

Combating Plaintiff Reptilian Tactics in Complex Litigation: Discovery, Voir Dire, Direct and Cross-Examination

THURSDAY, JULY 15, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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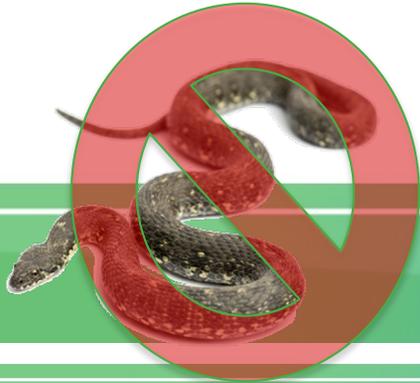
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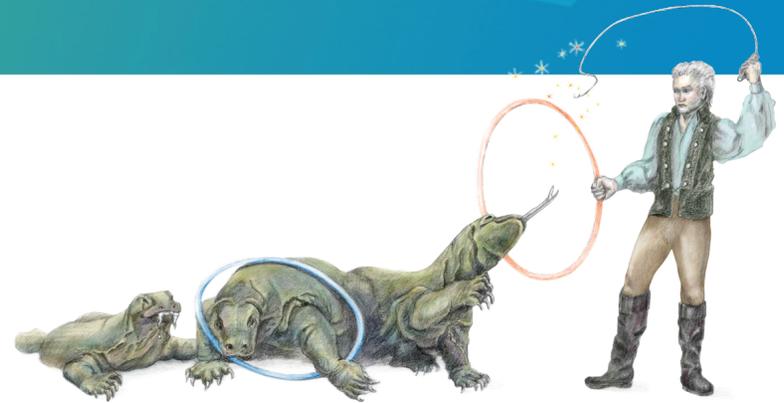
Combating Plaintiff Reptile Tactics in Complex Litigation: Discovery, Voir Dire, Direct and Cross-Exam

Dr. Ken Broda-Bahm



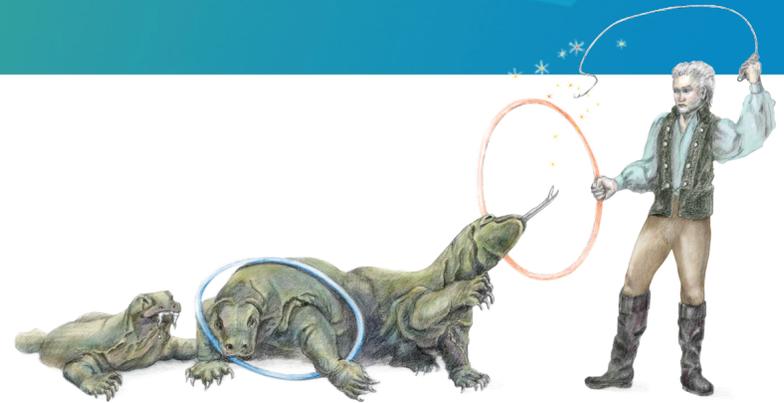
July 15, 2021

Taming the Reptile



Taming the Reptile

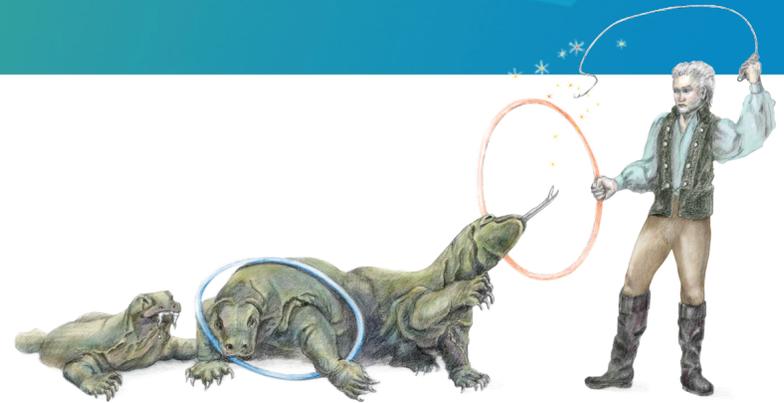
1. What Is the Reptile?



Taming the Reptile

1. What Is the Reptile?

2. How Do You Recognize the Reptile?

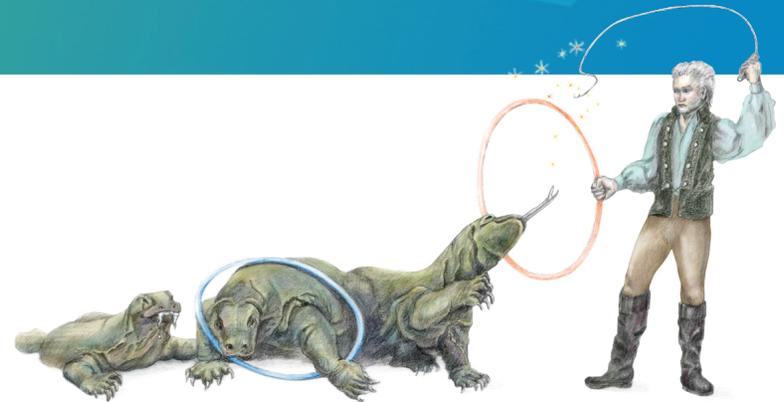


Taming the Reptile

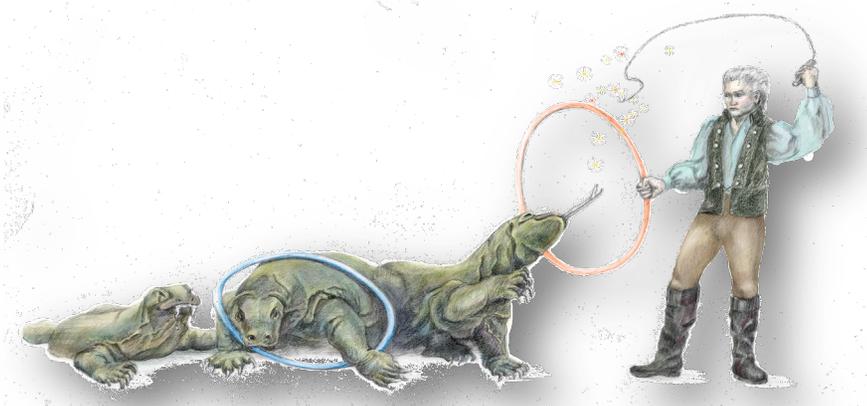
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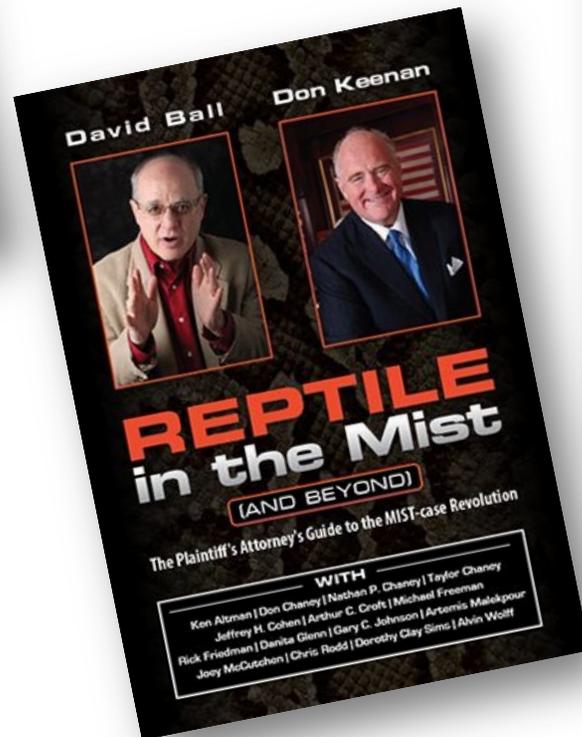
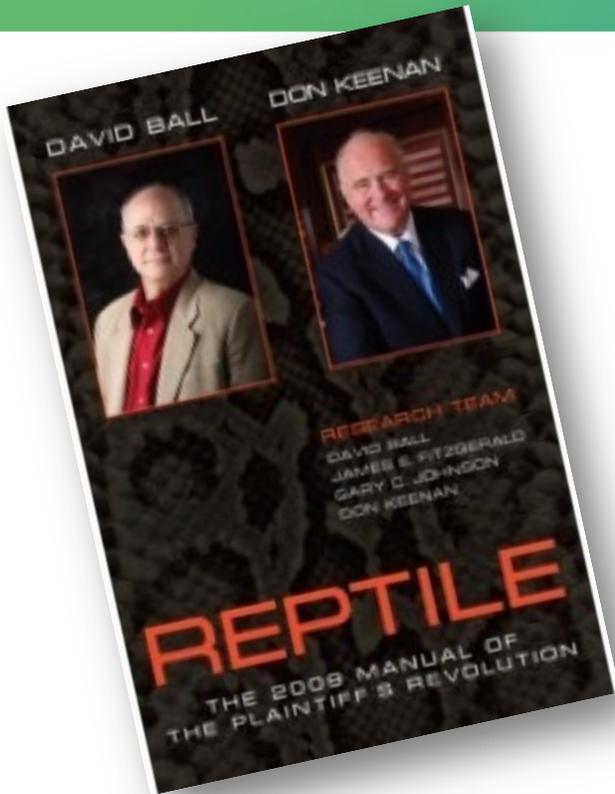
3. Why Does the Reptile Work?

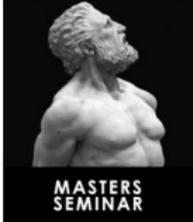
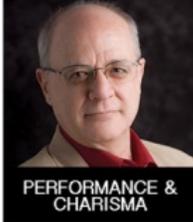
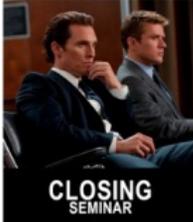


1. What Is the Reptile?



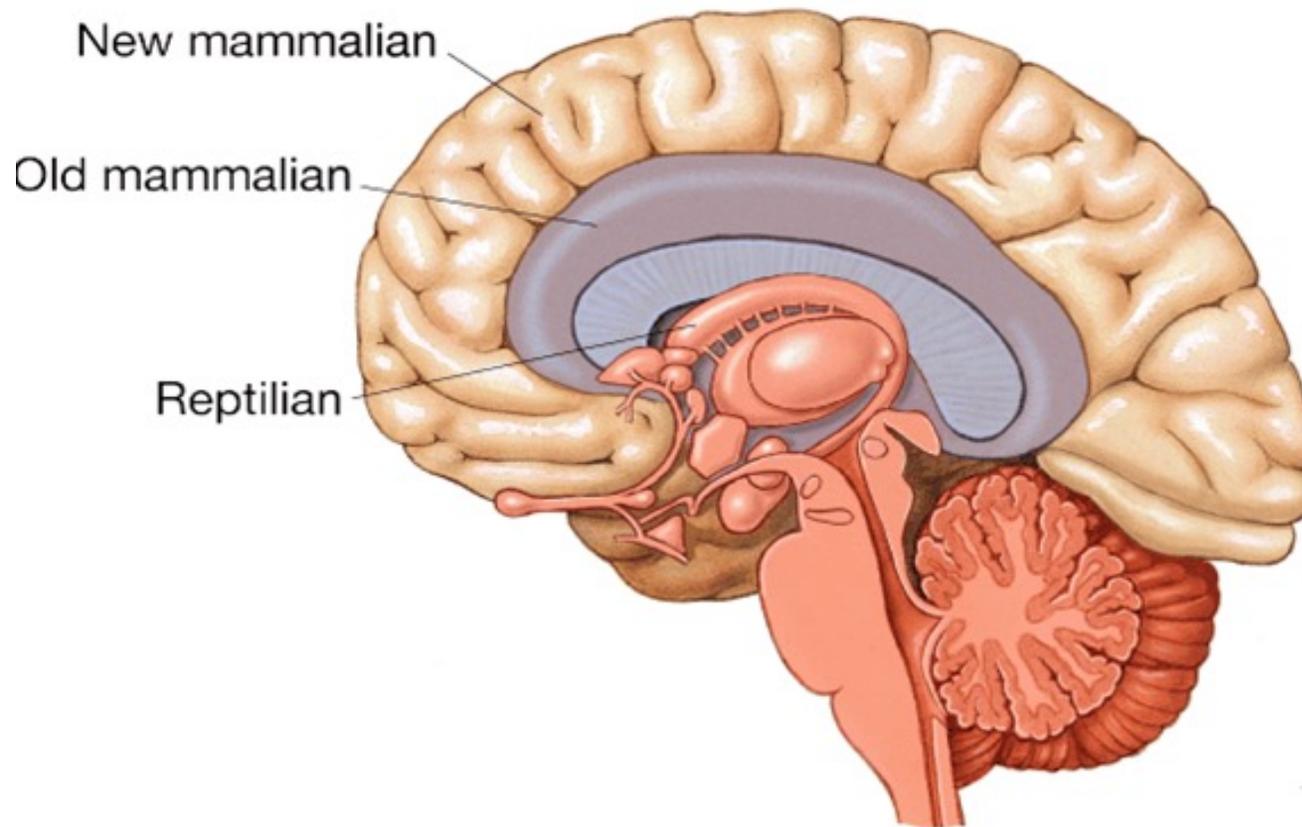
What is the Reptile?



 <p>MASTERS SEMINAR</p>	 <p>MIST Seminar</p>	 <p>PERFORMANCE & CHARISMA</p>
REPTILE MASTERS - ATLANTA, GA : (OCT 13-14, 2017)	MIST - JUNE 23-24, 2017 (ATLANTA, GA)	PERFORMANCE & CHARISMA - RALEIGH, NC - DATES PENDING
\$800.00 Registration Open Digital Delivery.	\$800.00 Pre-Requisite: Intro to the Reptile Seminar Digital Delivery.	\$800.00 Pre-Requisite: Intro to the Reptile Seminar Digital Delivery.
ADD TO CART	ADD TO CART	ADD TO CART
 <p>STIPULATED CASES SEMINAR</p>	 <p>SCIENCE IN TRIAL SEMINAR</p>	 <p>CLOSING SEMINAR</p>
STIPULATED CASES - COMING SOON!	SCIENCE IN TRIAL - COMING SOON!	CLOSING SEMINAR - COMING SOON!

What is the Reptile?

Paul MacLean and the “Triune Brain”

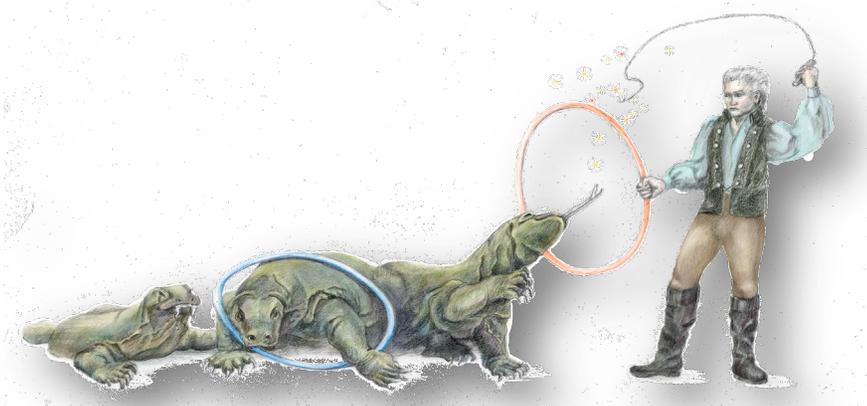


The plaintiff's bar is instructed to try everything to get the reptile theory to the jury:

If you can't get it in through the front door, knock on the back door. If you can't get through the back door, then try one of the windows. If that doesn't work, try coming down the chimney. If the place ain't got a chimney, then dig underground. Whatever it takes don't give up until you get it in.

The Keenan Edge

2. How Do You Recognize the Reptile?



How Do You Know You're Being Reptiled?

1.
Language
of
“Security” or “Safety”



How Do You Know You're Being Reptiled?

2.

“Community”
Not Just
Plaintiff



How Do You Know You're Being Reptiled?

3.

“Safety Rules”
Instead of
Legal Duties



The Basic Idea:

SAFETY RULE + DANGER =

REPTILE

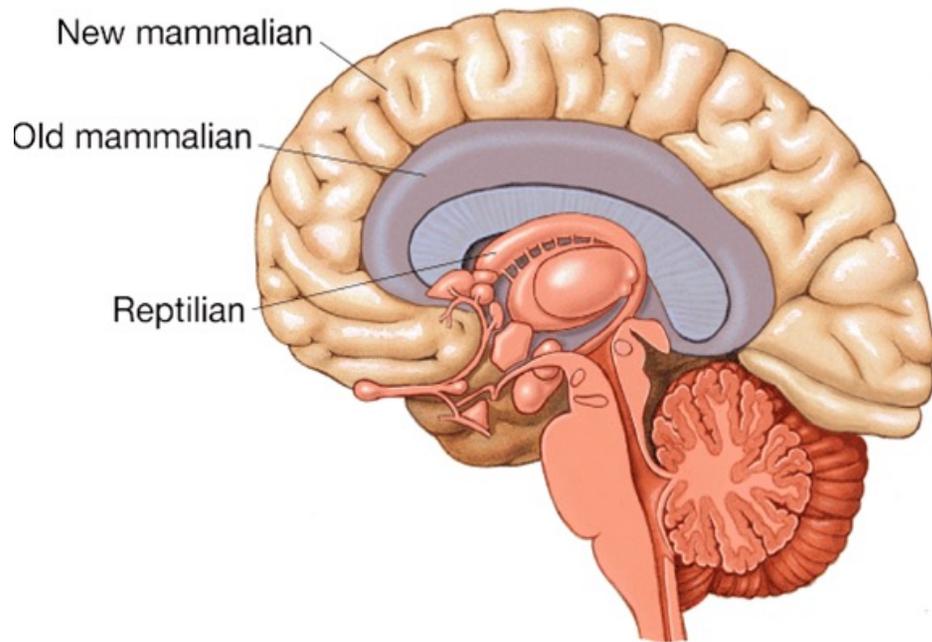
Plaintiff's Focus Will Be Safety

- 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

“Umbrella Rule” or “Safety Rule”

“A _____ is not allowed to needlessly endanger the public.”

Reptile, the 2009 Manual of the Plaintiff's Revolution,
David Ball and Don Keenan



3. Why Does the Reptile Work?

Why Does It Work: Brain Science?

Just One Problem...

MacLean's 'Reptile Brain' "has proven outright insane in light of the latest scientific research."

"Today, writers and speakers are dredging up the corpse of this old theory, dressing it with some smart-sounding jargon, and parading it around as if it's scientific fact."

- Ben Thomas, *Scientific American* (September, 2012):

Why Does It Work: Brain Science?

Threat Response is More Complex

THREAT

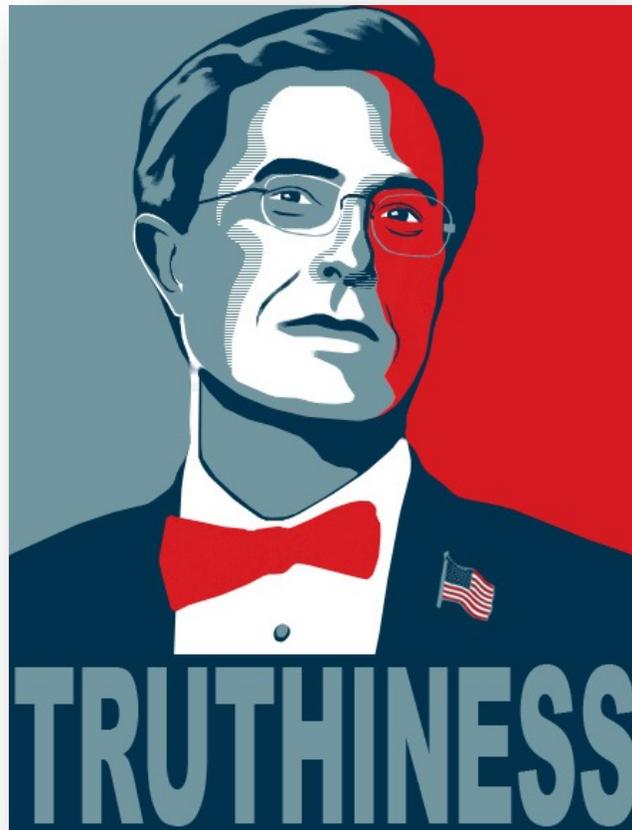


Motivation



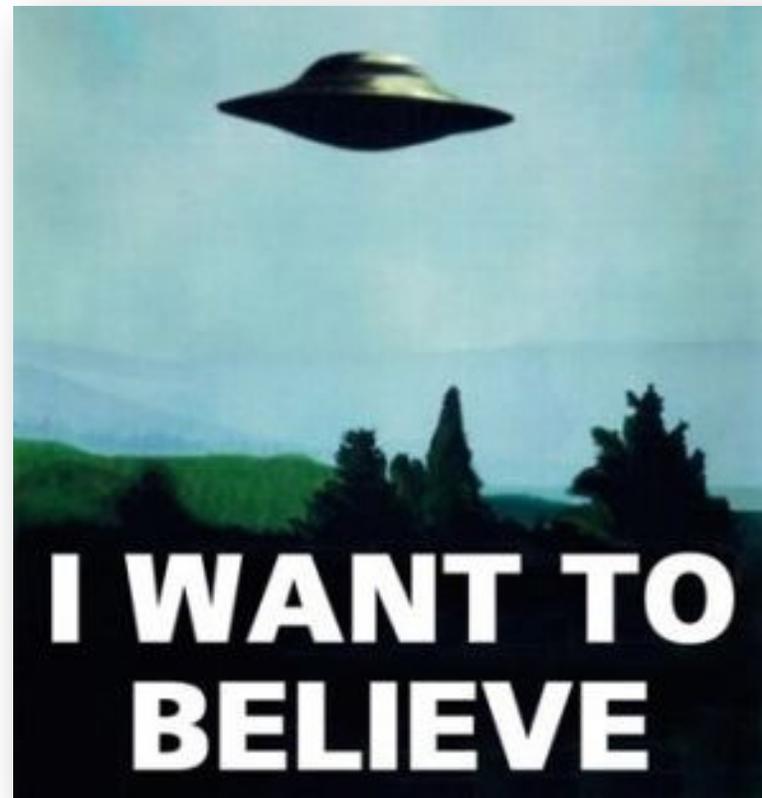
Motivation

Useful Science Rather than Valid Science



Motivation

Motivated Reasoning



How Can Defendants Tap In?

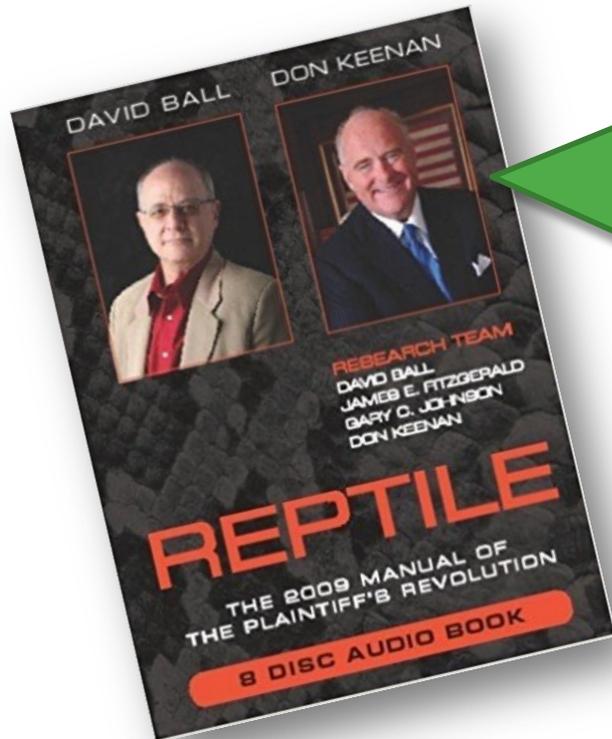
Motivations Lead, Reasons Follow



Can Defendants Tap In?

The Authors' Reasoning:

It's Ours not Yours!



“The Reptile prefers us [plaintiffs] for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, ‘Give danger a pass.’ Second, the courtroom is a safety arena, so when we pursue safety, we are doing what the courtroom was invented and maintained for.”

The “Reverse Reptile”?

The screenshot shows the DRI website header with the logo 'dri The Voice of the Defense Bar™', a search bar, and social media icons for LinkedIn, Facebook, Twitter, and YouTube. The main content area features a blue banner for the webinar 'The Reverse Reptile: Turning the Table on Plaintiff's Counsel', presented by DRI on April 24, 2019, from 12:00pm to 1:30pm Central. A sidebar on the left lists navigation options: Program Overview (highlighted), Registration, Attend Program, CLE, System Checker, and Technical Support. The main text under 'Program Overview' describes the webinar's focus on 'anti-Reptile' tactics. A 'Who Should Attend' list includes Defense Counsel, Claims Specialists, and In-house Legal Staff. A 'STREAMING LIVE' banner is positioned above a laptop displaying the webinar interface.

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DRI Webinars

The Reverse Reptile: Turning the Table on Plaintiff's Counsel

Presented By: DRI

April 24, 2019 | 12:00pm - 1:30pm Central

Program Overview

VIEW CLE Accreditation by State

Registration

Attend Program

CLE

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Technical Support

Program Overview

Since 2009, Don Keenan and David Ball, the Reptile founders, claim to have generated \$7.7 Billion in settlements and verdicts. While that figure is staggering, it is very important to know that several **well-prepared** defendants have crushed the Reptile attack in several areas of litigation. These defendants and their attorneys have adopted their own “anti-Reptile” tactics that have been highly effective in discovery and trial. On the 10-year anniversary of the plaintiff’s Reptile Revolution, with no end in sight and their membership bursting at the seams, it is vital for the defense bar understand the past and plan for the next 10 years of Reptile maneuvers. Key individuals and entities have empirically studied the evolving Reptile methodology and have tracked and defeated newer Reptile tactics. Disseminating this information, as well as newest “anti-Reptile” tactics across the defense bar is essential to future success. The newest of these tactics is called the “Reverse Reptile,” in which defense counsel can turn the tables on the plaintiff, experts, or other parties in a case.

Who Should Attend

- Defense Counsel
- Claims Specialists
- In-house Legal Staff

STREAMING LIVE

The “Reverse Reptile”?



So What Can Defendants Do?

Safety is Not the Only Motivator



What Matters?

MASLOW'S HIERARCHY OF NEEDS



How Can Defendants Tap In?

2-Stage Model



The Persuasive Route

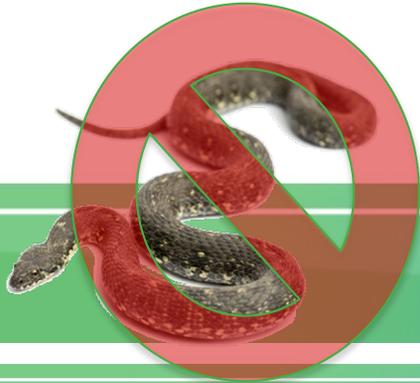
Q: What
Motivates in
Defense's
Favor?

1. Protecting Values:
Quality Service,
Reliability, Competition,
Unencumbered by
Frivolous Suits
2. Not Being Played:
Sound Policy, Law, Logic
– Not Emotion.
3. The Individual Claim:
The Unique Situation

Prepare for the 'COVID Reptile'



Strafford



Combating Plaintiff Reptile Tactics in Complex Litigation: Discovery, Voir Dire, Direct and Cross-Exam

Dr. Ken Broda-Bahm



July 15, 2021

What can you do about the reptile?

Cheryl A. Bush

30(b)(6) and Employee Depositions

30(b)(6) Deps are Trial Depositions

30(b)(6) Depositions

30(b)(6) Depositions Live
FOREVER

30(b)(6) Reptile Depositions

When you can, choose a 30(b)(6) witness with personal knowledge.

Prepare Your Company Witness for the Reptile Questions

Reptile Question:

Q: “You agree that a company should always put safety first.”

- Can the witness give a truthful one-word answer?
 - “Yes” – Not a true statement
 - “No” – Incomplete answer

Why not just say “Yes”?

Q: “You agree that a company should always put safety first.”

Answer: **“It De**X**ends.”**

30(b)(6) Reptile Depositions

The Witness must be prepared to explain why the question cannot be explained with a simple “Yes” or “No.”

There is no one-size fits all
answers to Reptile questions.

Witnesses must testify truthfully.

Why not just say “Yes”?

Q: “You agree that a company should always put safety first.”

Potential Answer: **TELL THE TRUTH**

Safety for who? If I’m driving a truck at night on the expressway and a car disabled car without lights is suddenly in front of me, I want not to hurt the driver of that car. But if I turn my steering wheel too far too fast, I could roll the truck over and that could cause other accidents and hurt a lot of people.

Why not just say “Yes”?

Q: “You agree that a company should always put safety first.”

Potential Answer: **TELL THE TRUTH**

I agree that, as a general matter, safety should always be one of the top priorities. But when we are designing cars, if we change a car to be safer in one type of crash, that same change will make it less safe in other types of crashes...

Why not just say “Yes”?

Q: “You agree that a company should always put safety first.”

Potential Answer: **TELL THE TRUTH**

I agree that **safety is an inherent part** of the design process of all [products].

Why not just say “Yes”?

Q: “You agree that a company should always put safety first.”

Potential Answer: **TELL THE TRUTH**

I agree that safety is an inherent part of the design process of all vehicles. That is why our company has detailed standards and specifications in place. The interrelationship among thousands of component parts and assemblies, the range of occupants who will drive our vehicles, and the universe of possible accident configurations means that safety is not a simple concept. But these standards and the regulations the federal government requires us to meet act to balance all those needs and allow us to develop reasonably safe vehicles.

Why not just say “Yes”?

Q: “You agree that a company should always put safety first.”

Answer: **TELL THE TRUTH**

Safety is certainly one of our priorities, but I would need more facts to answer your question.

There are Reptile questions that require a yes or no, or the witness loses all credibility:

Q: It's foreseeable that someone could slip and fall on ice?

Answer: Yes.

When plaintiff is finished with their questions, **ASK YOUR WITNESS QUESTIONS!**

Why ask questions of your own witness?

Rule of Completeness

Why ask questions of your own witness?

“Why didn’t you just agree with plaintiff’s counsel that the company should always put safety first?”

PROTECT YOUR RECORD DURING REPTILE DEPOSITIONS

During the Deposition: OBJECT

Plaintiff may later argue that the reptile questions could have been re-phrased. Object to “form and foundation” on every appropriate reptile question.

More Objections

- Golden Rule: appealing to the community makes the lawsuit about the juror. It appeals to the juror's self-interest.
- The “safety rule” creates confusion around a defendant's applicable duty of care by attempting to replace it with vague “safety rules”

More Objections

FRE 701:

Navar has not been designated as an expert by the defense. His testimony, as a lay witness, is limited to one that is rationally based on his perception, helpful to clearly understanding his testimony or to determining a fact in issue, and not based on scientific, technical, or other specialized knowledge. Federal Rule of Evidence 701. Accordingly, asking Navar about alleged “safety rules,” including generalized hypotheticals, would fall outside the scope of permissible discovery. The purpose of a deposition is to discover the facts. Hypothetical questions are designed to obtain opinions and are beyond the scope of the deposition of a lay witness.

Order of Magistrate Judge Andrew Rodovich, Estate of McNamara v. Navar, Case No. 2:19-cv-00109-APR, 4-22-20

More Objections

“Counsel’s repeated references to ‘we’ and ‘us’ impermissibly integrated the jurors with the plaintiff (and counsel) within a community of the average customers...[Counsel can] not draw the jurors into the position of the plaintiff.”

Fitzpatrick v. Wendy’s Old Fashioned Hamburgers of New York, Inc. ---- N.E.3d --- (2019)

More Objections

Plaintiff argued:

“Are these important rules in our community? Are we going to enforce them? Are you going to enforce them? If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that.”

Objection:

Not permissible “invoke future possibilities of harm, or that the jury through their verdict would protect the community from such dangers, or that a defendants’ verdict would give the defendants a ‘pass’ or ‘reward’ them”

Fitzpatrick v. Wendy’s Old Fashioned Hamburgers of New York, Inc. ---- N.E.3d --- (2019)

Openings and Closings

- Your first sentence should be powerful and dramatic
- Life is complex: There is no simple “Safety Rule”
- The Legal standard of care applies to these facts
 - Applicable
- The juror’s role is to decide whether the Defendant is liable, and if so, to give this Plaintiff fair compensation for what the jury finds to be her injury
- The juror’s role is not to “fix society” or “send a message” to the company

Motions for Protective Orders

by Beth C. Boggs

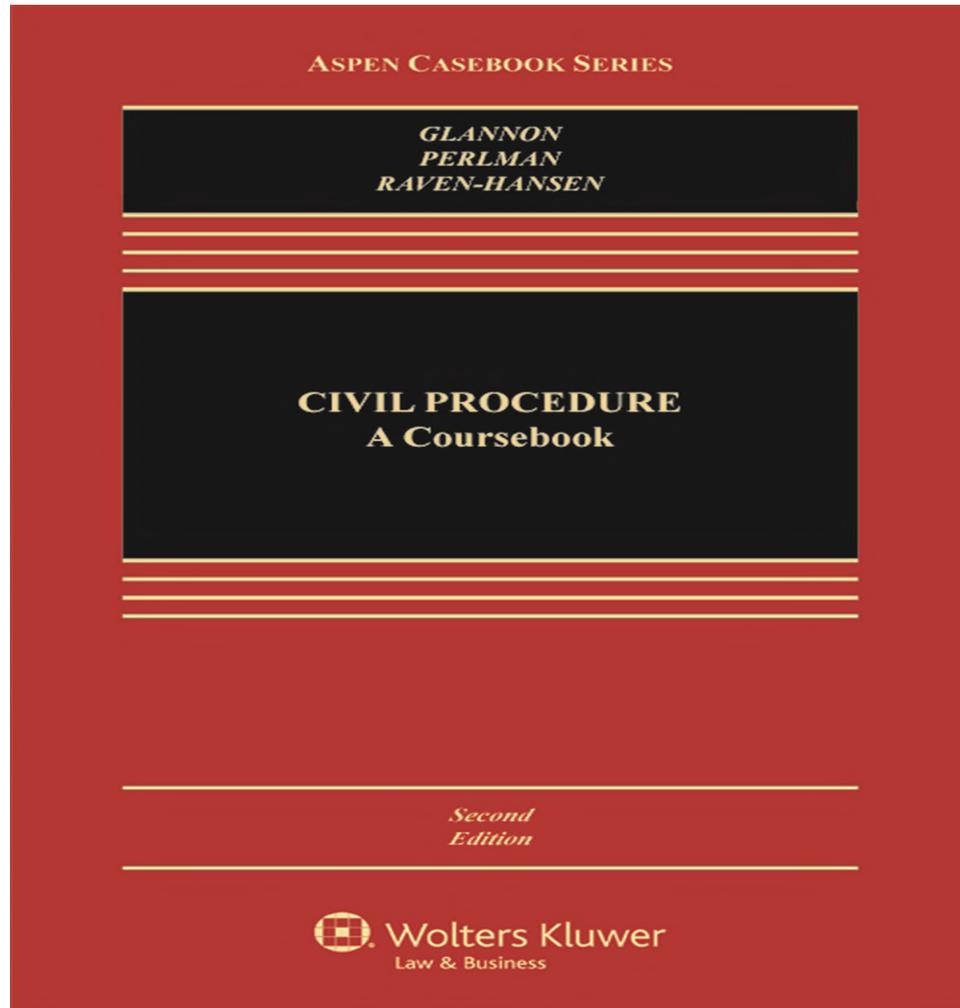


Be more proactive!

Along with Motions in Limine, Motions for Protective Orders are a tool for preventing use of the Reptile.



Federal Rule of Civil Procedure 26



CASE EXAMPLE:

Estate of Richard McNamara v. Jose Navar, et al., 2020 WL 1934175, at *1 (N.D. Ind., Apr. 30, 2020).

Background



CASE EXAMPLE:

Estate of Richard McNamara v. Jose Navar, et al., 2020 WL 1934175, at *1 (N.D. Ind., Apr. 30, 2020) (continued).



CASE EXAMPLE:

Estate of Richard McNamara v. Jose Navar, et al., 2020 WL 1934175, at *1 (N.D. Ind., Apr. 30, 2020) (continued).



CASE EXAMPLE:

Estate of Richard McNamara v. Jose Navar, et al., 2020 WL 1934175, at *1 (N.D. Ind., Apr. 30, 2020) (continued).

PLAINTIFF'S RESPONSE

- On the other hand, the plaintiff indicated that “questions regarding safety . . . are certainly permissible questions during a discovery deposition,” and “questions along this line of safety could reasonably yield discoverable information.”
- Plaintiff further argued in the response that the scope of discovery is much broader than the scope of admissibility, thus a protective order seeking to limit the line of questions to exclude blanket topics of “safety” is ridiculous and overbroad.

CASE EXAMPLE:

Estate of Richard McNamara v. Jose Navar, et al., 2020 WL 1934175, at *1 (N.D. Ind., Apr. 30, 2020) (continued).

THE COURT SAID...



Takeaways from Estate of Richard McNamara v. Jose Navar, et al.



Motions in Limine

by Beth C. Boggs



Please don't ask me for motions that I have filed on this topic because I have lost them all.



Be more proactive!

Along with Motions for Protective Orders, Motions in Limine are a tool for preventing use of the Reptile.



Purpose of using the Motion in Limine

- The motion in limine can target any question or argument that suggests the jury utilize a standard of community safety or personal safety instead of the appropriate standard of care.
- Defense counsel should point out that “safety rules” to protect the community at large are not a legal standard and are an irrelevant concoction brewed by plaintiffs attorneys.
- The duty of the jury is not to ensure the safety of the community at large, but rather, to determine whether the defendant breached the standard of care and caused harm to the plaintiff.
- The motion can also target any argument about potential harms that may occur in the future.
- Courts have held that it is inappropriate to suggest that a jury base its decision on the future impact of a verdict on society.
- There is limited case law on the use of motions in limine to attack Reptile tactics but a couple recent cases will be discussed.

CASE EXAMPLE:

Hensley v. Methodist Healthcare Hospitals, 2015 WL 5076982 (W.D. Tenn. August 27, 2015).

BE SPECIFIC



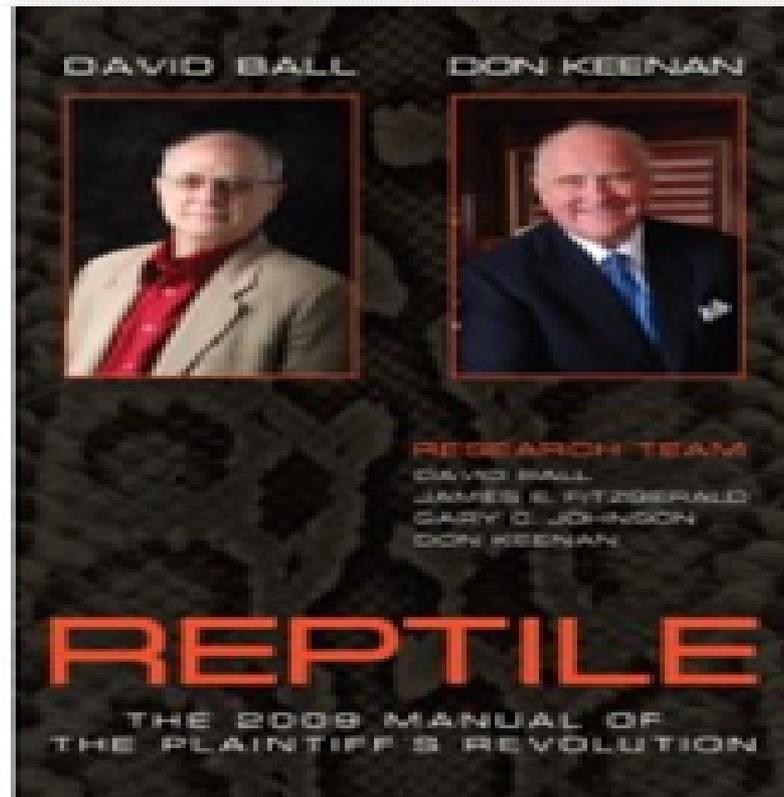
Takeaways from Hensley v. Methodist Healthcare Hospitals



Golden Rule Arguments



Golden Rule Arguments (continued).



Example of a successful motion in limine arguing that the plaintiff's Reptile tactics violate the Golden Rule prohibition.

“CGM America moves the Court to preclude any reference to the “Reptile Theory.” The “Reptile Theory” is a concept set forth in David Ball's and Don C. Keenan's book, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION. The authors suggest that a plaintiff's attorney must get the juror's brain into a “reptilian survival mode.” “Reptile” refers to the reptilian part of the brain that contains the survival mechanism. The central idea behind the “Reptile Theory” is that when a reptile (or juror in this case) sees a survival danger, she protects her genes by pushing the juror to protect herself and the community. To do this, the plaintiff's attorney defines a blanket rule, which for every case is something akin to, “a company [or landowner, driver, physician, accounting firm, etc.] is not allowed to needlessly endanger the public.” This theory is effective with jurors because it appeals to their survival instincts and their want to protect themselves and their community. It also benefits from hindsight. However, the theory is impermissible because it is a recreation of the inadmissible “Golden Rule” argument...”

(continued)

“...The same rationale underlying prohibitions on urging jurors to apply the “Golden Rule” or “send a message to the defendant” applies here. Such arguments have a tendency to “deflect the jury from their task, which [is] to render a verdict based solely on the evidence admitted at trial.” See Nishihama v. City of San Francisco, 93 Cal. App. 4th 298, 305 (2001). In the same way, “Reptile Theory” appeals to jurors’ subjective judgments about their best interest and the best interest of the community rather than their impartial judgment predicated on the evidence. Because it is simply a re-hash of the impermissible “Golden Rule” argument, the Court should prohibit the use of “Reptile Theory” arguments.”

The Court's Ruling

“The motion in limine is **GRANTED**. Reptile Theory arguments appear to mirror the “send the message” or conscience of the community arguments discussed previously. As noted above, “send a message” or conscience of the community arguments are disfavored in the Sixth Circuit. Strickland v. Owens Corning, 142 F.3d 353, 358 (6th Cir. 1998). Similarly, any argument by Plaintiffs' counsel that attempts to urge the jury to render a verdict against Defendant on the basis of fear for the safety of the community or fear for the safety of the jury and their families is inappropriate. Accordingly, Plaintiffs may not properly argue that the lawsuit was brought to ensure or promote community safety.”

Brooks v. Caterpillar Glob. Mining Am., LLC, No. 4:14CV-00022-JHM, 2017 WL 3401476, at *9 (W.D. Ky. Aug. 8, 2017).



Conclusion

Therefore, if defense counsel can expose the fact that many Reptile tactics are merely backdoor Golden Rule arguments, the court can easily prohibit them.