



The Voice of the Defense Bar



The Voice

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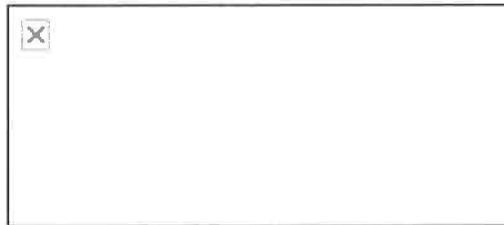
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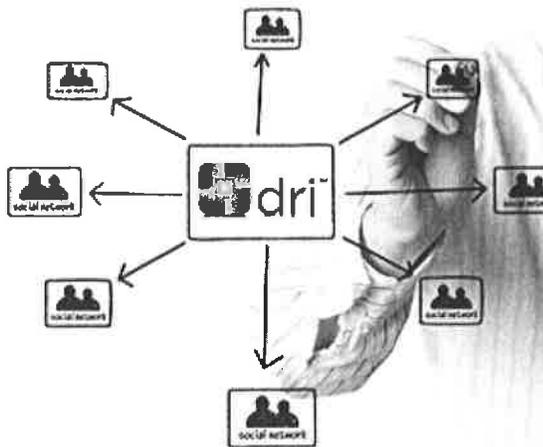
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This Week's Feature

Make Boots Out of That Lizard—Defense Strategies to Beat the Reptile

by Minton Mayer, Wiseman Ashworth Law Group, Memphis and Nashville, TN

Reptile Theory and Rules of the Road—A Brief Explanation

The Reptile strategy relies on the work of Yale Medical School, and National Institute of Mental Health physician and neuroscientist Paul D. MacLean. "Reptile" refers to the reptilian part of the brain that contains our survival mechanism. This theory was further developed by psychologist Clotaire Rapaille, who used it to reach the reptilian portion of consumers' brains in several highly successful national marketing campaigns. Rapaille suggested that his focus group research would also be effective with civil juries.

The Reptile approach attempts to affect jury behavior. This theory is based on the primitive human instinct to avoid danger. The belief is that, at the subconscious level, the primitive part of the brain controls decision-making. The primary theory is that the Reptile brain will choose safety and survival; the belief is that, if you can reach the reptilian portion of your jurors' brains, you can influence their decisions because they will instinctively choose to protect their families and community from danger through their verdict.

How Is It Used?

The Reptile theory starts with a simple formula: **Safety Rule + Danger = Reptile**. The Reptile strategy requires creating safety rules and demonstrating that a defendant violated the rules, subjecting a plaintiff and the surrounding community to needless danger. The Reptile attorney develops a set of the rules to determine how the conduct threatens community safety. The Reptile attorney attempts to demonstrate that every type of negligent conduct violates some basic safety rule. The Reptile strategy requires counsel to show the immediate danger of defendant's actions and how a large verdict will diminish danger in the community.

The focus of the case is the conduct of the defendant, not the injuries of the plaintiff. The belief is that jurors are not interested in the plaintiff's injury, even when severe. Rather, the only way to engage jurors is to demonstrate how the conduct endangers the juror or the juror's family.

The primary goal of the Reptile is to make the jury believe that the defendant endangers the community by its conduct and only a fair verdict can deter the defendant's behavior.

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Examples of Rules

The Reptile requires an attorney to formulate an umbrella rule. This rule serves as the foundation of a rule based system. The example umbrella rule routinely used by devotees of the strategy applies to any negligence based lawsuit. A _____ is not allowed to needlessly endanger the public. The blank is filled in with the defendant involved in your case, whether it is a nurse, truck driver, doctor, security guard, etc. The Reptile attorney then develops more specific rules based on the individual facts of the case.

Examples of Nursing Home Safety Rules

Safety Rule No. 1: Umbrella Rule—A health care provider is not allowed to endanger its patients needlessly.

Safety Rule No. 2: A health care provider is never permitted to remove a necessary safety measure.

Safety Rule No. 3: A health care provider must have enough staff to keep patient safe and to prevent unnecessary harm.

Safety Rule No. 4: A health care provider must have enough adequately trained staff to keep resident's safe and prevent unnecessary harm.

Safety Rule No. 5: A nursing home is a health care provider so it must have enough adequately trained staff to transfer residents safely to prevent unnecessary harm.

Safety Rule No. 6: That's because violating the staffing rules needlessly endangers patients, and (Umbrella Rule): no nursing home or health care provider of any kind is allowed to endanger any patient needlessly.

The rule must utilize a broad term such as "health care provider" because not all jurors will have experience with nursing homes. The rules must be broad enough to impact a juror's experience with other health care providers, such as a young mother who takes her daughter to the pediatrician but has never been to a nursing home.

Defuse the Codes and Deactivate the Snake

According to Clotaire Rapaille, the code is the key to connecting to your jury. The original champions of the theory maintain that plaintiffs' lawyers need to know the codes applicable to the persons involved in the case as it relates to the reptilian brain. Some individuals have very positive codes. For example, the code for physician is "Hero." The Reptile strategy suggests that the lawyer employ a strategy that shows how the physician does not act like a hero or is off code. An example would be developing relevant testimony establishing that the physician defendant is uncaring, greedy, unavailable, impersonal, fraudulent, or dangerous. The goal of the defense should be to keep the physician on code by showing that the physician is caring, knowledgeable, altruistic, authoritative, and a lifesaver.

The codes also provide insight into areas that can help you defeat the Reptile strategy. For instance, according to the code system, a *hopeless tragedy or accident never activates the Reptile*. If something is an accident or hopeless tragedy, it can't be prevented. Thus, a large verdict will not protect the community. The Reptile cannot protect against a tragedy or accident. Another important code for the defense is **remorse = life**. If a defendant shows remorse, the Reptile is not activated because a remorseful individual is not a danger to the survival of the Reptile. The individual's safety is not endangered because it is unlikely that the act will be repeated.

Key Codes for the Defense



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Order = Safety—Prove your client follows the rules and adheres to policies and procedures. **Chaos = Danger**—Limit any claims or arguments related to a chaotic environment paying close attention to former employees. **Health = Mobility**—Defend cases keeping in mind that someone who already lacked mobility is not considered healthy. If a plaintiff has regained his or her mobility, focus on the recovery to deactivate this code. **Remorse = Life**—Consider defusing the Reptile by admitting liability or showing remorse for the loss, despite your liability defense. **(No Remorse = Death)** **Hospital = Processing Plant**—Demonstrate how your hospital provides personal care and attention. Call in advance to avoid waiting in the emergency room, provide valet parking, concierge services, and medicine with a focus on the patient and the best outcome.

Tort Reform's Effect on the Reptile Brain

Research indicates that tort reform arguments activate a juror's Reptile brain for the defense. It does so based on the negative impact a large verdict will have on the local community. For instance, if at trial, a jury renders a large verdict against a local hospital, it will have a direct impact on the local economy in the form of decreased employment of community members, decreased access to quality medical care, etc.

Early Witness Preparation

When effectively done, the Reptile strategy confuses witnesses, resulting in detrimental admissions. The strategy emphasizes the need for the Reptile attorney to gain admissions. For example, in a health care liability case, the attorney attempts to force the defense to admit.... prudent health care providers don't expose any residents to unnecessary danger. The assertion set forth above is consistent with the rules and regulations in most states that forbid unnecessary harm to patients. It can easily be supported by a series of questions that will be difficult for a hospital, nursing home or assisting living facility caregiver or director to deny. For instance, a Reptile lawyer will pose questions seeking to garner the following admissions:

1. There is no such thing as a standard of care that allows a health care provider to needlessly endanger a patient.
2. In its care of a patient, a health care provider should not expose a patient to more danger than necessary.
3. If there is a safer way available (to transfer, to perform a procedure, to staff, etc.), the health care provider must choose it.
4. A health care provider should choose an alternative that places a patient in the least amount of danger.
5. A health care provider must never endanger its patients needlessly. (Umbrella Rule)

Your witness will make detrimental admissions if he or she is not prepared to respond to these questions. You must prepare your client and experts to handle these types of questions. The key to preparation is to make your witness understand that **"A Safety Rule is Not the Standard of Care."** If your witnesses agree to the impossible standards sought to be imposed by the Reptile lawyer, you will be forced to defend that impossible standard at trial.

Prepare Your Witnesses to Rebut the Umbrella Rule

When asked if there is ever a time when a health care provider can endanger its patients needlessly and unnecessarily, consider the following: **The witness can simply respond that medicine is an inexact science and that there are just too many possible fact scenarios to answer such a general abstract question with a**

definitive all-encompassing answer.

A response to the anticipated follow-up question, Can you think of any situation or example?

Yes, when there is a patient with terminal cancer that is demonstrated to be clinically resistant to radiation, chemotherapy, and all known treatment protocols but the family insists on continuing treatment instead of palliative care.

Yes, when a family of a terminally ill patient refuses to make him or her a DNR or place him or her in a palliative care protocol and continues to insist upon lifesaving measures, despite evidence of suffering and futility.

Expert Witness Strategies

At the opposing expert's deposition, introduce specific pages from the Reptile or Rules of the Road that demonstrate the Reptile template. Question the plaintiff's expert witness regarding his or her familiarity with the strategy and the books that provide the questioning techniques and templates. Even better, why not get the plaintiff's expert to concede that medicine is an inexact science and that all patients are different, such that it is absurd to suggest a blanket set of rules to cover all possible scenarios?

Additional Defense Strategies

Use your jury instructions. The Reptile theory is an attempt to create a standard of care that is greater than the standard jury instruction. Demonstrate to the court that the strategy attempts to instruct the jury on a new standard. Jury instructions do not contain safety rules. Use the Standard of Care jury instruction in your opening and closing.

Prepare a motion in limine related to violation of the Golden Rule, use the term "Community Standards" and "unfair prejudice." Prepare your jury for plaintiff's opening statement that focuses solely on the conduct of the defendant, instead of the damages or harm suffered by the plaintiff.

Expose the psychological manipulation and the book to the court and jury.

Be wary of prejudicial voir dire questions designed to create juror bias. Do you feel medical care is better now or did you get better care 10 years ago? Some folks feel like their doctors don't care enough, others feel things are okay. How do you feel? Some folks feel like their doctors aren't honest with them. Others feel okay. How do you feel?

Work with jury consultants and learn to conduct cost effective focus group research to prepare and defend the issues identified by focus groups.

*Minton P. Mayer, an AV-rated attorney at the Tennessee law firm of **Wiseman Ashworth Law Group PLC** with offices in Memphis and Nashville. Mr. Mayer can be reached at minton@wisemanashworth.com.*

Attention Medical Malpractice and Health Care Law Attorneys: Join the Medical Liability and Health Care Law Committee at the DRI Annual Meeting for our presentation "**Medical Liability Trials from an Expert's Perspective**," **Thursday, October 17, at 7:45 a.m.** Dr. Arthur M. Altbuch, Mercy Health System, and moderator Julie Bargnesi, R.N., Esq., Damon Morey LLP, will cover

preparing the defense medical expert for cross-examination, cross-examining the plaintiff's medical expert, handling omissions in the medical record, and tips for selecting a "medical provider friendly" jury. All attendees are welcome to attend the committee business meeting immediately after the presentation, and this is a great way to learn about opportunities for committee involvement. Also, please plan to join Medical Liability and Health Care Law Committee members for our Annual Meeting committee dinner on Thursday night. For details and reservations, contact [Julie Bargnesi](#). We hope to see you at the Annual Meeting.

Ted McDonald, chair, DRI's Medical Liability and Health Care Law Committee

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