I. Know Thy Enemy—Understanding the Reptile

It has been said that the key to magic is misdirection. If that is true, there has never been a more magical litigation strategy than the Reptile Theory. Less science than clever marketing, David Ball and Don Keenan's book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, advocates a sea change in the way plaintiff counsel try cases. Gone are the days of sympathy pleas. Today's Reptile case puts defendant's conduct on trial, advocating jury verdicts based on perceived dangers to the “community” rather than actual case facts. While it is tempting to dismiss this theory as a mere fad based on junk science, defense counsel do so at their own peril.

If ignoring the Reptile theory in an average case is dangerous, it is suicidal in asbestos cases. Unlike many other types of litigation, corporate representative testimony in an asbestos case lives forever. It can be played in courtrooms coast to coast, border to border for decades. The author has tried cases where twenty year-old corporate representative testimony formed the basis of plaintiff’s liability arguments. Similarly, poor answers to safety rule questions can have lasting effects. Plaintiff counsel can effectively try the exact same case about a particular defendant's conduct no matter the strength of the underlying case facts.

Of the roughly 45,000 online papers, blogs, and comments about the Reptile Theory, the author did not find a single writing about Reptile's dramatic effect on asbestos litigation. This paper explains Reptile tactics and provides practical ways to level the playing field in the arena of asbestos litigation.

A. The “Science” of Reptile

David Ball and Don Keenan argue that primal instinct—not emotion, or deliberation—can subconsciously force juries to find for plaintiffs. The authors base their theory on Paul MacLean's idea of the “triune brain” theorized in the 1960's. The idea proposes that the brain is composed of three parts, the Reptilian Complex, the Paleomammalian Complex, and the Neomammalian Complex. The “Reptilian brain” relates to our most primitive senses—fear, anger, and the ability to survive. According to MacLean, the Reptilian brain is the oldest part of our brains and our ability to think and feel came only after years of evolution.

Reptile Theory takes MacClean's ideas one step further, positing that the Reptilian brain does not just control our fight or flight reactions. Citing a book that was later pulled from bookstore shelves for inaccuracies, Ball and Kennan state: “[t]he conscience brain may get all the attention, but consciousness is a small part of what the brain does, and it’s a slave to everything that works beneath it.” The authors sum up this science by stating “… the Reptile invented and built the rest of the brain and now she runs it.”

According to Ball and Keenan, the Reptile's instrument of control is a “splash of Dopamine, the ultimate pleasure-giver.” Conversely, “The Reptile has a darker and more potent force: anxiety and terror, which she uses to keep you from doing what she does not want.” Thus, according to Ball and Keenan, if the plaintiff counsel appeals to a juror's immediate sense of danger, the juror's survival mode will kick in, resulting in the juror's need to protect themselves and their community. “Control the Dopamine and you control the person.”

B. Snake Oil—Fatal Scientific Flaws in the Reptile Theory

For a book that is purportedly grounded in neuroscience, one might expect Ball and Keenan to devote more than 2 ½ pages to the “The Science” of their theory. Yet they do not. Only 40 footnotes grace the 331 pages of this book. The single 20 person experiment (of Ball and Keenan's own design) that forms the sci-
cient basis of their statement, “[s]o yes, it works,” falls just short of typical supporting data provided in latenight infomercials.

The fact that the authors cite little scientific support in their book underscores the truth that “Reptile” is more marketing ploy than scientific proof. The idea that an attorney can elicit a person’s survival instincts in a courtroom is impractical. A person’s survival instincts are triggered by a true danger stimulus, resulting in an immediate reaction. However, in a courtroom there is no immediate danger. The attorney can only suggest or hypothesize a danger to that person and the community. Thus, an instinctive, survival reaction is unlikely.

Moreover, there is little proof that our minds take orders from a “pea-brained snake.” It is irrational to think that a person’s survival instinct could be triggered so easily. If that was the reality, then people would revert to fight or flight survival mode during everyday provocations. The notion that dopamine has a strong influence on decision-making is also flawed. There is no current research about how communication or presentation interacts with dopamine production. If decision-making did have a pleasure-inducing response in the brain, perhaps fewer citizens would attempt to avoid jury service.

C. Junk Science: Real Results

Although the science behind the Reptile Theory is mere snake oil, few can question that Ball and Keenan have tapped into an effective trial strategy that artificially inflates jury verdicts. At the time this article is being written, the authors boast that their theory has resulted in over 6 billion dollars in verdicts and settlements. Since 2009, some of the most dramatic asbestos verdicts have involved Reptile tactics. “So yes, it works”—but not because of neuroscience. It works because of the following three tactics:

i. Reptile makes defendant’s conduct, rather than plaintiff sympathy, the focus of every case;

ii. Reptile changes the standard of care from the conduct of a reasonable person to “as safe as possible” and,

iii. Reptile encourages jury awards based on the maximum harm that could have been caused to the community as opposed to harm that was actually caused to the plaintiff.

The great trial attorney, Frank M. Bean, said that “the one who asks the question wins the debate.” Here, Ball and Keenan have reformulated the question in a way that rarely allows an asbestos defendant to win the debate.

D. Reptilian Verdicts: A Different Animal

If a juror’s reptilian brain is speaking to them, it is certainly not hissing the number of zeros to add to a damage award. Traditionally, civil jury verdicts were a product of a desire to compensate the plaintiff. Although sympathy for the plaintiff may result in damages, anger at defendants is becoming an increasingly significant factor in large jury awards. One study found that anger drove the mock jurors to vote guilty more often and believe that the prosecution’s evidence was sufficient. Defendants in civil cases likely face similar hurdles. Moral outrage, no matter the context, is a powerful force in punishment decisions.

For all its junk science, the Reptile Theory has tapped into something very powerful. Thomas M. O’Toole, Ph.D. correctly observes that verdicts based on anger are motivated by the desire to punish a perceived violation of a core principle. As explained more fully below, the Reptile Theory shifts the case focus to defendant’s violation of common-sense safety principles. In other words, it seeks a verdict based on anger rather than sympathy. Sometimes called the “referendum approach,” Reptile is designed to induce anger by showing the flawed business practices of the defendant, leading jurors to conclude that a message needs to be sent.
This tactic shift is uniquely suited to persuade members of the Gen X and Millennial generations, who now make up the majority of potential jurors.\textsuperscript{17} For example, Millennials are more desensitized than the earlier generations that used to encompass the jury pool. Sympathy pleas are far less effective with them. Gen X jurors tend to be more cynical than Baby Boomers. Moreover, two-thirds out of the approximately 76 million Millennials think “you can’t be too careful” when dealing with people.\textsuperscript{18} Reptile was tailored made to appeal to these individuals.

E. Safety Rules: The Reptile’s Heart

Recognizing this shift in juror attitudes, the Reptile case uses a thematic approach to spotlight defendant’s conduct rather than plaintiff’s individual harm. Reptile relies on a defendant’s perceived violation of a “one size fits all” safety rule, implying that defendant’s conduct endangers the entire community. Safety rules essentially shift the jury’s focus away from the actual case facts to much larger, imaginary dangers. Now, “the presence or absence of negligence is a function of the situation’s maximum potential harm, not the lesser harm, it caused in [the] case.”\textsuperscript{19}

The best way to understand the Reptile tactics is to start by understanding how plaintiff attorneys use safety rules to produce a verdict based on anger. The Reptile hides in the reeds of issue oversimplification. Plaintiff attorneys get defense witnesses, especially corporate representatives, to agree to “no brainer” safety rules, which sets up later impeachment based on the case facts. During the impeachment or “hypocrisy paradigm questions,” the witness must admit fault or look like a liar.

1. The Umbrella Rule

The Reptile’s deception all begins by using an “Umbrella Rule” to cross-examine defendant’s corporate witness and defense experts.\textsuperscript{20} The Umbrella Rule is “the widest general rule the defendant violated—wide enough to encompass every juror’s Reptile.”\textsuperscript{21} The authors state that the umbrella rule for almost every plaintiff’s case is:

A company, physician, policeman etc. is not allowed to needlessly endanger the public.

The umbrella rule contains two slights of hand. First, the subject of the umbrella rule is never the specific defendant company or even the specific industry at issue. The broader the subject, the more jurors can relate to it. Second, the word “needlessly” makes the statement very difficult to disagree with. Even when a witness thinks they have fielded an umbrella question well, their answer can be fatal for the defense’s case. For example,

Q: Sir, would you agree with me that a product manufacturer is not allowed to needlessly endanger the public?
A: I guess I’m not sure exactly what you mean by needlessly and how you define that, the products should be as safe as they can be, yes.

If a corporate witness agrees that the company’s “products should be as safe as they can be,” a plaintiff attorney will jump at the chance to argue that no product that contains asbestos is “as safe as it can be.” If the product is not as safe as it can be, the defendant has needlessly endangered the public, violating the umbrella rule.

2. Safety Rules and Case-Specific Rules

The umbrella rule then leads to “Safety Rules” and “Case-Specific Rules” designed to show that the defendant needlessly endangered the public. Safety rules are overly broad rules to which the defendant must agree or seem foolish. As one Reptile advocate states, “[j]urors want clear boundaries that delineate right
from wrong, and they will rely on bright-line rules, even if they are irrelevant.” An example safety rule is “a product manufacturer must not keep potential dangers of its product a secret.” The subtext to this rule is that if a manufacturer does not warn of a danger, it has needlessly endangered the public (a violation of the umbrella rule). Similarly, “you agree that any risk of serious injury or death is always unreasonable if reasonable means exist to reduce or eliminate the risk?” These sub-sets of the umbrella rule are designed to protect everyone, not just someone in the position of the plaintiff.

Ball and Keenan have masterfully drafted guidelines for creating irrelevant rules in every case:

<table>
<thead>
<tr>
<th>1. It must prevent danger</th>
<th>2. It must protect people in a wide variety of situations, not just someone who was in your client’s position.</th>
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<tr>
<td>3. It must be in clear English.</td>
<td>4. It must explicitly state what a person [or whatever] must or must not do.</td>
</tr>
<tr>
<td>5. The rule must be practical and easy for someone in the defendant’s position to have followed.</td>
<td>6. The rule must be one the Defendant has to agree with - or reveal himself as stupid, careless, or dishonest for disagreeing with.</td>
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As broad rules, they are designed to “spread the tentacles of danger” and lend themselves to analogies that might involve the members of the jury. So the asbestos case is no longer about a professional boilermaker repairing a complex piece of machinery. It is about anyone who has ever purchased a product. It is about consumer’s rights. The rules are designed to make jurors analogize an asbestos-related injury to famous product failures, like exploding gas tanks or faulty ignition switches. Effectively used, the Reptile Theory makes every rule violation appear premeditated, as if a company knew about a danger but chose profits over safety. Once a witness agrees with the umbrella rule and ratifies this rule in an oversimplified analogy, “[t]hat renders the general danger uncontested. Hello Reptile.”

3. The “Gotcha” Questions

After establishing broad safety rules, the Reptile does its real damage with “hypocrisy paradigm questions.” These questions are designed to make the defense witness look like a liar or force an admission of fault. Once the defense witness has agreed that “a product manufacturer must not keep potential dangers of its product a secret,” that witness will look foolish arguing that a defendant should not have placed an asbestos warning on its product. Similarly, a defense witness who agreed that “any risk of serious injury or death is always unreasonable if reasonable means exist to reduce or eliminate the risk” will later have a difficult time explaining why a defendant did not investigate alternatives for use of asbestos in its products.

F. Changing the Standard of Care

Relying heavily on hindsight bias, umbrella and safety rules have the practical effect of changing the standard of care to which a defendant is held. “When there are two or more ways to achieve exactly the same result, the Reptile allows—demands!—only one level of care: the safest.” No matter if an alternative safer design was impractical or even unfeasible, the rules are designed to shift the standard from a prudent choice to the safest possible choice. Under these rules, industry standards are irrelevant. “The only allowable choice is the safest choice.” As one defender of the Reptile Theory admits, promotion of fear causes people to impose higher standards of care on parties that control bad outcomes. She also brags that fear limits a juror’s ability to reconsider who is to blame for the injury. Consequently, Reptile essentially places the burden of proof on defendants and requires them to meet an impossible standard.
G. The Reptile Closing: A Case Study

Using the heightened standard of care, the Reptile closing in an asbestos case can be damning. It uses perceived violations of safety rules as absolute proof of negligence. For example, when asking the jury to find an asbestos defendant negligent, one plaintiff’s attorney argued the following:

I want to go through six different safety rules that everyone has agreed to in this case as being important and show how [defendant] violated [them] in order to demonstrate why you should answer yes to the [negligence] question.

It is important to note that the plaintiff attorney consistently references ratification of the safety rules by defense witnesses and implies that agreement with the safety rules constitutes a stipulation that those rules should decide the case. As quoted below, the plaintiff attorney then systematically goes through each rule with great effect:

1. Safety Rule One

Safety Rule:
The first, companies must research potential health hazards of their products. We talked to three experts on this, they all agree.

Violation: The defendant did not independently research the hazards of asbestos. Citing corporate representative deposition testimony regarding lack of research, the plaintiff’s attorney states, “[i]t is undisputed [defendant] violated the safety rule.

2. Safety Rule Two

Safety Rule:
Rule Number 2, companies must test to see if potential hazards apply to their product. If you put lead or a toxin or a substance or asbestos, this isn't just particular to this case, in your products, you need to figure out if that hazard applies to the product before you sell it to the American public. That was agreed to by everyone we talked to about it. [Defendant] violated the safety rule.

Importantly, the attorney makes a point to broaden the implications of this safety rule to all products sold to the “American public,” which is a classic Reptile tactic.

Violation: The defendant never performed asbestos fiber release testing on its products to determine if someone in Plaintiff’s profession would be exposed to asbestos when working with its product. Citing corporate representative deposition testimony regarding lack of air monitoring data, the plaintiff’s attorney states, “[i]t’s undisputed.”

3. Safety Rule Three

Safety Rule:
Rule Number 3, companies must warn of the potential hazards of their products.

And understand how broad this is and the law says the exact same thing. It’s not just the certain hazards. It’s the potential hazards because on the most basic level, what we as a community deserve is a right to know and evaluate things ourselves, and if you hide information, if you don’t give the potential hazards, we are left uninformed and unable to do anything to protect ourselves.

So again, and we talked to everyone about this, everyone agrees this is a safety rule.
Here, the plaintiff attorney expanded the “danger” of failing to warn beyond the complex machinery at issue in this case to everyday household products, thus making violation of this safety rule one that could affect the individual jurors.

This argument also subtly changes the measure of negligence to the maximum potential harm, not just the harm created in the actual case.

**Violation:** The defendant never warned end users about asbestos components in their equipment. The plaintiff attorney points out the ease of adding a warning as a factor making this violation especially egregious.

### 4. Safety Rule Four

**Safety Rule:**

Safety Rule Number 4. Companies must substitute the hazardous materials for equally functioning non-hazardous materials.

**Violation:** The defendant did not use a non-asbestos substitute.

### 5. Safety Rule Five

**Safety Rule:**

Another rule, that companies must never sacrifice safety for profits.

**Violation:** The defendant, like many companies, references cost in the evaluation of whether to substitute asbestos-free components.

### 6. Safety Rule Six

**Safety Rule:**

The safety rules, a company must pass on warnings it receives about the dangers of products it sells. The company agrees with that. That you must hold them responsible if they don't do this. That is undisputed.

Here, the plaintiff attorney implies that the ratification of a safety rule by defendant's corporate witness means the defendant agrees to responsibility in situations where the rule is violated. Ball & Keenan call this principle the “contract.” They argue, as the plaintiff attorney does in this closing that, as part of a societal contract, companies have agreed in advance to pay for harms caused by rule violations.31

**Violation:** The defendant received MSDS sheets from component suppliers referencing the product’s asbestos content and containing a standard OSHA warning, yet continued to provide asbestos components with their equipment. “[Defendant] set that aside and they continued making profits....”

In closing argument, the plaintiff attorney consistently brings the case back to defendant's conduct through violations of safety rules. The focus is entirely on the defendant. In the attorney’s roughly one and a half hour closing, less than five minutes are spent seeking sympathy for the plaintiffs. Less time is spent describing the decedent’s alleged asbestos exposures. The Reptile case does not care about decedent’s exposures—it only cares about defendant's conduct. The specific case facts are simply irrelevant:

But this is the chance for 12 people to generally consider what a company does and whether it's okay for our community.

Plaintiff counsel's use of safety rules made for a simple, yet effective closing argument. It was all about six easy to follow safety rules that are vital to the "community.” Violation of those rules endangers the American public, most especially the jurors. Importantly, the set up for this closing argument happened long
Never Mind the Facts: The Damning Narrative Plaintiffs Can Aim at Any Defendant

before the first juror sat down. It happened in corporate representative and defense expert depositions taken long before.

The reader’s temptation will undoubtedly be to say, “This cannot happen to my client.” Yes, it can. Few asbestos defendants (i) researched the health effects of asbestos exposure (ii) placed asbestos warnings on their products or (iii) researched asbestos substitutes—especially during the timeframe at issue in most cases. The excellent reasons why your client did not take these actions do not matter to the Reptile. This closing works against almost any asbestos defendant if their corporate representative or experts agree with the safety rules.

II. Beating the Reptile: Adapting the Way We Prepare and Try Cases

Although many plaintiffs’ attorneys have adopted the revolution that is The Reptile Theory, much of the defense bar has been slow to react. The plaintiff’s bar has forever changed the way they try cases and so too must the defense.

A. Changing the Narrative: Fighting on the Moral High Ground

The real magic of Reptile is that it is designed to “bait defense counsel into fighting a plaintiff’s battle-ground.” Before Reptile, plaintiff attorneys relied heavily on sympathy to obtain a verdict. Now, defendant’s conduct is on trial. Yet, much of the defense bar has not adapted to the changing courtroom environment, often relying primarily on defensive themes. Many defense opening statements begin with a narrative about how their defendant is a good corporate citizen and then quickly move to a “yeah, but…” strategy to refute plaintiff’s allegations. These tactics are a recipe for failure.

The traditional defense case is now obsolete, the product of a bygone era in litigation. Defensive themes make the defendant the central focus of the case, playing directly into the Reptile’s hands due to a concept called “availability bias.” In layman’s terms, availability bias stands for the proposition that the more available a party is to the jury, the more likely the jury is to criticize the party’s actions. It is human nature to become more critical with greater focus, and defensive themes place almost all of the focus on the defendant.

In the Reptile era, the best defense is a good offense. As Ken Broda-Bahm Ph.D. writes, “[s]ecurity may be a very powerful human motivator, but once we’re freed from the reptile analogy, it is far from the only human motivator.” Put simply, all people want to make decisions they feel good about. Jurors are no different. Perhaps one reason Reptile is so effective is that it makes the jury care about the trial’s outcome. For all its so-called “science,” Reptile’s power lies in the ability to give jurors a reason to find for the plaintiff. Defendants must give jurors a reason to find for them—not just logical reasons, but emotional ones too. Research suggests that jurors, like almost everyone, are “motivated reasoners,” which means that they make up their mind and come up with the reasons later. To win in the Reptile era, defendants must use emotion to their advantage.

Consequently, the defense must promote affirmative themes that present a competing case theory with its own unique psychological satisfaction. affirmative themes have the added benefit of combating availability bias against defendants. These case theories give jurors something else to talk about in the jury room. In other words, they move the game onto the defense’s home turf.

For example, personal responsibility is a highly effective trial theme and good motivator for the jury. The concept of personal responsibility is a core American value and one that resonates with Gen X jurors. All of us are reluctant to accept that bad things can randomly happen to good people. That’s human nature. When tragedies happen, we look to separate ourselves from the event by identifying differences between us
and the injured person. Jurors do too, and that impulse can lead them to a just and fair verdict if defendants promote a personal responsibility theme at trial. More importantly, personal responsibility themes empower the plaintiff and allow the jury to focus on plaintiff’s choices. For instance, it is a mistake to focus the jury in an asbestos-related smoking lung cancer case on anything other than the plaintiff’s choice to smoke.

B. Preparing Your Witnesses

As Benjamin Franklin once said, “[b]y failing to prepare, you are preparing to fail.” Reptile depositions are no different. The defense witness must understand the questions and their hidden tricks before the video camera comes to life. Stated scientifically, the defense witness must develop the “cognitive skills” to survive a safety rule attack. Here, there is no substitution for practice. One can read sheet music to their heart’s content and never learn to play the piano. Similarly, no one can field tricky Reptile questions without practice.

1. Dismantling Safety Rule Questions

Reptile questions are word games. To prevail at these word games, defense witnesses must learn to focus on the individual words within each question. As one author states, safety rules are mere physiological traps for defense witnesses. The questions all build to a “gotcha moment.” Once the witness has ratified the broad safety rules, no polished answer will help them during the hypocrisy paradigm questions. It is just too late at that point in the game to change the outcome.

Chief among the critical skills required of a witness is identifying the misleading and overly broad terms in each question. Safety rule questions by their very design lack the specificity to provide a specific answer. To borrow an analogy from President Lyndon B. Johnson, these questions are “like Grandma’s nightshirt—[they] cover everything.” For example, assume your witness is asked:

Do you agree that any risk of serious injury or death is always unreasonable if reasonable means exist to reduce or eliminate the risk?

The words “reasonable” and “unreasonable” are tricks. What is “reasonable” or “unreasonable” depends almost entirely on the situation. The question lacks specifics by design. “Any risk” implies absolute safety, which is a preposterous standard for products. Although it is almost impossible to answer in a generalized form, most witnesses agree with this generalization.

This question is also seductively simple but wildly misleading:

Do you agree that a product manufacturer is not allowed to ignore a known danger to its product?

Here, “ignore,” “known” and “danger” are problematic because they suggest clear cut choice by the manufacturer, such as warning about electric shock from a hairdryer. The witness must differentiate the product at issue from ordinary consumer products. For example, a sophisticated pump in service aboard a naval vessel that is repaired by trained naval experts is far different than a paper shredder sold at Office Depot.

Moreover, we do not typically think in terms of “danger” in everyday life. This word is the bread and butter of Reptile. Instead, we weigh risks. Driving to work is more dangerous than walking, but we chose to brave the freeways to save time. Jurors weigh risks every day and make choices based on their analysis. Companies weigh risks just like ordinary people, and that must be explained to the jury. When making a product, it is easy to eliminate one risk only to create another, greater risk. That is especially true for the historical use of asbestos in equipment. Moreover, the safest product may not be the most effective product. When a witness agrees that “a product manufacturer is not allowed to ignore a known danger to its product,” they have made the process of risk analysis irrelevant to the evaluation of fault.
2. Identifying Safety Rule Questions

Reptile questioning typically happens during the middle of a deposition, often lodged between technical fact specific inquiries. A good questioner will not sign post the change, but switch gears seamlessly. The Reptile will strike when the witness is tired from mundane questioning. As a result, defense witnesses must be constantly on the lookout for Reptile trickery. Because safety rule questions will vary from case to case, witnesses should know the misleading “buzz words” that form the basis of safety rule questions. The following words are some examples:

- Endanger/Danger
- Reasonable/Unreasonable
- Safety
- Public/Community/Others
- Needlessly
- Unnecessary

Once the defense witness can recognize the common terms used in safety rule questions, they can avoid being caught off-guard.

3. Responding to Safety Rule Questions

Bill Kanasky’s article in For The Defense crystalizes the right strategy for responding to safety questions in a simple phrase:

The very best way to respond to reptile plaintiff attorney safety rule or hypothetical safety questions is quite simple on the surface: be honest.  

Kanasky offers several example answers to Reptile questions that are completely candid given the overly broad and misleading nature of the plaintiff counsel’s inquiry:

- “It depends on the circumstances.”
- “Not necessarily in every situation.”
- “Not always.”
- “Sometimes that is true, but not all the time.”
- “It can be in certain situations.”

In essence, each witness must determine ways to agree with portions of safety questions while objecting to others. Simply answering “yes” or “no” to a safety rule question provides plaintiff’s counsel the tools they need to obscure the real issues in the case.

Most importantly, your witness must remember that case specifics are the anti-venom to Reptile questions. When asked, “Do you agree that a product manufacturer is not allowed to ignore a known danger to its product?” the witness should always bring the answer back to the product at issue. They are not an expert in every product sold to every consumer or business in America. But the defense witness is well qualified to talk about the product at issue and should stick to the subject where they are knowledgeable.

C. Evidentiary Challenges

The fact that Ball and Keenan devote 60 pages of their book to defeating “Golden Rule” challenges underscores just how inappropriate their tactics are. By their own admission, the Reptile case has little to do with the actual case facts. “When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.” The authors warn their readers as much when they state, “[b]e prepared to argue that what you are doing is proper. Have back-up plans to get around sustained objections.” This article does not attempt to rebut these 60 pages or add to the numerous publications regarding eviden-
tary challenges of Reptile tactics. However, the reader may consider using the following quotations in any Golden Rule motion:

- “Your most important Reptilian task in closing is to show how the dangers represented by this case affect the community.” (p. 145)
- “You will bring jurors to figure out that community safety is enhanced by means of justice. You are not asking jurors to sacrifice justice for the sake of safety. You instead show that justice creates safety.” (p. 19)
- “This gives us our primary goal in trial: To show the immediate danger is the kind of thing the defendant did - and how fair compensation can diminish that danger within the community.” (p. 30 emphasis original).
- “To gauge whether a defendant's act or omission was negligent- and whether it represents a community danger- jurors need answers to these three questions: … 3. How much harm could it cause in other kinds of situations?” (p. 31)
- “The basis is never the harm actually caused; it's always the potential maximum.” (p. 33)
- “Our research showed that once jurors understand that a full verdict will protect the community, they will actually want the plaintiff to take the money.” (p.151)
- Example given by the authors: “Analogizing to familiar situations gets past the narrow circumstance of this case, clarifies the rule, and shows how dangerous the violation is to everyone in the community not some stranger's baby.” (p. 59).
- Example given by the authors: “Your experts can say … 'Ignoring the rules of a Differential Diagnosis will kill patients whether they are in a labor and delivery room as in this case or in an emergency room, or in a children's clinic, or in any other medical setting.' Then have your expert give examples of how it can hurt or kill in each setting.” (p. 34)

The key to keeping snakes out of the courtroom is exposing Reptile for what it is: an obvious attempt to persuade through fear. To this end, Ball and Keenan are their own worst enemies.

III. Conclusion

On December 6, 1941, battleships were considered the key to naval warfare. A day later, six aircraft carriers changed naval warfare forever. Today, numerous aircraft carriers guard America's interests around the globe. Our battleships are just museums.

It's hyperbole to compare the Reptile Theory with “The Day that Shall Live in Infamy,” but the courtroom revolution occurring is still dramatic. It is a serious mistake to underestimate the change Ball and Keenan have brought to our cases. Defendants must do more to defend against the Reptile or find themselves prey to a sneak attack.

IV. Recommended Reading


4. Bill Kanasky Jr. & Ryan Malphurs, *Derailing the Reptile Safety Rule Attack*, Courtroom Sciences, available at [http://www.courtroomsciences.com/News/Articles/f89bc3ef-be4f-4cfe-93c1-a52c1b402623](http://www.courtroomsciences.com/News/Articles/f89bc3ef-be4f-4cfe-93c1-a52c1b402623)

Endnotes


2. Ball 2009, supra note 1, at 17. Author's note: to alleviate any risk of offending female readers (including the author's wife), the author notes that it was Ball and Keenan's choice to use the pronoun "she" when referring to the Reptile.

3. *Id.* at 18.

4. *Id.* at 17-19, 126-127.

5. *See id.* at 17-19, 126-127.


7. Ball 2009, supra note 1, at 19. ("Does this mean we take orders from a pea-brained snake? Yes.")


9. *See Broda-Bahm, supra note 7; See O'Toole, supra note 7.*

10. *See [http://www.reptilekeenanball.com](http://www.reptilekeenanball.com)*

11. Over his 50 year career, Frank Bean was widely considered to be one of the finest defense trial attorneys in America. In the interest of full disclosure, he was also the author's father and mentor.

12. O'Toole, supra note 7.


15. *See O'Toole, supra note 7.*

16. *Id.* at 10.


20. *See Bill Kanasky Jr. & Ryan Malphurs, Derailing the Reptile Safety Rule Attack, Courtroom Sciences, available at [http://www.courtroomsciences.com/News/Articles/f89bc3ef-be4f-4cfe-93c1-a52c1b402623](http://www.courtroomsciences.com/News/Articles/f89bc3ef-be4f-4cfe-93c1-a52c1b402623), for an in-depth discussion of how safety rules operate. Kanasky does an excellent job of explaining four types of safety and danger rules questions. For purposes of this paper, these concepts have been simplified based on the author's experience in actual depositions and trials involving the Reptile Theory.*


23. *Id.* at 58.
24 Id. at 59.
25 See id. at 8.
26 Id. at 62.
27 Id. at 64.
28 See Metzger (2011) supra note 22 at 3.
29 Id at 5.
30 The case name and parties have been omitted from these quotations to protect the innocent. More importantly, the actual defendant and case facts are irrelevant to an understanding the tactics used. Portions of the closing referenced have been repeated by the plaintiff attorney, almost verbatim, in several trials.
31 Ball 2009, supra note 1, at 68.
32 Kanasky 2014, supra note 5, at 18.
33 Broda-Baham, supra note 7, at 3.
34 Broda-Baham, supra note 7, at 2.
35 Broda-Baham, supra note 7, at 2.
36 O'Toole, supra note 7, at 4.
37 See Delany (2013) supra note 17 at 76.
38 See Kanasky 2014, supra note 5, at 4.
39 Referencing the Gulf of Tonkin Resolution passed on August 7, 1964, President Johnson remarked to his aides that the resolution was, “like grandma’s nightshirt—it covered everything.”
40 Id. at 76 (emphasis added).
41 Ball 2009, supra note 1, at 19.
42 Id. at 15.