior Litigation Consultant at Courtroom Sciences, Inc. Dr. Malphurs' background in persuasion and communication enables him to assist attorneys in the development of successful approaches to courtroom communication. His perspective of the courtroom blends both a scientific and humanistic understanding, guiding clients through communicative and thematic suggestions that are based upon proven research and experience. Dr. Malphurs' background in persuasive and interpersonal communication provides an effective foundation for litigation and trial consulting services including focus groups and mock trials; witness training for deposition and trial; *voir dire* and jury selection; development of opening statements and closing arguments; and general trial strategy. His unique experience observing more than 100 U.S. Supreme Court arguments also enables him to advise attorneys preparing for bench trials and appellate courts.

Endnotes

- 1 For the widespread impact of the Reptile Theory see Ken Broda-Bahm, "Taming the Reptile: A defendant's response to the plaintiff's revolution," *The Jury Expert* v.25.5, 2013; Ken Broda-Bahm "Defendants: Be the Mongoose," www.persuasivelitigator.com, 12/26/13; Kathy Cochran, "Reptiles in the Courtroom," www.dritoday.org, 1/12/10; Bill Kanasky, Jr. "Debunking and Redefining the Plaintiff Reptile Theory" Under Review 1/14; David C. Marshall, "Lizards and Snakes in the Courtroom: What every defense attorney needs to know about the emerging plaintiff's reptile strategy" For The Defense, 4/2013; Minton Mayer, "Make Boots Out of that Lizard: defense strategies top beat the reptile," *The Voice* v12.38, 2013; Pat Trudell, "Beyond the Reptilian Brain," www.zenlawyeraseattle.com, 2010; 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* v.22.3, 2010.
- 2 See www.reptilekeenanball.com for promotional material.
- 3 By "Reptile plaintiff attorneys" we do not mean to demean plaintiff attorneys practicing these tactics, but simply offer a term less burdensome than "plaintiff attorneys who practice 'reptile' tactics."
- 4 See Kanasky, William Jr., "Debunking and Redefining the Plaintiff Reptile Theory," Under review, 2014.
- 5 Deposition testimony, ADR, Motion en liminies, Supplemental juror questionnaire, voir dire, opening statements, graphics, trial testimony, closing arguments, and jury instructions.
- 6 See David Ball & Don Keenan, *Reptile: the 2009 Manual of the Plaintiff's Revolution*. Balloon Press, 2009.
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- 8 For discussions of weaknesses surrounding the Reptile Theory see Striedter, G. F. (2005) *Principles of Brain Evolution*. Sinauer Associates; Patton, Paul (December 2008). "One World, Many Minds: Intelligence in the Animal Kingdom". *Scientific American*. Retrieved 29 December 2008; Butler, A. B. and Hodos, W. *Comparative Vertebrate Neuroanatomy: Evolution and Adaptation*, Wiley; Smith CU., 2010, *The triune brain in antiquity: Plato, Aristotle, Erasistratus*. *Journal of the History of the Neurosciences*, 19:1-14.; and Ben Thomas "Revenge of the Lizard Brain," Blog.Scientific American.com 9/7/12.
- 9 David Ball & Don Keenan, *Reptile: the 2009 Manual of the Plaintiff's Revolution*. Balloon Press, 2009, Pg 17.
- 10 *Ibid*, Pg. 17, 19, 73.
- 11 *Ibid*, Pg 30.
- 12 David C. Marshall, "Lizards and Snakes in the Courtroom: What every defense attorney needs to know about the emerging plaintiff's reptile strategy" For The Defense, 4/2013, Pg 65.
- 13 *Supra* 9, Pg51.
- 14 *Ibid*, Pg.51
- 15 We believe jurors more commonly reflect a decision-making model called "Sensemaking," pioneered in the 1960s and 70s to explain group decision-making. Sensemaking has been adopted by the Department Of Defense and other high risk organizations to improve collective problem-solving in high stress environments. For more on the influence and widespread use of Sensemaking see Dennis Gioia and Kumar Chittipeddi, "Sensemaking and Sensegiving in Strategic Change Initiation," *Strategic Management Journal* 12 433-448; Maryl Louis, "Surprise and Sensemaking: What newcomers experience in entering unfamiliar organizational settings," *Administrative Science Quarterly* 25 226-251; Maryl Louis and Robert Sutton, "Switching Cognitive Gears: from habits of mind to active thinking," *Human Relations* 44 55-76; Ryan A. Malphurs *Rhetoric and Discourse in Supreme Court Oral Arguments*. New York: Routledge Press, 2013; William Starbuck and Frances Milliken, "Executives personal filters: What they notice and how they make sense," *The Executive Effect*. Donald Hambrick (ed). (Greenwich CY: JAI 1998); Karl Weick, *Making Sense of the Organization* (Malden, MA: Blackwell 2001); Karl Weick, *Sensemaking in Organizations* (Thousand Oaks, CA: Sage 1995).

