



**Anti-Nuclear Verdict Training Series
Session 2: May 25, 2021**

NUCLEAR VERDICTS: SLAY THE REPTILE

I. What is the number one factor motivating juries to award nuclear verdicts?

Anger is the number one factor motivating juries to award nuclear verdicts. Plaintiff lawyers will say almost anything to stoke this anger, as evidenced in countless cases resulting in nuclear verdicts. Common phrases from plaintiff’s counsel include, “defendant does not care,” “profits over safety,” and “defendant needlessly endangered the public.” The plaintiffs’ bar drives juries toward its desired results through research, jury psychology, and the Reptile Theory.

II. The Reptile Theory

“Safety is a top priority at your company, right?” This seemingly harmless question is just one example of a setup for the Reptile Theory, a technique plaintiffs’ attorneys use to evoke juror anger and elicit higher verdicts. The technique, which relies on triggering a sense of danger in jurors, has become so common many defense attorneys and claims professionals fear the word “reptile,” and for good reason – the Reptile can be a dangerous creature.

Plaintiff attorney Don Keenan and jury consultant David Ball put the “Reptile Theory” on paper in their 2013 book *The Reptile in the Mist*. At the time of writing, their website boasted a total of \$7.7 billion in reptile verdicts and settlements nationwide. While the Reptile is most prevalently known in the personal injury arena, the theory applies to many practice areas and can be implemented in business disputes, employment claims, and professional malpractice actions, among others. Using the Reptile Theory, plaintiff attorneys stoke juror anger and fear in order to drive up damage awards against defendants, which can include lawyers, accountants, architects, contractors, and other professionals.

The Reptile Theory reduces jurors to their basest animal instincts by tapping into their sense of fear and need for survival. Specifically, these tactics target what the book calls the “reptile” brain, a primitive, subcortical region of the brain housing survival instincts. The science

behind the Reptile Theory relies on the most basic instinct shared between humans and animals: aversion to danger. 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. Moreover, it informally appoints jurors as guardians of community safety. Reptile tactics start by getting a defense witness to agree with a broad premise regarding safety. From this agreement, plaintiffs' counsel will create a "safety rule" and attempt to show the safety rule has been broken in the specific case. These tactics promote the primary goal of the reptile: to make jurors feel the immediate danger arising from the *kind of thing* defendant did and attempt to diminish danger in the community by awarding damages.

When used effectively, the Reptile Theory hijacks the standard of care, convincing jurors no harm is acceptable. Additionally, the Reptile Theory violates the prohibitions on using the Golden Rule and invokes principles of community harm. Perhaps the most dangerous aspect of the Reptile is how easily it can be disguised and offered into evidence in the form of unsuspecting testimony. This can all lead jurors to award large damages in an attempt to enhance safety or minimize danger. However, the Reptile is not invincible. It is possible to limit testimony supporting the reptile, exclude reptile evidence, and keep the jury from falling prey to the Reptile.

III. How has COVID-19 changed things?

The ongoing global pandemic has changed many things, and juries are no exception. In a study conducted by Magna Legal Services, 52% of potential jurors surveyed answered the COVID-19 outbreak has made them feel more vulnerable. 46% of polled potential jurors felt they would "be more conservative" with their money after the COVID-19 pandemic subsides, with 12% answering "more liberal," and 42% with "no change." When asked if business insurance policies should cover any business interruption losses that occur due to the COVID-19 pandemic, only 19% of polled jurors disagreed, and 3% disagreed. 78% of the individuals polled either agreed or strongly agreed business insurance policies should cover losses resulting from COVID-19.ⁱ

Potential plaintiff advantages in a post-pandemic trial environment include increased mistrust in corporations, deference to attorney-referred doctors, and feelings of fear and powerlessness, effectively increasing susceptibility to Reptile arguments. The defense is not out of luck—the post-pandemic world also garners advantages for defendants, including a kinder society, increased empathy for professionals and businesses hit hard by the crisis, more perspective on the importance of togetherness, and the notion hope, reason, and community still prevail over anger and fear. Rachel York Colangelo, national managing director of jury consulting for Magna Legal Services, notes, "Where in the past companies may not have felt comfortable discussing the financial ramifications of a decision for fear that it would play into the Reptile Theory catchphrase, 'profits over people,' now jurors might be more receptive to understanding a corporate defendant's decisions do not hinge on just one thing (profits), but on a multitude of factors (including safety)."ⁱⁱ

These polls give valuable insight into shifts in juror attitude in a post-pandemic world. “Understanding a juror's willingness to consider factors other than human health and safety when responding to the coronavirus pandemic will give defense lawyers an idea of the lens through which they see the world. Is it black-and-white, or rather somewhere in the gray, where so many hard decisions by corporate defendants are made?”ⁱⁱⁱ

“Whether a juror is receptive to alternative considerations for responding to the coronavirus pandemic may be a good indicator of his or her willingness to listen to the company's story, particularly where the Reptile Theory is being used to paint the company as valuing profits over safety. For example, was the prospective juror in favor of shutdowns until a vaccine was developed, or did he or she support limited opening while trying to mitigate risk? The experiences and mindset of those jurors will be key for defense lawyers to know as they represent their corporate clients going forward.”^{iv}

This shift in juror attitude is persistent nationwide and should be approached with care and caution. “Overall, what we’re seeing is about 76% of juries around the country believe that corporate executives will lie and cover up,” Colangelo said. “Juries are very skeptical of corporations and their representatives. They’re going to be thinking, ‘Sure Mr. CEO, you’re going to say whatever you need to protect your company.’ So there’s a big hurdle for those representatives to get over in credibility... Magna’s nationwide surveys found that 30% of juries believe it takes billions of dollars to send a message to large corporations that they perceive exhibit bad or risky behavior.”^v

IV. How can we slay the reptile?

Spot the Reptile

Like a snake hiding in a garden, the reptile can be difficult to spot. The key is to recognize signs of the reptile before too much damage is done. You can be sure plaintiffs’ counsel will implement reptile techniques at their earliest opportunity. In fact, this opportunity may present itself before a claim is even initiated. As a result of the global pandemic, companies are prioritizing safety and issuing statements such as, “Safety is our *number one* priority.” These communications may be more vulnerable to the Reptile Theory.

Ensure defense counsel is on the lookout for the Reptile in depositions. Listen for the creation of a safety rule in questions. Be on guard for questions referring to safety, risk, and community or eliciting agreement to “always” or “never” questions. Object to Reptile questions as appropriate—a few to consider are incomplete hypothetical, calls for a legal conclusion, not reasonably calculated to the discovery of admissible evidence, and misstates applicable law

(especially if counsel is trying to shift the standard of care). The best defense to the Reptile starts early!

Prepare Your Witnesses for the Reptile

Slaying the Reptile involves getting defense witnesses on board. Show witnesses what the Reptile looks like. Many setup questions for the Reptile Theory sound reasonable at first. Make sure witnesses avoid the trap of overbroad “yes” and “no” questions by being able to qualify when necessary and explain inherent risks in answering these questions without qualification. This is even more important for “always” and “never” questions. Remind witnesses to ask for clarification if they do not understand a question. Teach witnesses to limit broad questions to specific facts and to view them from the perspective of when the work occurred. For example, answers including “it depends on the circumstances” or “not always” acknowledge the general question may be true in some circumstances, but not necessarily all the time or in the facts of the case.

Use Risk-Benefit Analysis

A hidden danger of the Reptile is subtly shifting the jury’s perception of the standard of care. Plaintiffs’ counsel will use the Reptile Theory to suggest *any decision other than the safest choice is negligent*. However, the concept of “what is safe” has changed significantly over time. While safety is always a concern, there are other factors at play in various decisions. This is where a risk-benefit analysis is critical to defend against the reptile. Do not allow the jury to lose sight of the true standard of care!

Bring Motions in Limine

One of the most effective weapons to keep the reptile from rearing its head in court is a motion *in limine*. Many judges are familiar with the Reptile Theory, and some judges will need education to understand the Reptile Theory is a carefully disguised violation of the Golden Rule. Regardless of your judge, ensure defense counsel keeps the Reptile away from the jury with a motion *in limine* to exclude *all evidence and argument based on the Reptile Theory*. In California, courts can exclude Reptile arguments for impermissibly heightening the standard of care and asserting Golden Rule arguments. The Reptile standard for using “the safest possible choice” does not reflect the standard of care in negligence cases. What others could do or could have done is irrelevant; the jury should base their deliberation on the evidence.

Expose the Reptile

Finally, reveal the Reptile for the snake oil it is. Ensure defense counsel tells the jury plaintiffs’ counsel is using mind games to take advantage of them. Explain the Reptile Theory is

an attempt to use the primitive part of the jurors' brains to detect danger to inappropriately allow bias and prejudice into the courtroom. Show the jury the Reptile and remind the jury of the controlling "standard of care." Nobody can be 100% safe 100% of the time. "As another defensive approach, defense attorneys can tap into these threats, even crafting their own safety rules, for example, noting, 'We make the hazards known and we let individuals make their own reasonable choices.' That is the kind of a safety rule which protects not only people, but also the underlying goal of skiing and recreation."^{vi}

V. YOU have the power!

Next time... **How to Defuse Anger by Personalizing the Corporate Defendant, and Accepting Responsibility**

ⁱ <https://magnals.com/juries-in-a-post-coronavirus-world-new-lawsuits-new-exposure-new-juries/>

ⁱⁱ <https://www.law360.com/articles/1271720/current-crisis-may-render-plaintiff-reptile-tactics-ineffective>

ⁱⁱⁱ *Id.*

^{iv} *Id.*

^v <https://www.ttnews.com/articles/plaintiff-attorneys-often-use-reptile-theory-solicit-nuclear-jury-verdicts-experts-say>

^{vi} <https://www.law360.com/articles/982244/jury-persuasion-in-an-alt-fact-world>