

REPTILE DEFENSE TACTICS: DEPOSITION AND WITNESS TESTIMONY

by 4. August 2016 13:30



The [Reptile Theory](#) is arguably the most game-changing trend in litigation in recent history. It was originally developed by its authors, Don Keenan, Esq. and jury consultant Dr. David Ball, as a counter to tort reform that would achieve plaintiff verdicts and high damages, even in jurisdictions where damage caps exist. According to the theory as it has been popularized, jurors' survival instincts (the reptilian brain) can be triggered in the courtroom by establishing the existence of a "safety rule," by proving that the defendant violated this rule, and by arguing that the defendant's actions present a clear, immediate threat to the survival or wellbeing of the juror and/or the community. When executed successfully, the jury will deliver a plaintiff verdict and punish the defendant for his or her actions via a high damage award as a means of deterrence.

With more than \$6 billion (and counting) in verdicts and settlements for the plaintiff since 2009, it may seem like the theory is scientifically sound—except that it isn't. Jury expert Bill Kanasky has done an outstanding job debunking the science behind the strategy and offering effective tactics to combat the Reptile at three stages of trial: deposition/witness testimony, voir dire, and opening statements. And while we won't summarize what is already expertly explained [here](#), [here](#) and [here](#), we would like to offer our takeaways.

As Kanasky explains, it is likely that the only ones at trial who will have their survival instincts triggered are the defense witnesses who get trapped in a Reptile line of questioning because they were not thoroughly prepared. The Reptile Theory relies on the establishment of (and defendant's accidental agreement to) a generalized "safety rule," so the earliest questions will revolve around these concepts.

Such questions will seem simple and will be based on principles which, at first glance, would be reasonable to agree with, such as "safety is always a top priority," "sooner is always better," or "danger is never appropriate." Once they've established this basis, plaintiff attorneys move on to more specific questions (Kanasky uses the example, "Would you agree that if you see A, B, and C symptoms, then the standard of care requires you to order tests X and Y?"). Such questions lead witnesses down a path where a series of testimonial missteps result in the witness implicating the defendant in wrongdoing, with no real way to rectify the damage that has been done.

The only real way to combat this tactic is to train witnesses specifically to deal with Reptile lines of questioning. The crucial takeaway from Kanasky's writings, however, is that these lines of questioning won't be saved for trial; they'll be put into play in the earliest depositions. For the defense, this means witness preparation simply cannot wait until trial approaches. Instead, it must happen in the earliest stages of the litigation life cycle. Witnesses must be trained to recognize and avoid Reptile traps prior to their first deposition. They must be prepared until they recognize Reptile questions in any form, and they must practice until their responses become second nature. This will require an investment of time very early in the process.

But, it's not just time that you need. You also need the right information. You must know exactly who your witnesses are and what their involvement with the plaintiff was. You and your witnesses must have a crystal clear understanding of the patient's condition and why one course of action was chosen over another—and they must be able to eloquently explain this during questioning.

Adequate time and accurate information are critical to preparing your defense and your witnesses, and basic tools, including a complete, accurate caregiver list and a record of their involvement with the plaintiff, will bring much-needed efficiency to the earliest days of case preparation. Your witnesses can make or break your case in their very first deposition, long before you ever step foot in the courtroom. Maximizing your time and using the right tools to support your witness preparation at the beginning of the litigation cycle may give you the competitive edge you need to help stop the Reptile in its tracks.

Need help efficiently gathering a list of potential witnesses? Check out our [Provider of Care Report](#).

[Defense Tactics](#) | [Litigation Trends](#) | [Long-term Care](#)

[Permalink](#) | [Comments \(0\)](#)

