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PERSPECTIVE

The Reptile Theory: Use it!

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There has been an explosion of nuclear verdicts in recent years, with plaintiffs awarded billions of dollars in damages for all types of losses purportedly sustained at the hands of small businesses and large corporations. This trend is a major problem for corporate America, as well as the attorneys who defend these claims.

The number one driver of nuclear verdicts is juror anger. The challenge for defense lawyers is to figure out how to defuse that anger. But what if you cannot stop plaintiff counsel's antics to inflame a jury? What if your motions to prevent "bias, sympathy or prejudice" in the courtroom are not successful? What if there is nothing left for you to do to achieve justice for all, not just plaintiffs and their counsel?

Then it is time to beat them at their own game.

The Reptile Theory

How have plaintiffs' lawyers been getting juries angry over

the last 10 years? The Reptile Theory is one way.

Described in the book "Reptile: The 2009 Manual of the Plaintiff's Revolution," the Reptile Theory has changed the landscape for plaintiffs' lawyers and their approach to jury trials. The best plaintiffs' attorneys will employ Reptile tactics to incite anger in jurors — tapping into the primitive part of jurors' brains and evoking a fight or flight mentality. In effect, the Reptile Theory is designed to shift the jury's focus from the law — or standard of care — to absolute safety at all costs and total absence of danger.

Plaintiffs' attorneys across the country now regularly employ the Reptile Theory in a variety of civil cases, including personal injury, medical malpractice, transportation, construction defect, and other professional liability suits. To date, plaintiffs' attorneys have attributed over \$8 billion dollars in verdicts and settlements to the Reptile Theory.

Worry About Yourself!

Remember the days when both sides of the courtroom were worried about what kind of impression the plaintiff would make at trial? Was she going to be sympathetic? Was she likeable? How will she present to a jury? Do you think the jury will give her a lot of money? Those days are over!

Now, all good plaintiffs' lawyers are laser focused on the actions of the defendant. And many are using the Reptile Theory to engage the most primal part of a juror's mind and evoke the idea that if a defendant's actions are allowed to continue, then the community — perhaps even the jury itself — may be in danger. By focusing on the defendant's conduct and fueling jurors' fear, plaintiff's counsel ultimately incites anger over something the defendant did or failed to do.

How do you know the Reptile is coming in your case? When plaintiff's counsel begins to use "priming" words in discovery, such as always, never, risk,

danger, community, safety or public safety, and needlessly endanger. They combine these words with simple statements that most deponents may unwittingly agree with, such as:

- "Safety is always the top priority."
- "Danger is never appropriate."
- "Protection is always a top priority."
- "Reducing risk is always a top priority."
- "Sooner is always better," and/or "More is always better."

How to Slay the Reptile

In terms of legality and morality, the Reptile Theory really has no place in the courtroom, so the defense — and fairness-seeking plaintiffs' counsel — must work to keep it out of trial.

Defense must object, early and often! Object in deposition and in trial. Instruct your deponent not to answer improper Reptile Theory questions. File motions in limine with applicable law to keep it out of trial. You can even expose the Reptile by telling the jury in closing argument exactly how plaintiff's counsel is trying to manipulate them.

Reverse Reptile

But, what if despite all your efforts to keep out the Reptile Theory, it slithers into your trial? Use the Reverse Reptile. The Reptile Theory acknowledges that the same safety rules apply to both the defense and plaintiff. So, in reality, the defense can use it too!

Defense counsel may choose to establish a safety rule that governs a plaintiff's contributory negligence, similar to plaintiff counsel's efforts to trap the defense in a safety rule. The defense may create rules the plaintiff needs to follow depending on the type of case:

- Employees should follow company policy in the execution of their work duties;

- Consumers should follow manuals and instructions when using a product;

- Patients should follow doctors' instructions after being discharged from medical care;

- Patrons should watch where they are walking in a crowded store;

- Drivers should follow the rules of the road.

How does this work in practice? We had a jury trial a couple of years ago against a top

ranked plaintiff's lawyer in Sacramento where our client was at fault. A 6-foot-long pipe fell off the back of our company truck and bounded straight for the front windshield of the plaintiff, who was coming from the opposite direction. If plaintiff turned to her right, she would have driven off the side of a mountain. If she held her course, she would have been impaled.

Rather than face a certain death, she turned to her left and drove into a dirt embankment, suffering an alleged brain injury. Her demand was \$12 million at trial. Rather than admit full liability in this scenario, we employed the Reverse Reptile and asked questions such as:

- "When you're driving, is safety important to you?"

- "How about the safety of others, is that a priority of

yours when you are driving?"

- "You understand if you drive over a double yellow line, you can hurt someone, right?"

- "You will agree you had a duty to maintain control of your vehicle at all times during this incident, right?"

Through this line of questioning, the plaintiff acknowledged (1) people should follow the rules of the road when driving, (2) people can get hurt when someone does not follow roadway laws, and (3) she didn't follow the rules of the road when she crossed the double yellow line. In the end, the jury found the plaintiff 40% at fault, when she really had no other choice.

Nuclear verdicts are real. The good news is they can be minimized if the defense learns how to spot — and reverse — the Reptile Theory. Sometimes

you have to follow the old adage: If you can't beat 'em, join 'em! ■

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