The Jury EXPERT
The Art and Science of Litigation Advocacy
from NOVEMBER 2013
Volume 25, Issue 5
A publication of the American Society of Trial Consultants

Taming the Reptile:
A Defendant's Response to the Plaintiff's Revolution

by Ken Broda-Bahm, PH.D.

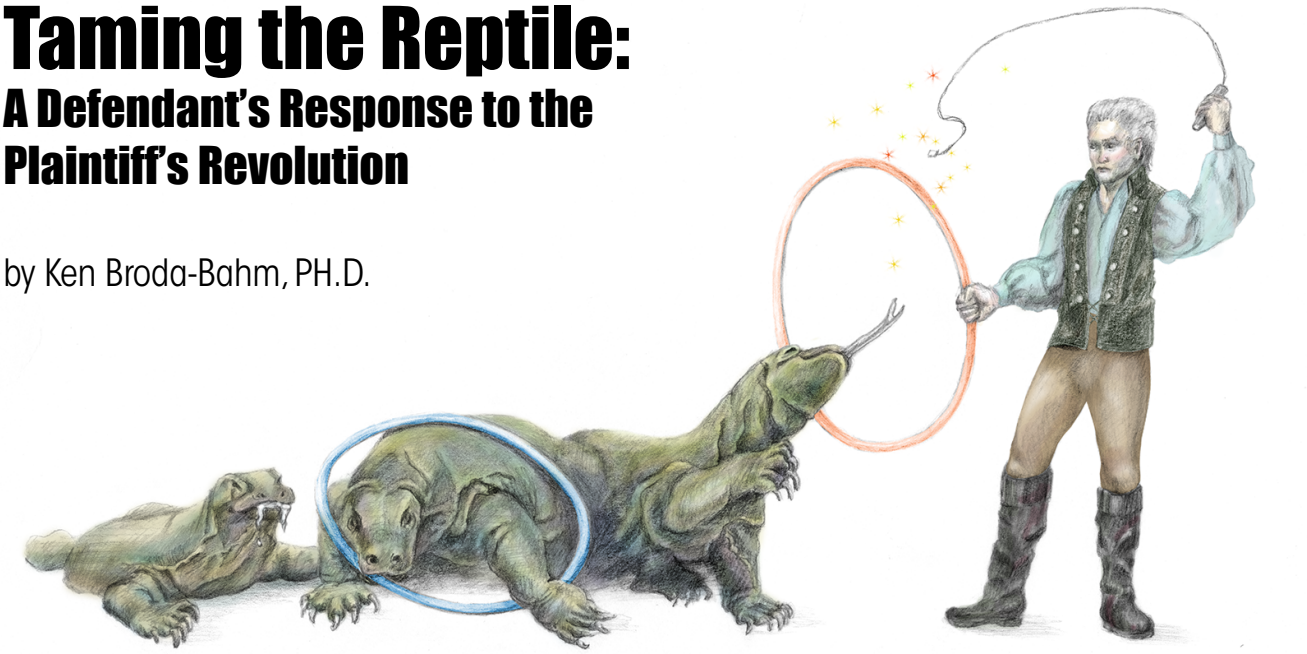

Image by Pamela Miller of Persuasion Strategies.

Before a recent presentation, I was chatting with a Texas medical malpractice defense attorney when she shared the following:

> Plaintiffs' lawyers have changed. They're all talking about "safety" now, and that word is finding its way into every deposition: "What is the safe procedure?" or "What would've kept Mrs. Johnson safe?" They're all talking about safety and security instead of standard of care.

I replied, "Oh, that is the Reptile." She hadn't yet heard about the popular book by David Ball and Don Keenan, so I explained, it's a theory for trying plaintiffs' cases by portraying the defendant's conduct as a threat to jurors' own safety and the safety of others. By framing arguments in terms of our most biologically basic need for security, the theory goes, plaintiffs are able to successfully tap into jurors' primitive or "reptile" mind. And when the Reptile decides, our conscious mind and reason-giving ability follows. Based on that unifying concept, the perspective has taken the plaintiffs' bar by storm, spinning off more books as well as frequent trainings. The approach has significantly influenced plaintiffs' methods of trying cases, and the philosophy currently claims close to $5 billion in associated verdicts.

"Cases are not won by logic," Ball and Keenan write, "you need to get the Reptile to tell the logical part of the juror's brain to act on your behalf. To get the Reptile to do that, you have to offer safety."

Defending Against the Reptile: A General Approach

Since its introduction in 2009, there has been only limited response from the defense bar, and some of these responses have taken on the theory on its own terms - terms that appear to rest on some questionable assumptions, particularly in light of a recent Scientific American piece. So this section offers a defense manifesto, so to speak, recommending three steps for a defense response to this trend.

But first, one quick disclaimer is in order. My intent isn't to add just another comment to the others (here, here, here, or here) claiming that the Reptile perspective is legally inappropriate, unethical, or ineffective. Indeed, the enthusiasm of its adherents,

as well as its record of application in court, speaks volumes about its effectiveness. Despite what some critics might warn, the Reptile isn't some radical new toxin introduced into our court system. Instead, it is a new way of thinking about some very old ideas in communication. Accordingly, it calls for a thoughtful response.

For defendants looking at the prospect of the other side increasing their effectiveness by appealing to the survival instincts of the reptile brain, here is what I'd suggest.

Step One: Strip Away the Brain Baggage

A central support for the Reptile approach is the "Triune Brain" theory, as Ball and Keenan acknowledge in the foreword to their book. The notion is based on the work of neuroscientist Paul MacLean, who theorized in the 1960s that there are three discrete parts to the brain reflecting the stages of evolution: a reptilian complex at the core of the brain (primitive and survival-based), a paleomammalian complex located in the mid-brain (focused on emotion, reproduction, and parenting), and a neomammalian complex at the top (capable of language, logic, and planning). But it is that basic reptile level, the theory goes, that drives our behavior, and even when we think we are acting based on the language and the logic of our neomammalian brains (e.g., in deliberation), we are unknowingly responding to the commands of the reptilian brain. "The Reptile invented and built the rest of the brain," Ball and Keenan write, "and now she runs it."

This perspective on brain structure is an important part of what makes Ball and Keenan's perspective new. The message is that since the Reptile is in control of our thinking, our persuasion needs to tap into the only things that waken and motivate the Reptile: safety, security, and freedom from threats. That is what makes the approach unique and powerful at a level that goes beyond reason-giving and is essentially precognitive. So Ball and Keenan are offering plaintiffs' lawyers a kind of magic button to engage the most powerful persuader imaginable. Some defendants have taken note. Attorney Mark Bennett, for example, wrote in a blog post entitled "Lizards Don't Laugh," that civil defendants "can try to a) make a stronger appeal to the reptile brain, or b) disengage the reptile brain, and engage the dog brain or the ape brain." He goes on to suggest that laughter, by creating incongruity and relief, gets the jury out of their reptile minds, creating the possibility for at least a "Simian Trial."

The problem with all of this is that the idea of the "reptile brain" is more figurative than literal. "The theory," as science writer Ben Thomas notes, "has proven outright insane in light of the latest scientific research." In a recent blog piece invited by Scientific American, Thomas highlights the so-called reptile brain as an example of the popularization of dubious science. "The Triune Brain idea holds a certain allegorical appeal: The primal lizard – a sort of ancestral trickster god – lurking within each of us," Thomas writes, "But 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." Looking at MacLean's "reptilian complex" referring to the bundle of nerves at the base of the brain called the basal ganglia, for example, Thomas notes that this was only called "reptilian" because biologists in the 1960s believed that the forebrains of birds and reptiles were made of basal ganglia. But it turns out they aren't. In addition, the idea that these sections of the brain could operate more or less independently like three brains, also hasn't held up in the face of modern neuroscience, because the brain tends to operate as a unified whole.

In light of Thomas' critique, Ball and Keenan's Reptile perspective stands out as illustrating scientific beliefs that persist more because they are useful than because they are valid. It persists and sticks not because there is strong evidence that it is true, but because it feels "complete" and has, as Stephen Colbert would put it, "Truthiness" independent of its truth. The idea that our persuasion is controlled by a reptile mind, as Thomas notes, "makes a weird kind of intuitive sense. We're bundles of instincts and inhibitions and desires that don't fit neatly together. It'd be comforting, in a way, if we could pin those conflicts on little lizard brains." But saying that persuasion isn't controlled by a reptilian underbelly is not the same as saying that our brains are logical, analytical, and predictable either. They're not. Instead of one neat and simple driver of decisions being found in the survivalist reptile, we need to continue to look at the more complicated picture of behavioral drivers that are nuanced, individual, and situational.

Step Two: Recognize that What is Left is Different, But Still Valuable

So what is the Reptile theory without the part about the reptile brain? It is a practical perspective that is as good as its results. Independent of the doubtful neuroscience, the ability to make one's case stronger by applying Ball and Keenan's advice is what matters. As the Los Angeles plaintiffs' attorney Sonia Perez Chaisson put it succinctly in The Jury Expert, "We care not at all about brain anatomy and solely about whether the Reptile works." And by all indications, it works. But it most likely works not because its adherents have found a way to communicate directly the fact finders' primitive reptile brains, but simply because attorneys are recognizing that motivation exists and picking a very strong motivation to speak to. Instead of applying the rational-legal model of jurors reasoning their way to a conclusion by applying the law to the facts and deducing to a verdict, the Reptile practice forces attorneys to speak to what would make jurors *care* about the verdict. The principle of motivated reasoning is that once jurors, or any other decision makers, know what decision they *want* to reach, then they'll have no problem coming up with reasons to support that conclusion. The decision comes first and the reasons are filled in later. So, once you identify the motivation and tie that motivation to your case, you are more than halfway there. If you excise all of the brain-speak from Ball and Keenan's

book, I read them as saying, "Speak to the motivator. Make it an individual motivator, and make it an important motivator." Whether that motive is attributed to the brainstem or to the neocortex matters not a bit.

Step Three: Find Your Own Motivation

A central part of Ball and Keenan's argument is that the Reptile approach is a tool that helps one side, not the other. "The Reptile prefers us," meaning 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," they write, "so when we pursue safety, we are doing what the courtroom was invented and maintained for." Defendants might justifiably counter that the more limited purpose of the court is to resolve the claim before it, and not to broadly enhance society's safety with each verdict. But at the level of personal injury, product, and medical malpractice suits, Ball and Keenan do have a point in emphasizing that it is often easier for the plaintiff to invoke safety than the defendant, except in those cases where the defendant's own conduct is the more salient source of the danger.

But remember, the part of the theory that says, "safety is all that matters" is also the part that is based on the dubious "Triune Brain" theory. Security may be a very powerful human motivator, but once we're freed from the reptile analogy, it is far from the only human motivator. Smart defendants will tie their own case to a powerful principle that is at stake: responsibility, innovation, or fairness. It can even be a strong appeal to empower jurors to resist the pull of an emotive safety-based verdict, and instead base their decision on evidence, science, and facts. Even within the assumptions of the Reptile perspective, there is one source of insecurity that can be hung on a plaintiff's case: The idea of being manipulated can be very threatening. In one of Don Keenan's Georgia trials in 2010, for example, the insurance defense counsel called out the Reptile strategy by name, and previewed what Keenan was likely to do in closing. Just like any other strategy, it becomes less effective when it is known and named.

Defending Against the Reptile: Protecting Your 'Safety Rules'

In a number of different legal contexts – medical, personal injury, and products cases in particular – plaintiffs who adhere to a Reptile approach believe that by framing legal claims as basic appeals to community and personal safety, they are able to wake up jurors' reptilian minds and motivate verdicts in their favor. As outlined above, there are reasons to believe the theory rests on a dubious foundation (the largely discredited belief in a reptilian brain governing the rest of our decision making), but that it works nonetheless (because it encourages persuaders to put motivation front and center). In this section, I want to focus on one element that is a particular vulnerability to the theory: the safety rule. In looking at this particular part of the Reptile perspective, I will use medical malpractice as an example. While not exclusive to the field of medical malpractice, the Reptile and the earlier Rules of the Road work by Rick Friedman both focus strongly on coaching plaintiffs to win these and similar claims related to safety. While safety might apply most tangibly in a medical context, the notion of being secure applies as well, not only to other personal injury cases but, at a more abstract yet still meaningful level, to even contract or patent cases as well.

Safety Rules: The Soft Underbelly of the Reptilian Perspective

According to both the *Reptile* and the *Rules of the Road* views, the key to the plaintiff's ability to persuade is to ground the case, not in a legal standard of care, but in a "safety rule," or a commonsense principle jurors can immediately understand and apply to other contexts. In the formula Ball and Keenan advocate, "*Safety Rule* + *Danger* = *Reptile*" means that once the advocate is able to identify such a rule, and show fact finders the danger to themselves and the community when it's violated, then they've awakened those jurors' reptile brains, motivating them to equate justice in this case with their own security.

In other words, the med mal safety rule might be that doctors should do nothing without a patient's or family's agreement. The danger lies in doctors practicing in ways that take away our freedom and might miss hidden dangers. When jurors see both, then they'll act, not in defense of a legal standard of care or abstract notion of "informed consent" but in order to prevent the doctor-defendant, and others like him, from threatening the safety of patients like the jurors and their loved ones. So the act of identifying a safety rule is key to the theory. Even setting aside the notion of a primitive reptilian brain, the articulation of a simple and widely applicable rule is what frames the conflict and motivates the jury, encouraging them to view the dispute in personal and community terms.

Not just any safety rule works. To really "awaken the reptile," the rule needs to have the six qualities identified below. These rules about rules are not arbitrary, but help get plaintiffs over the barriers to jurors seeing themselves and their verdict as key to promoting safety and removing danger.

What the Plaintiff Wants (and What Medical Reality Often Refutes)

Underlying all six elements of a safety rule in a medical liability context is a black and white view of the medical world. But the advantage for medical defendants is that the real world of treatment and care typically isn't black and white, but is instead situational and highly dependent on a particular patient's circumstances. In resisting plaintiff's attempt to distill it down to one pithy rule, medical defendants will generally have reality on their side. This sets up a conflict that has existed prior to and aside from this Reptile approach, but has been magnified by it:

As plaintiffs' attorneys push for a black and white worldview, defendants push back with a realistic appraisal of shades of gray.

The "umbrella rule," or the formulation with the widest possible application is that "doctors are never allowed to needlessly endanger their patients." That rule will contain a variant for each particular case, and there are six criteria that, according to Ball and Keenan, will determine whether that safety rule is effective or not. Blocking the overly simplistic rule thwarts the Reptile approach by minimizing the perception of personal and community danger, bringing the focus to what the case should be about: a particular plaintiff's treatment by a particular physician. The response on each of these six elements should inform the ways medical defendants prepare fact and expert witnesses, conduct voir dire, and create openings and closings. Each effort to deny a safety rule in your own case can be part of your message at trial.

1. The Safety Rule Must Prevent Danger

Of course, nothing is able to literally and fully "prevent" danger. Teach your jury that physicians are instead trying to lessen its impact or control its course. The reality is that medical care often involves swapping one danger for another in an imperfect effort to make the patient better off. For example, you prescribe a drug with known side effects in order to treat a condition that is, probably, worse than the side effects. This means that the line from the Hippocratic Oath to "first, do no harm" isn't literally true. Excising tissue in a surgery, for example, is doing harm, but a lesser harm than doing nothing. This, of course, is something that doctors, claims representatives, and defense attorneys understand intuitively. Jurors may resist the message, wanting to believe that physicians can guarantee safety. With a little explanation, however, they can realistically set that notion aside.

2. The Safety Rule Must Protect People in a Wide Variety of Situations, Not Just Someone in the Plaintiff's Position

Key to the Reptile's advice is to encourage jurors to abstract beyond the particular patient-plaintiff and to view the rule as broadly applicable and personally relevant. But chances are, patients' situations are not interchangeable, and there is no easy cut-and-paste set of rules that apply to all. Doctors have the job of treating the patient, and the more jurors understand that this is highly particular – patient and situation specific – the better they'll be able to resist the general safety rule.

3. The Safety Rule Must Be in Clear English

Of course, there is nothing wrong with clear English, but making something perfectly clear in a medical context should never require softening, generalizing, or leaving out key medical distinctions. A dumbed-down principle can be a less accurate principle. Complexity for its own sake is the defendant's enemy, and can be rightly seen as obfuscation. But *realistic* complexity – factors and distinctions that are critical to patient care and can be patiently and accurately taught to the jury – is the defendant's friend.

4. The Safety Rule Must Explicitly State What a Person Must or Must Not Do.

The key language here is "must" and "must not." There is no room in a Reptile perspective for "typically," "probably," or "in most cases." It has to be an imperative: "If the doctor sees X, she must do Y." Certainly, there are some parallels to this absolute and linear decision-making in a medical context, but there are also plenty of situations where it isn't a "must" or a "must not," it is a realistic "it depends." Help jurors understand that by explaining and supporting all of the factors that go into that choice. Using a graphic showing a more complicated decision-tree, for example, can truthfully undermine any plaintiff's rule that assumes an "if A, then B" style of thinking.

5. The Safety Rule Must Be Practical and Easy for Someone in the Defendant's Position to Have Followed.

It is often practical and easy in hindsight: If only Dr. Smith had ordered that biopsy, or if only Dr. Jones had transferred the patient earlier. But the question is never what would have provided better care in retrospect, it is always whether appropriate care was delivered based on what was known and believed at the time. *Could* the physician have ordered a different test at an earlier time? Of course, that is going to be both practical and easy. But *did* the physician have solid reasons *at the time* to have ordered that test? That is a different question. Of course, getting jurors past this psychological preference for hindsight can be a challenging task, but not an insurmountable one. You can encourage jurors to adapt a hindsight-resistant mindset by using a timeline to walk through the story based on what was known at the time, and by focusing on the multiplicity of treatment options, not just the one obvious choice that could have been made in hindsight.

6. The Safety Rule Must Be One That the Defendant Will Either Agree With or Reveal Him or Herself as Stupid, Careless, or Dishonest in Disagreement

This final rule really sums up the mindset: You either agree with a simplistic rule, or you are stupid, careless or dishonest. To fight back, you need to mount an educational offensive that frames the choice as something other than that. For example, craft your own safety rule that is simple, yet honest: a principle that jurors can understand and that the doctor followed in this case. If the true rule is a little more complicated than the plaintiff's proffered rule, then make jurors proud of the extra effort it takes for them to get it: They aren't taking the easy route, they're taking the accurate route.

Closing Thought: No One's a Reptile...But Plaintiffs Are Pandas and Defendants Are Seals

Noting the responses I outline above to the six criteria for a successful safety rule, it is clear that at every point, the Reptile practitioners are aiming for the simplicity and comfort of an absolute and cut-and-dried formula for medical care. It is so wedded to the black and white that it could have been called "Panda" rather than "Reptile." Defendants, on the other hand, are often realistically wrapped in all shades of gray – like seals.

In practical terms, plaintiffs are often the ones saying, "It's simple, it's clear, it's obvious" while defendants are responding, "Not so fast. There's more to it than that."

Popular psychology can have a preference for the black and white and many people prefer low effort thinking. That is why the Reptile approach works. But reality is often gray. That can be a big advantage, and defendants shouldn't hesitate to use it.

Dr. Ken Broda-Bahm is a Senior Litigation Consultant for Persuasion Strategies and has provided research and strategic advice on several hundred cases across the country for the past fifteen years, applying a doctorate in communication emphasizing the areas of legal persuasion and rhetoric. As a tenured Associate Professor of Communication Studies, Dr. Broda-Bahm has taught courses including legal communication, argumentation, persuasion, and research methods. He has trained and consulted in nineteen countries around the world and is a past President of the American Society of Trial Consultants.

Ken blogs at Persuasive Litigator (www.persuasivelitigator.com), is an editor for The Red Well (www.redwellblog.com), is active on LinkedIn and can be reached directly at 303-295-8294 or kbrodabahm@persuasionstrategies.com

Note: Content for this article is adopted from two posts in the author's blog, *Persuasive Litigator*.