

Understanding the 'Reptile Theory'

Bill Smith discusses how to protect your company from a frustrating legal trend.

In the book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, Don C.

Keenan and David Ball make a case for persuading jurors by appealing to their "reptile brains," the "oldest" part of the brain and the part responsible for primitive survival instincts. In their books, videos and seminars, Keenan and Ball advise plaintiff attorneys to demonstrate to jurors the immediate danger posed by the actions of defendants because, as they write, "when the reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect herself and the community."

According to various sources, Reptile strategy has taken the plaintiffs' bar by storm. This is at least in part because Reptile theory asserts that you can prevail at trial by speaking to – and scaring – the primitive part of jurors' brains, commonly understood as the part of the brain they share with reptiles.

How it works

At this point, Reptile strategy is no longer new, and it has been widely used in negligence cases, including those involving personal injury, products liability and commercial transportation. In Texas, Reptile theory is often used, with varying degrees of effectiveness, and it is being spread throughout the other 49 states.

The common thread amongst these varied types of litigation is that each category of defendant – healthcare providers, manufacturers *and those who transport goods on public roadways* – all have potential impact on every single juror. Everyone needs healthcare.



THE AUTHOR

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Everyone purchases goods. Everyone travels on road. These make for ideal characters in the Reptile narrative because they not only impact (positively or negatively) the individual jurors and their loved ones, but also the community as a whole.

Make no mistake: Reptile strategy is designed to take your business and tear it apart from within. Plaintiff attorneys are trained to look at everything you say you do, find what you actually *didn't* do and then use it to paint a picture of your company that makes it appear that you're more concerned with profit than safety.

The ideal defense

While Reptile theory is frustrating and alarming, it's also something that you can prepare for in your day-to-day business. Here are a few of the many ways you can bolster your protection efforts.

1 MAKE SURE YOU KNOW EXACTLY WHAT'S IN YOUR SAFETY PROGRAM.

When was it created? Are there things in the manual you no longer do? Are there things in there you have never done? Be sure it's current, effective and won't be used against you. Do what you say you do or take it out of your manual.

2 MAKE SURE YOUR AGREEMENTS, CONTRACTS AND WORK TICKETS ARE SIGNED.

If it's not signed, it's not executed. If it's not executed, it can't protect you. Don't make the mistake of going through the effort of having a contract, rental ticket or agreement and then not following through with getting it signed. There's far too much on the line.

3 MAKE SURE THE CONTRACT LANGUAGE IS RIGHT.

If you're going to the trouble of getting something signed, make certain the language can actually protect you. Your terms and conditions should be up to date, state-specific and provide optimum company protection.

4 TRAIN, TRAIN, TRAIN.

Continual training is critical. Take advantage

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of online training programs that allow employees to train when it's most convenient for them. Have employees take advantage of training on bad weather days, whenever there's down time on the job, when they're waiting for loads or when they're sitting in a crane for hours with an empty hook. Be sure to document the training as well.

Don't scramble, prepare

Many of the companies I come across are really good at what they do. However, instead of preparing for the probability of an incident by implementing prevention strategies via training, documentation, intervention or even discipline, they often end up reacting to an incident after it's happened. This is what Reptile strategy thrives on – the fact that you're scrambling after something has happened. The best way to counter this is through basic, run-of-the-mill preparedness.

If you're looking for additional ways to counter Reptile strategy, or if you'd like to learn about other ways you can train your employees to protect your company from plaintiff attorneys, reach out to me or one of the other risk management team members at NBIS. ■