



## **2014 CLM Annual Conference**

**April 9, 2014 – April 11, 2014**

**Boca Raton Resort  
501 E. Camino Real  
Boca Raton, FL 33432**

**Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)**

### **How to Spot the Reptile Effect Before It's Too Late**

#### **I. What Is “Reptile”?**

Have you recently had a case where the plaintiffs’ counsel continuously focused on seemingly unrelated safety issues or constantly used specific words throughout discovery which seemed unusual? If so, chances are you were “Reptiled.” A growing trend in civil litigation is the implementation by plaintiffs’ counsel of the “Reptile” program, which was created over the past few years by experienced advocates from the plaintiffs’ bar. The “Reptile” program refers to a set of manuals, books, DVDs, seminars and workshops developed by plaintiffs’ counsel, Don Keenan, and jury consultant, David Ball, designed to produce high verdict results in plaintiff cases. The Reptile system utilizes themes taken from psychology, marketing, and subliminal messaging which are intended to activate jurors’ “reptilian brains” and cause jurors to render verdicts based on primitive fear instincts rather than using their “ape brains” to apply the law to the facts of the case. In sum, Reptile programming seeks to gain plaintiffs an unfair advantage by producing a reactionary verdict rather than one based on rational thought and reasoning.

#### **A. Origins of the Program:**

The Reptile program began with the publication of a manual in 2009 explaining the basic premise of the program, and recommended uses for the Reptile program, and then expanded into a series of additional manuals and DVDs specifically geared toward voir dire, witness preparation, opening statement, and other trial preparation techniques, as well as seminars and workshops around the country which defense attorneys are not permitted to attend. Over the past year or so, however, defense attorneys have begun to see Reptile tactics applied in their cases at a growing rate. Alarming, the Reptile website claims total Reptile verdicts and settlements of nearly *five billion dollars* as of January 2014.

#### **B. Reptile Basics:**

The Reptile program is premised on the idea of a “triune brain”, where the brain functions on three basic levels: 1) the neocortex involves higher reasoning functions – i.e. the “ape brain”; 2) the limbic region involves pleasure reactions – i.e. the “dog brain”; and 3) the “reptilian brain” involves reactions to fear and anxiety. In a nutshell, the Reptile program teaches that when the “reptilian brain” perceives danger, the juror is prompted to protect herself and the community by rendering a plaintiff

verdict. The greater the danger, the more firmly the reptile brain controls the juror. Consequently, according to the “Reptile” program, plaintiffs’ counsel must activate the jurors’ reptilian survival instincts in order to prevail with maximum results.

**C. The Reptile Focus:**

Reptile encourages plaintiffs’ counsel to focus not on what actual harm was caused in the case at hand, but rather on 1) how likely the defendant’s act or omission was to hurt someone, 2) how much harm the act or omission could have caused, 3) and how much harm the act or omission could have caused in other situations (rather than in the particular factual situation of the case being decided). The message which the Reptile program sends to jurors is that the defendants’ conduct threatens everyone’s safety, a proper verdict will reduce this danger, and, if a proper verdict is not given, the danger to everyone will be increased.

**II. How to Spot Reptile in Litigation**

**A. Reptile’s Code Words:**

The Reptile program uses code words and rules based on psychological studies of jurors’ perceptions in order to trigger jurors’ reptilian brains as early as during voir dire, to produce the desired results by either getting jurors “on-code” or by showing how the jurors’ circumstances are “off-code”. For example, the Reptile program suggests jurors equate code words like “good health” with mobility, “hospital” with a processing plant, “immigrant” with outsider, and “trial” with opportunity. Reptile encourages use of these code words, in connection with what are referred to as “umbrella safety rules”, to produce reptilian brain reactions in jurors to result in high plaintiff verdicts.

**B. Reptile’s Umbrella Safety Rules:**

According to the Reptile approach, a good umbrella safety rule plus the threat of danger activates the reptilian brain. An example of an umbrella safety rule would be, “defendant is not allowed to needlessly endanger someone like you.” One Reptile technique is to get the defendant or the defense expert to agree to these umbrella safety rules during deposition, agree that some standards of conduct are safer than others, agree that the standard should not allow extra danger unless it might work better or increase odds of success, and then proceed to discredit the witness using questions which suggest the defendant’s conduct could have caused greater harm in situations other than the factual situation in the pending case. The Reptile program advocates that plaintiffs’ counsel should never refer to an “accident,” “mistake,” “misjudgment,” or “inadvertence,” but rather should characterize defendant’s conduct as a *choice*.

**III. Reptile in Premises Liability Scenarios**

**A. How an Umbrella Rule Might Be Presented in a Premises Liability Context:**

The most basic and general umbrella rule advocated by the Reptile program is that defendant is not allowed to needlessly endanger the public. Plaintiffs’ counsel must then create case specific rules attributable to the defendant’s conduct in the case and seek to get agreement from defendants’ employees and experts. In the premises liability context, a classic umbrella rule might be where defendants are asked to agree that defendants should keep floors clear from spills in order to prevent customers from slipping. Follow up questions might ask defendant to agree that if defendant’s employees fail to follow safety procedures for cleaning up and then a person slips on a spill and is injured, then defendant should be responsible for that injury. Further questions would likely explore what types of serious injuries might result in such situations.

Defensive responses to these types of questions might include: “it depends, that is why we have courts and juries in order to decide who is at fault for an injury.” “Every accident is different.” “I cannot just give blanket answers about hypothetical scenarios because I don’t have all the facts, but I can discuss what happened here.” “I don’t know, there might be other factors involved.” “Maybe, but that is not what happened here.” The importance of witness preparation and practicing responses to such lines of questioning cannot be stressed enough.

**B. Site Inspections and Surveillance:**

Plaintiffs’ counsel using Reptile tactics will undoubtedly seek to show the jury that defendant simply does not care about safety or security and, consequently, anyone can be hurt. No matter how much you prepare your witnesses and experts, a photo or video is worth a thousand words to a jury. Showing that defendants are not serious about safety or security may be as easy as a snapshot of a cartoon or joke posted on an employee safety bulletin board taken by Plaintiff’s expert while walking through the premises during a site inspection. Surveillance of workers skirting minor safety procedures during everyday activities can also be used to demonstrate lack of importance placed on safety policies. Awareness of these pitfalls, vigilance, and pro-active management to reduce the potential development of such evidence are often more successful and cost-effective than needing defense counsel to move to exclude such evidence as overly prejudicial at trial.

**IV. What Can You Do to Minimize the Reptile Effect?**

**A. Be Aware:**

Awareness is the first step. Defense counsel familiar with Reptile tactics will be in a better position to spot and prevent the damaging effects of attempts to implement Reptile by plaintiffs’ counsel. Claims professionals can also alert defense counsel who may not yet know about the Reptile program to be on the lookout for code words, umbrella safety rules, and interest in safety concepts which may seem unrelated to the injury at issue in the case. Risk managers and corporate counsel can advise management and employees to be aware of employee conduct and conditions of premises which might be used as fuel for Reptile litigators, and then work to avoid or minimize those potentially harmful factors.

**B. Prepare Witnesses:**

Defense lawyers who understand the Reptile system can make their witnesses, clients, and experts aware that they will be asked to agree with umbrella safety rules and then be asked to extend those rules to other contexts beyond the facts of the pending case. The witnesses, clients, and experts should be prepared to differentiate the facts of the pending case from the umbrella rule and to avoid discussion about situations other than the factual situation at issue. Corporate counsel and risk managers can build a foundation for this preparation by working with management and employees to understand how even minor lapses of safety policy can be used as fuel for litigation, and how to think critically when addressing accident situations in order to minimize potential Reptile pitfalls.

**C. Motions in Limine and Jury Instructions:**

Motions in limine and jury instructions can be used to prevent extension of plaintiff arguments and evidence beyond the scope of the pending case, thereby preventing jurors from being exposed to Reptile tactics. At least one court has already granted a motion to exclude use of the Reptile strategy at trial and such motions are now being filed with increased frequency. Jurors should be reminded that the case is not a class action, and their purpose is to weigh the facts and law involved in the present case for the particular injury involved.

Depending on your state laws, legal authority against “golden rule” or “conscience of the community” type arguments may be successful in limiting Reptile arguments at trial through motions in limine and jury instructions. Although Reptile does not directly advocate asking jurors to step into plaintiff’s shoes, the effect is the same by requiring jurors to seek to protect themselves and the community by rendering a substantial verdict in favor of plaintiff. Many states laws prevent these types of arguments, especially in the context of punitive damages. Essentially, these arguments are based on passion and prejudice, and deprive defendants of due process by punishing defendant for potential injuries that could have resulted to other members of the community. Once the courts become more educated and motions seeking to restrict Reptile tactics are commonplace, perhaps plaintiffs’ counsel’s incentive and motivation to try Reptile strategies in the future will be significantly diminished and/or dismissed as just a fad.

**D. Consider Use of Reptile Defensively:**

Facts establishing comparative fault should be explored to minimize the impact of Reptile programming – perhaps showing how the plaintiff violated an umbrella safety rule (for example, ignoring safety instructions, needlessly walking through an obvious hazard, failing to wear a seatbelt, etc.). If counsel can show plaintiffs make mistakes, just like defendants, the Reptile effect may be minimized. Similarly, if defense counsel can get jurors to identify with defendants, an opposite Reptile effect could occur (i.e., everyone, even people like the jurors, can make a mistake or have an accident happen just like defendant. Therefore, you too could be sued and have to pay if plaintiffs prevail in this lawsuit.)

**E. Alerting the Jury to Reptile Tactics:**

Jurors may even be told that Plaintiffs’ counsel are using mind programming techniques to influence them and counsel may encourage jurors to reject this manipulation by fighting their “reptilian brain” with their “ape brain”. Jurors who understand that Plaintiff’s lawyers are deliberately exploiting fear and using manipulation in order to produce a reactive result may feel disrespected and reject Plaintiff’s arguments. In fact, some attorneys have seen positive results for the defense after describing Reptile techniques to jurors during closing argument, and encouraging the jurors to decide the case based on the facts presented, rather than hypothetical dangers designed to manipulate their decision. Exposing Plaintiff’s unfair and insulting strategies may seriously deflate the effect of Reptile techniques.

**F. Get Involved:**

The defense bar is working to develop additional techniques and information combating Reptile programming by the Plaintiffs’ bar. Participation in seminars, workshops, and publications by attorneys, claims professionals, and risk managers will continue to expand awareness and strategies for avoiding the impact of Reptile in our courts. Consider use of social media sites to create resource sharing and discussion groups to support defense efforts against Reptile. Everyone is encouraged to spread the word and circulate examples of how Reptile is being used in litigated cases in order to provide the defense community with additional tips or techniques on how Reptile’s effects can be prevented.