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Combating Plaintiffs' Reptilian Tactics in Commercial Vehicle, Premises Liability, Products Liability and Med Mal Cases

Responding to Reptile Techniques During Discovery and Deposition

WEDNESDAY, AUGUST 9, 2017

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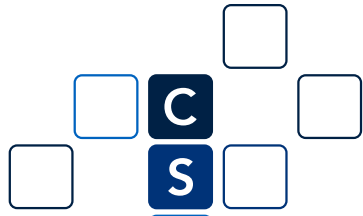
Today's faculty features:

Jedidiah M. Bernstein, **Hinshaw & Culbertson**, New York

Beth C. Boggs, Managing Partner, **Boggs Avellino Lach & Boggs**, Olivette, Mo.

Melissa L. Loberg, Ph.D., Litigation Consultant, **Courtroom Sciences**, Tampa, Fla.

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Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution



**Bill Kanasky Jr., Ph.D.
and Ryan A. Malphurs, Ph.D.**



Introduction

“What happened?” your client barks over the phone. As you gather the words to impress upon your client the challenges your witness faced, you also wonder and search for an explanation. “I prepared him like any other witness by explaining he should remain calm, deliver confident answers, listen carefully, and only answer the question asked”; but thinking back on the deposition, you cringe. Your objections went unheard. Your “preparation” sessions were useless. Your “Deposition 101” speech had no impact. You then realize that plaintiff’s counsel used a new, sophisticated approach that is immune to your standard witness preparation efforts—a form of psychological warfare. You realize the case is now over. “We were Reptiled, weren’t we?” the client demands....

As your client asks why the key witness in the case just “gave away the farm,” with you defending the deposition right next to them, you flash back to what happened:

- Plaintiff’s counsel presents the defendant witness with a series of general safety and/or danger rule questions;
- The witness instinctually agrees to the safety and/or danger rule questions because it supports their highly-reinforced belief that safety is always paramount and that danger should always be avoided;
- The witness then continues to agree to additional safety and/or danger rule questions that link safety and/or danger to specific conduct, as

it aligns with their previous agreement to the general safety and/or danger rules;

- The witness begins unknowingly and inadvertently entrenching themselves deeply into an absolute, inflexible stance that omits circumstances and judgment;
- Plaintiff’s counsel then presents case facts to the defendant witness that creates internal discomfort, as these facts do not align with the previous safety and/or danger rule agreements;
- Plaintiff’s counsel then illuminates that the safety and/or danger rules, which have been repeatedly agreed to under oath, have been violated and that harm has been done as a result;
- The defendant witness regrettably admits to negligence and/or causing harm, as the perception of hypocrisy has been deeply instilled.
- The emotionally-battered defendant witness further admits that if they would have followed the safety and/or danger rules, harm would have certainly been prevented.

Rest assured your witness was not the first, nor will he be the last to fall victim to Reptile manipulation tactics because traditional preparation techniques are not sufficient for the emotional and psychological manipulation witnesses endure during Reptile style questioning. The four devastating psychological weapons that were used against your defendant witness are known as:

- Confirmation Bias
- Anchoring Bias
- Cognitive Dissonance
- The Hypocrisy Paradigm

The combination of these powerful psychological weapons doesn't influence witnesses; rather, it CONTROLS witnesses. These psychological weapons are precisely what the Reptile plaintiff attorney uses to destroy defendant witnesses at deposition.

The well-known "Reptile Revolution" spearheaded by attorney Don Keenan, Esq. and jury consultant David Ball, Ph.D. is now a ubiquitous threat to defendants across the nation.¹ Keenan and Ball advertise their tactics as the most powerful approaches available for plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform, and they boast more than \$6 billion in jury awards and settlements.² Ball and Keenan's tactics have been called "the greatest development in litigation theory in the past 100 years."³ Although the theory developed within medical malpractice cases, Ball's and Keenan's seminars, held nationwide, now cover specific topics related to products liability and transportation. While the Reptile theory has been shown to be invalid, the specific Reptile tactics have proven deadly, particularly during defendant depositions.⁴

Generating damaging witness deposition testimony creates the foundation for Reptile attorneys. Reptile attorneys accomplish high value settlements by manipulating defendants into providing damaging deposition testimony, specifically by cajoling them into agreement with multiple safety rules. Once these admissions are on the record, and often on videotape, the defense must either settle the case for an amount over its likely value, or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility.

Witnesses cannot be faulted for damaging testimony because Reptile tactics employ emotional and psychological tactics to manipulate witnesses into admitting fault. Witnesses' mistakes are caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the Reptile strategy. In other words, if defendants are not specifically trained to deal with Reptile questions and tactics, the odds of them delivering damaging testimony is high. Preventing Reptile attorneys from gaining leverage through damaging witness deposition testimony is the critical first step in combatting reptile tactics.

"Generating damaging witness deposition testimony creates the foundation for Reptile attorneys. Reptile attorneys accomplish high value settlements by manipulating defendants into providing damaging deposition testimony, specifically by cajoling them into agreement with multiple safety rules."

Most papers and presentations from defense attorneys and jury consultants about the plaintiff Reptile theory merely describe the theory and provide rudimentary suggestions to defense counsel

who may face a Reptile attorney.⁵ While these efforts provide basic descriptions of the Reptile Theory, they fall woefully short on providing in-depth analysis and scientifically-based solutions. Suggestions such as “better prepare your witnesses” and “tell a better story during opening” do not provide defense attorneys with the neuropsychological weaponry needed to defeat the plaintiff Reptile approach. The Reptile attack during deposition is specifically designed to exploit the defendant witness’ cognitive and emotional vulnerabilities. As such, a neurocognitively-based training system and counter-attack strategy is necessary if defendant witnesses are to defeat the Reptile attorney during deposition. This paper will serve to a) expose the step-by-step psychological attack orchestrated by Reptile attorneys, b) identify and analyze the cognitive breakdowns that lead to witness failure, and c) provide neurocognitive interventions to prevent witness failure.⁶ Because Keenan and Ball have recently expanded their Reptile tactics past medical malpractice to target transportation and product liability litigation, we offer examples of Reptile questions commonly found within these three areas of litigation.

2. General Danger Rules (Broad Danger/Risk Avoidance)
3. Specific Safety Rules (Safe conduct, decisions and interpretations)
4. Specific Danger Rules (Dangerous/Risky conduct, decisions, and interpretations)

“Preventing Reptile attorneys from gaining leverage through damaging witness deposition testimony is the critical first step in combatting reptile tactics.”

Manipulating defendant witnesses into agreeing with these four types of questions is the linchpin of the Reptile cross-examination methodology, as the agreement creates intense psychological pressure during subsequent questioning of key case issues. Generating and intensifying this psychological pressure over the course of the questioning is essential to the Reptile attorney’s success. Absent this psychological pressure, the Reptile attorney’s odds of success drop exponentially. Therefore, the Reptile attack requires painstaking effort to both construct and order the questions in a manner which fully capitalizes on the natural biases and flaws of the witness’ brain. The attack plan consists of four phases that build off of each other to ultimately force the defendant witness into admitting fault and accepting blame.

Understanding Reptile Safety and Danger Rule Questions

The Reptile attorney uses four primary “rule” questions to lure unsuspecting defendant witnesses into their psychological trap. The four questions are classified as:

1. General Safety Rules (Broad Safety Promotion)



Anatomy of the Reptile Cross-Examination Method

Phase One

Confirmation Bias: Forcing Agreement to General Safety Rule Questions

Confirmation biases are errors in witness' information processing and decision-making. The brain is wired to interpret information in a way that "confirms" an existing cognitive schema (i.e., preconceptions or beliefs), rather than disconfirming information.⁷ This means that during testimony, most witnesses quickly accept information which confirms their existing attitudes and beliefs rather than considering possible exceptions and alternative explanations. Essentially, witnesses struggle to say "no," to, or disagree with a line of questioning because of emotional and psychological challenges. Reptile attorneys rely on these cognitive challenges to entice defendant witnesses into a dangerous agreement pattern.

Cognitive schemas, the mental organization of knowledge about a particular concept, are powerful because they often relate to our identity as people.⁸ The safety movement in many industries (healthcare, trucking, products, etc.) has strongly conditioned witnesses to *automatically* accept any safety principle as absolute and necessary, while simultaneously rejecting danger and risk. Specifically, years of repeated safety seminars, safety publications, and continuing education classes provided by employers have created powerful and inflexible cognitive schemas about safety. Therefore, when Reptile attorneys ask witnesses about safety

issues during deposition, automatic agreement occurs as a function of the brain working to confirm its cognitive safety schema. Reptile attorneys have discovered that they can use a witness' confirmation bias tendency to their advantage, because it virtually guarantees agreement to safety and danger questions.

Here is how it works:

- The Reptile attorney illuminates the defendant witness' cognitive safety schema regarding safety within their question, relying on the psychological principle of confirmation bias to ensure agreement;
- The defendant witness has no choice but to agree to safety questions, as cognitive schemas are strongly related to an individual's self-value and identity. In other words, disagreement with a cognitive schema is burdensome, if not impossible, as deviating from their internal value system proves uncomfortable for witnesses—no one likes to view themselves or their actions as anything but "safe."
- The Reptile attorney asks additional general safety and/or danger rule questions to the defendant witness, which forces further agreement and momentum.

Examples of General Safety and Danger Rule Questions (any case type):

- Safety
 - "Safety is your top priority, correct?"
 - "You have an obligation to ensure safety, right?"
 - "You have a duty to put safety first,

correct?"

- Danger
 - "It would be wrong to needlessly endanger someone, right?"
 - "You would agree that exposing someone to an unnecessary risk is dangerous, correct?"
 - "You always have a duty to decrease risk, right?"

These repeated agreements lock the defendant witnesses into an inflexible stance, allowing the Reptile attorney to move to Phase Two of the attack—linking safety and/or danger issues to specific conduct, decisions, and interpretations.

Phase Two

Anchoring Bias: Linking Safety and/or Danger to Conduct

Anchoring bias refers to the cognitive tendency to rely too heavily on early information that is offered (the "anchor") when making decisions. Anchoring bias occurs during depositions when witnesses use an initial piece of information to answer subsequent questions. Various studies have shown that anchoring bias is very powerful and difficult to avoid. In fact, even when research subjects are expressly aware of anchoring bias and its effect on decision-making, they are still unable to avoid it.⁹ The Reptile attorney cleverly uses the initial agreement to general safety and/or danger rule questions to form an "anchor" that forces defendant witnesses to continue to agree to subsequent questions that are designed to link safety and/or danger to specific conduct, decisions, or interpretations. This sophisticated psychological approach manipulates the defendant

witness by forcing them to repeatedly focus on their cognitive schema alignment, rather than effectively processing the true substance (and motivation) of the question.

Examples of Specific Safety and Danger Questions (Medical Malpractice Case):

Safety

- "If a patient's status changes, the safest thing to do is call a physician immediately, right?"
- "If a patient is having chest pain and shortness of breath, the safest thing to do is to send them to the ER immediately, correct?"
- "If a patient's oxygen saturation drops to 82%, and you are on-call, the safest thing to do to protect the well-being of the patient is to come to the hospital ASAP, right?"

Danger

- "Documentation in the medical chart must be thorough; otherwise a patient could be put in danger, right?"
- "You would agree with me that when a Troponin value is elevated, that the patient is in imminent danger, correct?"
- "Doctor, when you order a test or labs, you'd agree with me that you should review the results immediately, because any delay would put the patient at risk, right?"

Examples of Specific Safety and Danger Questions (Transportation Case):

Safety

- “To ensure safety, as a commercial truck driver, you must follow the federal rules governing hours of service, correct?”
- “Another safety rule requires daily inspection of the truck and trailer, such as brakes, correct?”
- “And you agree that if someone violates those safety rules and causes an accident, then they should be held responsible for their actions, correct?”

Danger

- “Commercial drivers must maintain daily log books, to ensure other drivers on the road are not put in danger, right?”
- “You would agree with me that when a commercial driver has exceeded the speed limit, other drivers on the road are put in danger, right?”
- “A commercial driver who places others in danger should be held responsible for the harms and losses caused, right?”

Examples of Specific Safety and Danger Questions (Product Liability Case):

Safety

- “Product manufacturers must make consumer products that are safe and free from defects, correct?”
- “To ensure consumer safety, authorized dealers must follow the product manufacturer’s policies when selling, servicing, or repairing a product, correct?”

- “A product’s operating manual ensures consumers know how to safely use a product, correct?”

Danger

- “Product testing should be thorough; otherwise consumers could be put in danger, right?”
- “When a product is mislabeled, you would agree with me that the consumer is in real danger, correct?”
- “Any defect discovered in the manufacturing process should result in an immediate recall of a product, because any delay could put the consumer in danger, right?”

These subsequent agreements to specific safety and/or danger rule questions accomplish two key Reptile attorney goals: a) it forces the defendant witness to become deeply entrenched in an inflexible stance on safety issues and b) it sets the stage to introduce case facts in a powerful manner to create psychological discomfort.

Phase Three

Cognitive Dissonance: Creating Psychological Distress

Cognitive dissonance is the mental discomfort people experience whenever beliefs or attitudes they hold about reality are inconsistent with their conduct, decisions, or interpretations.¹⁰ Cognitive dissonance can occur in many areas of life, but it is particularly evident in situations where an individual’s behavior conflicts with beliefs that are integral to his or her self-identity and profession. The Reptile attorney purposely generates cognitive dissonance

by highlighting case facts which show the defendant witness' conduct, decisions or interpretations contradict his or her cognitive schema regarding safety and danger. Repeated contradictions result in the defendant witness experiencing psychological distress. Importantly, the amount of cognitive dissonance produced depends on the importance of the belief: the more personal value, the greater the magnitude of the cognitive dissonance. Additionally, the pressure to reduce cognitive dissonance is a function of the magnitude of said dissonance. Hence, the Reptile attorney purposely lays out multiple safety and/or danger questions in an effort to increase the magnitude of dissonance between the safety and/or danger admissions and the witness' conduct, decisions, or interpretations in the actual case.

During a deposition, there is a clear transition from general and specific safety and/or danger questions to case specific questions. Once the defendant witness has agreed to the safety and danger rule questions, the Reptile attorney starts to present case facts that do not align with the safety and danger rule answers. Here is how the question sequence works:

- General Safety Rule Question
- General Safety Rule Question
- General Danger Rule Question
- General Danger Rule Question
- Specific Safety Rule Question
- Specific Safety Rule Question
- Specific Danger Rule Question
- Specific Danger Rule Question
- Case Fact Question
- Case Fact Question

- Case Fact Question

As you can see, the Reptile plaintiff attorney strategically places the case fact questions directly behind several safety and danger rule questions. As the case fact questions are delivered to the defendant witness, his or her brain senses the contradiction between the case facts and their previous testimony, leading to cognitive dissonance. The ordering of the questions is crucial, as presenting case fact questions too early in the sequence will not produce cognitive dissonance. Therefore, the Reptile attorney will purposely delay the delivery of case questions to ensure that the safety and danger rule questions have been agreed to first.

Phase Four

The Hypocrisy Paradigm: Forcing an Admission of Fault

By repeatedly introducing case facts that contradict the defendant witness' previous testimony regarding safety and/or danger, the Reptile attorney intensifies the amount of psychological distress the witness experiences. The final and most powerful Reptile attack is the use of the hypocrisy paradigm¹¹. By getting people to advocate positions they support but do not always live up to maximizes the level of cognitive dissonance an individual will experience. During a Reptile deposition, when the reptile attorney directly accuses the witness of putting someone else in danger and causing harm, the attorney's questioning generates shame and threatens the witness' sense of integrity. Hypocrisy is an intense threat to one's identity and self-esteem, and creates intense psychological discomfort. Therefore, the Reptile attorney, as a form of manipulation,

repeatedly points out that the defendant witness has failed to live up to his or her own professional standards. The hypocrisy fuels further cognitive dissonance, often generating feelings of shame and embarrassment.

Examples of Hypocrisy Paradigm Questions:

Medical Malpractice Case

- “Failing to call a physician at 4pm was a safety rule violation, correct?”
- “It exposed my client to unnecessary risk and harm, right?”
- “And if you would have called a physician, it would have prevented my client’s stroke, right?”
- “Nurse Jones, failing to call a physician immediately at 4pm was a deviation of the standard of care, wasn’t it?”

Transportation Case

- “Failing to perform a complete vehicle inspection prior to your travel was a safety rule violation, correct?”
- “It endangered my client and other drivers, correct?”
- “If you would have performed a vehicle inspection, it would have prevented my client’s injury, right?”
- “By failing to perform a vehicle inspection prior to your travel, a violation of the safety rule, and endangering other drivers, including my client, you were negligent weren’t you?”

Product Liability Case

- “Failing to perform an immediate recall after learning of a product’s defect endangered consumers, right?”
- “Recalling the product immediately would have prevented my client’s injury, correct?”
- “By failing to order a recall and allowing your product to harm consumers, you were negligent correct?”

After fostering shame and embarrassment through hypocritical behavior, the Reptile attorney has emotionally battered the defendant witness to a point in which he or she understandably concedes defeat and admits negligence. While some defendant witnesses attempt to fight and defend their conduct, the Reptile attorney often aggressively reminds them of their previous testimony about safety and danger rules, typically forcing the witness into submission.

Witnesses generally attempt to decrease intense cognitive dissonance by either admitting to fault or attempting to change previous testimony, neither of which prove successful when a video camera captures a clear admission, or credibility eroding back-pedaling.

1. Admitting Fault – Admitting fault reduces cognitive dissonance and relieves psychological pressure. When the defendant witness realizes that he or she is trapped and has no chance at escape, admitting fault is a fast way to decrease the intense cognitive discomfort that has been created by the Reptile attorney. Admitting fault is a low-road cognitive processing survival response that represents a “flight” (vs. fight) reaction. Specifically, admitting fault is a version of

“playing dead” in an effort to decrease exposure to an aggressive negative stimulus (i.e., a Reptile Attorney). While this flight response may relieve psychological discomfort within the defendant witness, it obviously increases psychological discomfort within the defense attorney since both strategic and economic leverage in the case have been severely compromised.

2. Attempt to Change Previous Testimony – Some witnesses attempt to “back up” and try to change the conflicting belief so that it is consistent with their behaviors. Specifically, the defendant witness can try to explain to the Reptile plaintiff attorney that they were mistaken on their previous answers in an effort to escape the safety and/or danger rule trap. However, this is rarely effective as any attempt to reverse previous testimony is characterized as dishonesty by the Reptile plaintiff attorney, who will remind the defendant witness that he or she was under oath during the previous safety and danger rule questions. Even though the defendant witness may never admit fault in this circumstance, his or her credibility becomes severely damaged.

Regardless of how the defendant witness decides to decrease the psychological distress created from the hypocrisy paradigm questions, they both result in the Reptile plaintiff attorney gaining extraordinary strategic and economic leverage in the case. Table 1 illustrates the tactical use of each psychological weapon against the defendant witness and the subsequent result.



Derailing the Reptile Attack at Deposition: Rebuilding Cognitive Schemas

The foundation of the Reptile attack during testimony is to take advantage of the defendant witness’ distorted cognitive schema related to safety and danger issues. Again, the witness’ flawed cognitive schema results from years of conditioning and reinforcement regarding workplace safety rules, which foster powerful and inflexible preconceptions absent circumstance and judgment. The Reptile attorney preys upon these cognitive flaws.

Table 1 illustrates how the Reptile attorney heavily relies on the initial agreement to safety and danger rule questions to implement subsequent psychological weapons that will effectively force agreement from the defendant witness. Importantly, without this initial agreement to safety and danger rules, the ensuing questions become impotent and ineffective because confirmation bias and anchoring bias cannot occur. In other words, if a defendant witness can be properly trained to identify safety and danger rule questions and avoid absolute agreement, the powerful effect of cognitive dissonance can be completely neutralized.

Table 1: The Reptile Question Script (Medical Malpractice Case)

QUESTION TYPE	QUESTION FORM	PSYCHOLOGICAL WEAPON	RESULT
General Safety Question	"Nurse Jones, you'd agree with me that ensuring patient safety is your top clinical priority, right?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
General Danger Question	"Because, you wouldn't want to expose your patient to an unnecessary danger, correct?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
Specific Safety Question	"You'd also agree with me that if a patient becomes unstable, the safest thing to do would be to call the physician immediately, right?"	Anchoring Bias to General Safety Agreement	Agreement; Psychological Comfort
Specific Danger Question	"Because hemodynamic instability can be dangerous, and even lead to death, right?"	Anchoring Bias to General Danger Agreement	Agreement; Psychological Comfort
Case Fact Question	"Nurse Jones, isn't it true that my client's blood pressure was 174/105 at 4pm?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"And you could have picked up the phone to call the physician, but you decided not to, correct?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"At 5:30pm, my client suffered a hemorrhagic stroke, correct?"	Cognitive Dissonance	Agreement; Psychological distress
Hypocrisy Question (Conduct)	"Failing to call a physician at 4pm was a safety rule violation, correct?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"It exposed my client to unnecessary risk and harm, right?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"Nurse Jones, failing to call a physician immediately at 4pm was a deviation of the standard of care, wasn't it?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Prevention)	And if you would have called a physician, it would have prevented my client's stroke, right?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt

Properly training a witness to withstand Reptile attacks requires a sophisticated reconstruction of the original cognitive schema, followed by a rebuilding of a new, adjusted schema built upon an understanding of the role of circumstance and

judgment. Once the new cognitive schema is firmly in place with no signs of regression, the defendant witness will be immune from the Reptile attorney's safety and danger rule attacks (see Table 2).

Table 2: Effective Responses to General and Specific Safety and/or Danger Rule Questions

General Safety Questions	Rebuilt Cognitive Schema Responses
<p>"You have an obligation to ensure safety, right?"</p> <p>"Safety is your top priority?"</p>	<p>Option 1: General Agreement (not absolute)</p> <ul style="list-style-type: none"> • Safety is certainly an important goal, yes. • We strive for safety, of course. • In general, yes. <p>Option 2: Request Specificity</p> <ul style="list-style-type: none"> • Safety in what regard? Can you please be more specific? • In what circumstance are you referring? • Safety is a broad term, can you be more precise?
Specific Safety and/or Danger Rule Questions	Rebuilt Cognitive Schema Responses
<p>"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?"</p> <p>"(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"</p>	<ul style="list-style-type: none"> • It depends on the patient's specific circumstances. • It depends on the full picture. • Not necessarily, as every situation is different. • That is not always true. • I would not agree with the way you stated that. • That is not how I was trained. • That is not how (INDUSTRY) works.
General Danger Rule Questions	Rebuilt Cognitive Schema Responses
<p>"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?"</p> <p>"(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"</p>	<ul style="list-style-type: none"> • I don't understand what you mean by "needlessly endanger." • That is a confusing question; can you define "needlessly endanger?" • I don't understand what you mean by "unnecessary risk;" can you please be more specific? • That is a very broad question, what specific circumstance are you referring to?

The cognitive schema reconstruction process is no easy task and requires advanced training in neurocognitive science, communication science, personality theory, learning theory and emotional control. As such, the following steps are only intended to provide general knowledge to defense counsel about how to identify and reconstruct a witness' cognitive schema.

10 Steps to Rebuilding the Cognitive Schema

1. Education: scientifically define cognitive schemas and how they work
2. Identification: identify and discuss the witness' personal Safety and Risk schemas
3. Demonstration: demonstrate cognitive flaws regarding safety and danger (live, video, written)
4. Education: scientifically define confirmation bias and anchoring bias
5. Education: scientifically define cognitive dissonance and hypocrisy paradigm
6. Simulation: create cognitive dissonance and force failure (i.e., the witness must fail repeatedly, proving that their current cognitive schema is flawed and ineffective, in order to ingrain successful communication patterns and behavior)
7. Operant Conditioning: positive reinforcement of correct answers (see Table 2)
8. Operant Conditioning: punishment (criticism) of incorrect agreement
9. Repeated Simulation: attempt to force cognitive dissonance and agreement from varying angles
10. Solidify New Cognitive Schema: repeat simulation until cognitive regression is minimal to none



Conclusion

The ultimate goal of the Reptile attorney is simple: create economic leverage. They have no interest in truth, justice, or even prestige in the courtroom. Rather, the Reptile attorney is only interested in fast cash. They strive to force clients to settle a case for far more than the realistic case value by manipulating the defendant witness into delivering damaging testimony. The economic impact of being "Reptiled" is staggering, resulting in millions of dollars of unnecessary payouts to undeserving plaintiffs and their attorneys. The plaintiff Reptile methodology is pure psychological warfare designed to attain the plaintiff attorney's economic goals. As such, defense counsel and clients need to supplement their traditional witness preparation efforts with sophisticated psychological training to specifically derail the perilous Reptile attacks.

"The plaintiff Reptile methodology is pure psychological warfare designed to attain the plaintiff attorney's economic goals."

Advanced neurocognitive witness training can completely stymie a savvy Reptile attorney from controlling a defendant witness' answers and

steering them towards admissions to negligence and causation. The problem is that merely warning a defendant witness about these sophisticated tactics is grossly inadequate. Well-prepared defendant witnesses have repeatedly failed at deposition because the preparation program did not include training to diagnose and repair the neurocognitive vulnerabilities where the Reptile attorney attacks. Proper training can not only protect the defendant witness from Reptile attorney safety rule attacks at deposition, but it can substantially decrease the economic value of the case. To no surprise, many corporate clients, particularly insurance companies, put great emphasis on decreasing annual legal costs and expenses. Claims specialists and corporate counsel routinely question whether they can afford the cost of advanced deposition training for their defendant witnesses. However, as Reptile settlements and damages continue to mount into the billions, the real question becomes: Can they afford the cost of NOT training witnesses?



Bill Kanasky Jr., Ph.D. is the Vice President of Litigation Psychology at Courtroom Sciences, Inc., a full-service, national litigation consulting firm. He is recognized as a national expert, author and speaker in the areas

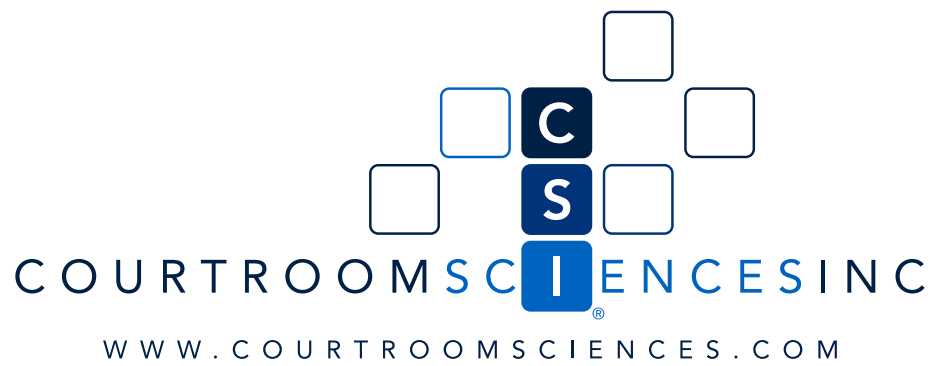
of witness preparation and jury psychology. Dr. Kanasky specializes in a full range of jury research services, including the design and implementation of mock trials and focus groups, venue attitude research, and post trial interviewing. Dr. Kanasky's success with training witnesses for deposition and trial testimony is remarkable. His systematic witness training methodology is efficient and effective, as it is designed to meet each witness's unique needs, while concurrently teaching core principles of persuasive communication. Clients benefit from Dr. Kanasky's ability to transform poor or average witnesses into extraordinary communicators. He can be reached at 312.415.0600 or bkanasky@courtroomsciences.com.



Ryan Malphurs, Ph.D. is a Senior Litigation Consultant at Courtroom Sciences, Inc. Dr. Malphurs' background in persuasion and communication enables him to assist attorneys in the development of successful approaches to courtroom communication. His perspective of the courtroom blends both a scientific and humanistic understanding, guiding clients through communicative and thematic suggestions that are based upon proven research and experience. Dr. Malphurs' background in persuasive and interpersonal communication provides an effective foundation for litigation and trial consulting services including focus groups and mock trials; witness training for deposition and trial; voir dire and jury selection; development of opening statements and closing arguments; and general trial strategy. His unique experience observing more than 100 U.S. Supreme Court arguments also enables him to advise attorneys preparing for bench trials and appellate courts.

Endnotes

1. For the widespread impact of the Reptile Theory see Ken Broda-Bahm, "Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution," *The Jury Expert* v.25.5, 2013; Ken Broda-Bahm "Defendants: Be the Mongoose," www.persuasivelitigator.com, 12/26/13; Kathy Cochran, "Reptiles in the Courtroom," www.dritoday.org, 1/12/10; Bill Kanasky "Debunking and Redefining the Plaintiff Reptile Theory," *For the Defense*, April 2014; Ryan Malphurs and Bill Kanasky Jr. "Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training," *Georgia Defense Lawyer's Association*, Spring 2014; David C. Marshall, "Lizards and Snakes in the Courtroom: What every Defense Attorney needs to know about the Emerging Plaintiff's Reptile Strategy" *For The Defense*, 4/2013; David C. Marshall, "Litigating Reptiles," *The Defense Line*, 41.1.2013; Minton Mayer, "Make Boots Out of that Lizard: Defense Strategies To Beat the Reptile," *The Voice* v12.38, 2013; Pat Trudell, "Beyond the Reptilian Brain," www.zenlawyeraseattle.com, 2010; Stephanie West Allen, Jeffrey Schwartz, and Diane Wyzga, "Atticus Finch would not Approve: Why a Courtroom full of Reptiles is a Bad Idea," *The Jury Expert* v.22.3, 2010..;
2. See www.reptilekeenball.com for promotional material.
3. Introductory Remarks, Georgia Motor and Trucking Association 2014 Annual Meeting, Atlanta GA, 9/23-25.
4. See Ryan Malphurs and Bill Kanasky Jr. "Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training," *Georgia Defense Lawyer's Association*, Spring 2014., and Bill Kanasky "Debunking and Redefining the Plaintiff Reptile Theory," *For the Defense*, April 2014
5. See note 1 for list of prior articles addressing the Reptile Theory.
6. Scott Plous, *The Psychology of Judgment and Decision Making*. McGraw-Hill, New York: 1993.
7. Paul DiMaggio, "Culture and Cognition," *Annual Review of Sociology* 23.1.263-287, 1997.
8. Tim Wilson, Christopher Houston, Kathryn Etling, and Nancy Brekka, "A New Look at Anchoring Effects: Basis Anchoring and its Antecedents." *Journal of Experimental Psychology*, 125.4, 387-402.
9. Leon Festinger, *A Theory of Cognitive Dissonance*. Stanford, CA: 1957.
10. See Elliot Aaronson, Carrie B. Fried, and Jeff Stone "Overcoming Denial and Increasing the Intention to use Condoms Through the Induction of Hypocrisy," *American Journal of Public Health*, 81 1636-1637, 1991; Chris Ann Dickerson, Ruth Thibodeau, Elliot Aaronson, and Duaya Miller (1992), "Using Cognitive Dissonance to Encourage Water Conservation: *Journal of Applied Social Psychology*, 22, 841-854.; Jeff Stone, Elliot Aaronson, Lauren A. Crain, Mathew P. Winslow, and Carrie B. Fried, "Inducing hypocrisy as a means of encouraging young adults to use condoms," *Personality and Social Psychology Bulletin*, 20. 116-128, 1994.
11. Eric Stice, "The similarities between cognitive dissonance and guilt. Confession as a relief of dissonance. *Current Psychology Research and Reviews*, 11.1, 69-77, 1992.



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A Neurocognitive Approach

By Bill Kanasky Jr. and Melissa Loberg

Defense counsel preparing to combat a reptile plaintiff attorney who is requesting tens of millions of dollars must make the client aware of the increased risk and take the necessary steps to mitigate that risk.

Rehabilitating the Defendant in the Reptilian Era

Reptilian adverse examination of defendant witnesses often represents the most stressful, vulnerable time of a trial for both witness and defense counsel. For the witness, surviving the cognitive and emotional chess match of a

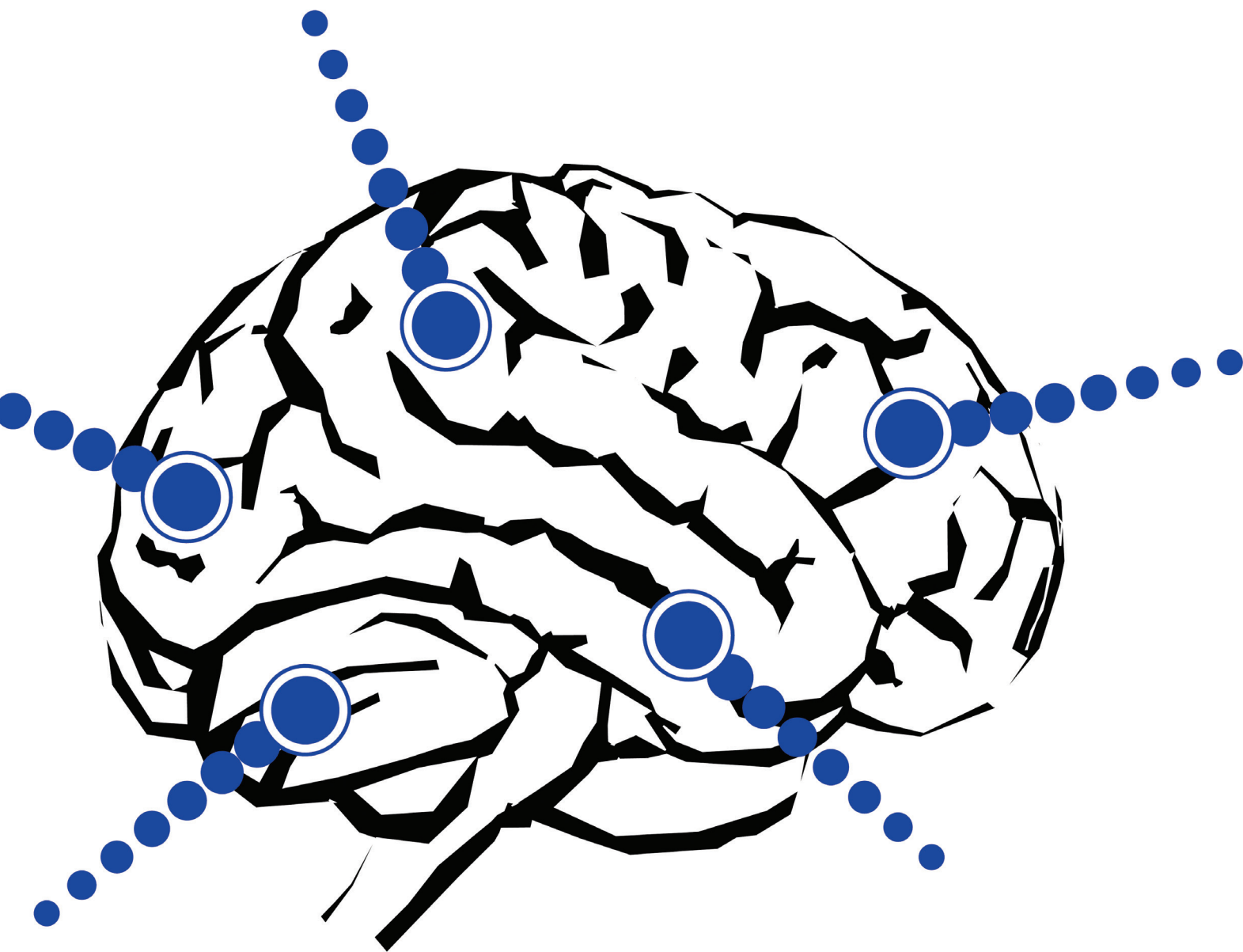
reptile plaintiff attorney’s manipulative pattern of safety and danger questions is often a daunting task. For defense counsel, feelings of helplessness and powerlessness are common, particularly when their witness is getting pounded with textbook reptile attacks on the stand. If the defense witness is well-trained and survives the reptile attack, the ability to rehabilitate the witness is now crucial to ensuring his/her credibility and believability at the jury level. Because so much attention and worry has been directed toward halting or derailing the reptile attack during adverse examination, witness rehabilitation is now (erroneously) perceived as a relieving, non-threatening, “easy” part of the trial for both witness and defense counsel. This is because the witness and attorney now possess total control of the infor-

mation that is presented to the jury, free of manipulative influence from opposing reptile counsel. Unfortunately, this false sense of security can lead to unbalanced witness preparation efforts that result in ineffective defense testimony at trial. Specifically, the intense focus on defeating the plaintiff’s reptile attack during witness preparation has led to an unusual and counter-intuitive phenomenon in civil litigation: defense witnesses performing *better* on adverse examination than they do during rehabilitation.

There is no denying that defense witness performance during rehabilitation testimony has suffered since the rise and spread of Ball and Keenan’s reptile trial methodology. Ball, D. and Keenan, D. *Reptile: The 2009 Manual of the Plaintiff’s Revolution*, 2009. After several highly publicized

■ Bill Kanasky Jr., Ph.D., is the Vice President of Litigation Psychology at Courtroom Sciences Inc., a full-service, national litigation consulting firm in Irving, Texas. Dr. Kanasky is recognized as a national expert, author, and speaker in the areas of witness preparation and jury psychology, and is the nation’s leading authority on recognizing, derailing, and defeating the plaintiff reptile theory. He specializes in a full range of jury research services, including the design and implementation of mock trials and focus groups, venue attitude research, and post-trial interviewing. Melissa Loberg, Ph.D., is a litigation consultant with Courtroom Sciences Inc. Dr. Loberg applies her expertise in research methodology to the planning and implementation of focus group and mock trial studies, as well as the development and analysis of jury supplemental questionnaires and post-verdict juror interviews.





and high-dollar verdicts, the defense bar has finally started to take Ball and Keenan's reptile tactics seriously. Defense attorneys are realizing that witness preparation requires a greater time investment than it has in the past, as teaching witnesses how to avoid falling victim to the reptile attack takes considerable time and effort, even with experienced and highly intelligent witnesses. Unfortunately, by the time the defendant witness is thoroughly prepared for the impending reptile attack, many defense attorneys are running out of time or simply considering the job done. Thus, the needed preparation for rehabilitation of

the witness is neglected. This lack of preparation has led defendant witnesses to make avoidable mistakes during what should be the time for the witness to provide critical testimony necessary to combat the plaintiff's themes of safety and danger. Now that a scientifically based counterattack has been constructed to derail the reptile attack on defense witnesses effectively, solutions to new problems with defendant rehabilitation must be discussed.

After intense preparation for reptilian adverse examination, many defense attorneys calmly tell their witness, "Rehabilitation is when I toss you 'softballs' and you

crush them out of the park; don't worry, you will be great." What many defense attorneys do not understand is that their witnesses are highly vulnerable during rehabilitation efforts. Witnesses can make dangerous cognitive, emotional, and communication mistakes that can severely hurt their credibility with the jury. This is particularly true after a surviving a reptilian attack on adverse examination, as the witness experiences an overwhelming sense of emotional relief, thus distracting them from meeting their objectives when being questioned by defense counsel. Furthermore, defense attorneys are also highly susceptible to

cognitive and strategic errors during rehabilitation efforts that can inadvertently set up their witness for disaster. Neither witness nor attorney is safe during rehabilitation questioning, as both are vulnerable to committing key errors. This paper is designed to (a) educate defense attorneys about the three common errors that can damage witness credibility during rehabilitation ef-

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forts, and (b) provide defense attorneys with a plan to prepare for and conduct rehabilitation questioning more effectively.

Rehabilitation Errors

Error #1: Juror Cognitive Saturation

Both defense witnesses and attorneys vastly overestimate how much information jurors can process during testimony. Thanks to the persistent growth of portable technological gadgets (PDA's, tablets, etc.) that provide people with constant and near instantaneous information, juror attention span has declined from poor to atrocious. Specifically, the human brain has become so reliant on technology to provide multiple sources of information that sustained attention and concentration to a single source of information has become difficult for most people. Attentively listening to a witness testify and effectively processing that information now creates a unique neuropsychological challenge for jurors that was absent before the tech age. Therefore, both defense attorneys and witnesses

need to understand jurors' neurocognitive limitations and ensure that information is being presented to them in the correct fashion. Otherwise, valuable information may be missed, lost, or forgotten.

Jurors struggle to maintain focus during witness testimony, particularly during long, complex answers. Therefore, the goal of rehabilitation should be to promote juror cognitive digestion and prevent cognitive saturation. Cognitive "digestion" refers to the maximum amount of information that a juror can process without becoming overwhelmed, while cognitive "saturation" refers to information that exceeds the brain's processing limits and is ultimately lost. To avoid cognitive saturation, defense attorneys must ensure that their witnesses are delivering information in a way that does not exceed jurors' cognitive capacity limitations.

Specifically, when information is delivered to a jury, it can either be "chunked" or "streamed." The human brain is designed to process smaller "chunks" of information effectively, rather than long, continuous streams of information. The best examples of chunking include phone numbers, social security numbers, and combination locks. All of them have numbers with dashes between them, resulting in numbers being "chunked" together in groups, rather than one long stream of numbers. This results in enhanced memory capacity as the dash allows the brain to digest before processing the next chunk of information. This pause, even if only for a second, allows the brain to digest the information and prepare for subsequent information. In contrast, serial numbers and product identification numbers are good examples of information stream-

ing, as these numbers are presented as long, continuous strings of data with no dashes or spaces. Trying to memorize such numbers is nearly impossible, as the continuous stream of information causes short term memory (STM) to become quickly saturated.

In testimony, answers can be delivered in digestible chunks if the length of answers persistently stays under five seconds ("the five-second rule"). Answers that exceed five seconds are considered a form of information streaming, and therefore overwhelm short-term memory (cognitive saturation), resulting in information being lost rather than being appropriately processed and transferred into long term memory (LTM) (see Figure 1).

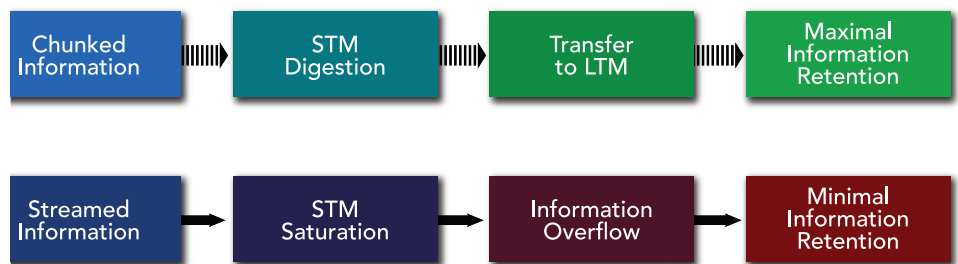
When information is streamed, short-term memory becomes saturated, or "full," preventing subsequent information from being processed and stored. Instead, the overflow information is lost and cannot be recovered. Consider the following examples of information chunking and streaming.

Case Example: Medical Malpractice "Streaming" Information (ineffective)

Question: Doctor, would you please explain to the jury what Heparin is?

Answer: Heparin is an anticoagulant that prevents the formation of blood clots. It is used to treat and prevent blood clots in the veins, arteries, or lung. Heparin is also used before surgery to reduce the risk of blood clots. You should not use this medication if you are allergic to heparin, or if you have uncontrolled bleeding or a severe lack of platelets in your blood. Heparin may not be appropriate if you have high blood pressure, hemophilia or other bleeding disorder.

Figure 1



der, a stomach or intestinal disorder, or liver disease.

“Chunking” Information (effective)

Question 1: Doctor, would you please explain to the jury what Heparin is?

Answer: It is a medication used to thin a patient’s blood.

Question 2: How exactly do physicians use Heparin?

Answer: We use it to treat and prevent blood clots in the veins, arteries, or lung, particularly before surgery to reduce the risk of blood clots.

Question 3: Is Heparin safe for all patients?

Answer: No. If a patient has uncontrolled bleeding or a severe lack of platelets in their blood, Heparin can be dangerous.

Question 4: Are there other instances in which the use of Heparin may be inappropriate?

Answer: Yes, Heparin may not be appropriate if a patient has high blood pressure, hemophilia or other bleeding disorder, a stomach or intestinal disorder, or liver disease.

Long, complex answers by witnesses may be authentic, truthful, and important, but they can be highly ineffective at the jury level. This may result in critical information being lost or forgotten, which can have dramatic effects in the deliberation room. However, jurors usually process more concise answers (under five seconds) very effectively, resulting in maximum information retention. Additionally, the slower pacing that is achieved when witnesses provide information to jurors in digestible chunks allows the attorney to work with the witness to ensure defense themes are repeated, further increasing juror retention of the key arguments in support of the defendant’s case.

Chunking of testimony is particularly important in courtrooms that allow and encourage note-taking, as this activity can distract jurors from effectively processing information during rehabilitation questioning. If witnesses persistently adhere to the five-second rule, it allows jurors to listen and take notes simultaneously without becoming overwhelmed. Therefore, it is critical for both the witness and defense attorney to undergo juror cogni-

tive training to gain a better understanding of the capabilities and limitations of the juror brain, and how to formulate questions and answers properly to enhance juror comprehension.

Error #2: Emotional Volunteering of Information

A savvy attorney should have his/her questions strategically ordered, providing both the witness and the jury with a road map, or blueprint, to the case. The ability to stick to that plan and present jurors with the proper order of information helps jurors effectively understand the defense story. However, defense witnesses often develop the burning desire to jump ahead of the attorney and bring up important information that has not been asked for yet, particularly after surviving a treacherous reptile attack on adverse examination. This problem is emotionally based, as many witnesses are highly motivated to “win” the case during their testimony.

When a witness jumps ahead of the questioner, it has three detrimental effects on the jury. First, it appears that the witness is over-advocating the defense position, thus potentially damaging credibility. Second, the witness-attorney team appears disorganized, as the witness is not directly answering the actual question the attorney asked. Finally, it can confuse jurors and inhibit proper comprehension of key case information. This ultimately results in frequent interruptions from the attorney to get the witness back on track, which can damage jurors’ perceptions of the entire defense team.

An example of how a witness can jump ahead of the questioner and bring in information that the questioner intended to come out later in the questioning is as follows.

Question: How many air traffic controllers are required to be in the tower at any given time?

Answer: In higher traffic situations it is ideal to have more than one, but in this case the traffic had just picked up when the incident occurred and the controller on duty was very experienced, plus another controller was on his way back from a required break.

In this example, while the information about who was in the tower during

this incident is indeed very important to the case, the witness has delivered it to the jury at the wrong time. This not only can confuse jurors, but also can create the appearance of disorganization within the attorney-witness team. The attorney’s plan was first to educate the jury about laws and requirements for staffing of the tower, then educate them about the experience

Therefore, it is critical

for both the witness and defense attorney to undergo juror cognitive training to gain a better understanding of the capabilities and limitations of the juror brain, and how to formulate questions and answers properly to enhance juror comprehension.

level of the controller in charge during the incident, and then describe how required breaks affect staffing later on in the questioning. However, the witness deviated from the plan and introduced this information immediately. This is an emotional error on behalf of the witness, as high levels of witness motivation can result in decreased patience and poise.

Some witnesses, particularly named defendants, think they must win the case themselves, and therefore tend to try too hard. To prevent this damaging error at trial, witnesses require emotional-control training from a qualified litigation consultant to ensure they stay on course throughout their examination. Witnesses need to understand that the attorney must be in the driver’s seat and guide them down the correct path, as an attorney’s carefully developed strategy wins cases, not wit-

nesses. Additionally, witnesses must also understand jurors' cognitive needs, and develop the motivation to improve juror comprehension, rather than fulfilling their own emotional needs during rehabilitation testimony.

Error #3: Failure to Use the Primacy Effect

The first three minutes of a witness' testimony is more valuable to jurors than testimony that is delivered toward the middle and end of the examination. This important neuropsychological timing effect is precisely why attorneys should not start their witness rehabilitation by covering the witness's education and work history, as that information is better placed in the middle or end of the testimony. Rather, the most effective way to examine a witness during rehabilitation questioning is to start with questions that go right to the heart of the case, as jurors will value that information more than subsequent information. This is known as the primacy effect, meaning jurors perceive information presented early in an examination as more valuable and meaningful than information presented in the middle or at the end. This is a very powerful neurocognitive tool that few defense attorneys utilize because they erroneously assume that primacy and recency effects are similar. While recent information tends to be better remembered by jurors, it is certainly not valued similarly as the juror brain places great significance on early information (vs. later information). As shown in Figure 2, the

recency effect only impacts juror memory recall, while the primacy effect improves both memory and meaningfulness of the information. Kanasky, Jr. B., "The Primacy and Recency effects: The Secret Weapons of Opening Statements," Trial Advocate Quarterly, Summer 2014.

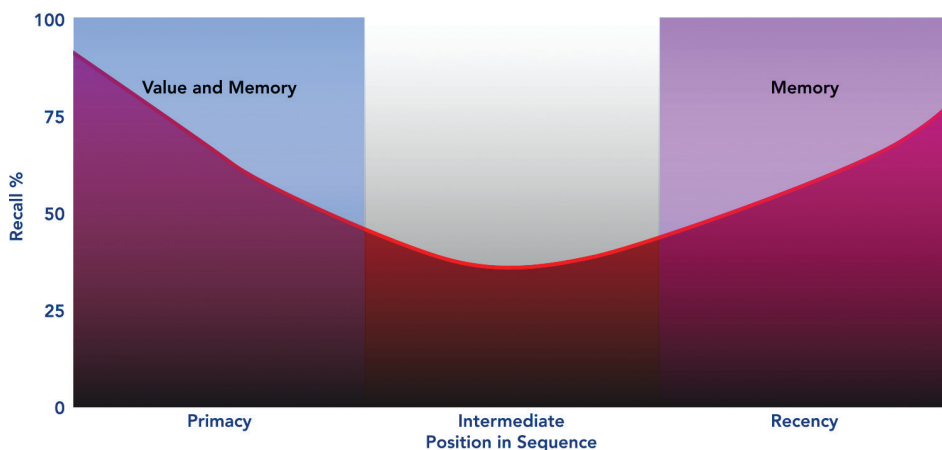
For example, in medical malpractice cases, defense attorneys usually ask the following question at the end of the rehabilitation testimony: "Doctor, was your care of Mr. Smith appropriate and reasonable in this case?" Of course, the physician delivers a firm, confident "YES" to the jury. Most defense attorneys do this because they want to end on a high note, assuming that placing this important information at the end will have a powerful influence on jury decision-making. However, this is not the best strategic approach, as this question is THE pivotal question in the case. Instead, this question should be the very first question out of the gate, with a few follow up questions allowing the witness to explain why the care provided to Mr. Smith was reasonable and within the standard of care. That is what the jury wants and needs immediately, rather than later in the examination. This is especially true in a reptile case, as jurors are starving for explanations after a well-trained witness shuts down multiple reptilian attacks on adverse examination. Defense attorneys often state "I want the jurors to get to know my witness, so I start with the biographical questions; I want to 'wow them' with my client's impressive education and training." In reality, jurors don't

care where the witness went to school or what honors they have attained. Jurors' primary concern is about the defendant's conduct and decision making, and asking those key questions immediately in the rehabilitation phase takes full advantage of the primacy effect. Kanasky, Jr. B., "The Primacy and Recency Effects: The Secret Weapons of Opening Statements," Trial Advocate Quarterly, Summer 2014.

Reptilian questioning, characterized by leading, closed-ended questions focusing on safety and danger rules, allows for very little explanation, if any, from the witness. In that circumstance, jurors are craving explanations regarding the defendant's conduct and decisions once the defense attorney approaches the podium to begin rehabilitation efforts. For example, in a lawsuit alleging negligence of a bus driver who was driving in the far left lane of a major highway at the time of the accident, the reptile attorney may spend considerable time asking the bus driver questions about whether it is safer to drive in the far left lane with higher speed traffic or the far right lane with slower traffic. If the witness answers by stating that it depends on the situation, he is unlikely to get the opportunity to explain his statement further. Thus, it would be up to the defense attorney to ask very early in rehabilitation, "Can you tell the jury why it was reasonable for you to be driving in the far left lane at the time of this accident?" By giving jurors what they desire immediately, the defense team can considerably increase the meaningfulness and influence of the defendant's most important testimony.

Figure 2

Primacy Effect in Witness Rehabilitation



Conclusion

Reptile plaintiff attorneys have been increasing the stakes in litigation by boldly requesting extremely high damage numbers and successfully convincing jurors that a high verdict is necessary, not to make the plaintiff whole, but to ensure the safety of the community. Ball, D. and Keenan, D. Reptile: The 2009 Manual of the Plaintiff's Revolution, 2009. Defense counsel preparing to combat a reptile plaintiff attorney who is requesting tens of millions of dollars must make the client aware of the increased risk and take the necessary steps to mitigate that risk. The best way to mitigate the risk is to prepare all witnesses fully prior to testimony, as this must be at the core of

the defense team's effort when large damages are on the line.

The need for advanced, scientifically based preparation of defendant witnesses is especially profound as reptile attorneys have been placing significantly greater attention on the defendant throughout trial. Rather than attempting to evoke sympathy from jurors by emphasizing the injuries of the plaintiff, reptile attorneys strive to anger and motivate jurors by centering the case on the actions and decisions of the defendant. *See* Kanasky, Jr. B., "Debunking and Redefining the Plaintiff Reptile Theory," *For The Defense*, April 2014. With the plaintiff's focus of the case on the defendant, the defendant's testimony, while it has always been of great importance to jurors, is even more critical during a trial against a reptile attorney. Thus, rigorous preparation of the defendant's testimony, both on adverse examination and rehabilitation is imperative to a successful defense in the reptile era.

Some attorneys who prefer not to prepare their witnesses vigorously for rehabilitation questioning often state that they want to avoid the witness appearing "coached" while on the stand. Some trial attorneys tend to forget what it was like to have never stepped into a courtroom. Most witnesses do not have the litigation experience or the skill of thinking on their feet, like a trial attorney. Thus, nerves and emotion can take over and cause the witness to make numerous mistakes. If witness training is performed appropriately, with the same vigor and attention as adverse examination, the witness will not appear "coached," but rather "confident."

From the jurors' perspective, rehabilitation of a defendant witness is arguably the most important part of a trial, as the party being accused of negligence or causing harm has the opportunity to explain their conduct and decisions. However, the three errors of juror cognitive saturation, emotional volunteering of information,

and failure to use the primacy effect can significantly impair juror comprehension of key case issues, as well as negatively impact jurors' perception of the defense team. To prevent these problems, and to enhance the quality of rehabilitation questions and responses, it is imperative that defense attorneys take a step back and reevaluate their trial preparation plans. In the short term, it is wise to retain a qualified litigation consultant to evaluate witness responses to promote juror cognitive digestion, as well as assess the attorney's order of questioning to ensure proper use of the primacy effect. A qualified consultant should have advanced training in the areas of cognition, memory, attention and concentration, communication science, and emotion. In the long term, attorneys should receive training in these areas by attending CLE's from litigation consultants who have expertise in the neurocognition behind jury decision-making. 