

Be Smarter Than a Lizard: Overcoming Reptile Theory in the Discovery Phase

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It's no secret: plaintiffs' attorneys want to win big. Using reptile theory, plaintiffs (and their counsel) are enjoying gargantuan jury verdicts. Through thoughtful and strategic lawyering, however, the harsh effects of reptile theory can be avoided.

What is reptile theory?

Reptile theory is based upon the idea that humans—like reptiles—have a primitive portion of the brain that is conditioned to pursue safety and survival. Plaintiffs' attorneys often attempt to influence juries and achieve favorable verdicts by speaking to the “reptilian” portion of the jurors' minds and appealing to emotions rather than a rational, impartial evaluation of the evidence. While the [science](#) behind the “reptilian” brain has been debunked, the theory remains very effective in the litigation context. Using facts that provoke innate feelings of danger in jurors, plaintiffs' attorneys suggest ruling against the defendant a means of eliminating that danger. When employed effectively, reptile theory leads jurors to want to punish the defendant and award the plaintiff a grossly excessive amount in damages. Thankfully, defendants can defeat reptile theory by utilizing effective case strategy and management along the way. Here are some tactics to help defend against a reptile verdict in the discovery stage.

Start Early

Reptile strategy starts early and is developed throughout the case, so it's never too soon to begin defending yours. Reptile theory encourages the jury to focus on the acts of the defendant rather than the specific facts surrounding the individual plaintiff's injury. Combat that strategy by assessing your case promptly and developing your defense theory at the outset. Doing so will enable you to maintain control of your case, fend off overbroad discovery (where reptile theory often first appears), and respond effectively to early settlement demands with a reasonable assessment of your case.

Client Communication is Key!

Your client can be a valuable asset to your team throughout the discovery process—develop an open line of communication with them and meet together early and often; they are your best resource. Through effective communication with your client, you will gain an understanding of the evidence they have and who the problem witnesses may be, which enables you to prepare accordingly. It is imperative that your client understands the case’s strengths and weaknesses. Take the time to educate your client on the discovery process, including the need for thorough searches and the importance of investing the time and resources into deposition preparation.

Invest in Discovery

Because plaintiffs’ attorneys use the discovery process to lay the foundation for a reptile verdict, it’s crucial that you set up your defense strategy thoughtfully. Time spent on discovery *is* worth the effort. Review discovery requests carefully for reptile theory and object accordingly. Keep the needs of the case in constant consideration and avoid boilerplate discovery. Hold the plaintiffs’ feet to the fire: do not shy away from filing a motion to compel or a motion for a protective order when necessary.

When it is time for depositions, invest your energy into building relationships with your witnesses. The “reptilian” brain does not do well with complexity or nuance, so plaintiffs’ attorneys often seek to engineer a simple case that demonstrates “bad behavior” on the defense’s part, removing any and all focus away from the individual plaintiff’s injury. Combat plaintiffs’ approach by preparing your witnesses to feel confident and comfortable heading into their depositions, armed with an understanding of how to handle an attorney’s questions without reliance on improper attorney objections. Your witnesses should feel empowered to emphasize the details of the case in their responses, equipped with the knowledge of common pitfalls such as making clean admissions that agree with plaintiffs’ oversimplified characterization of events and play into their reptile approach. Be vigilant in defending these depositions; they are often a roadmap of what the plaintiffs’ strategies will be at trial.

The Takeaway

The “reptile brain” may not be real, but reptile theory is effective, nonetheless. To successfully defend against reptile theory, stay vigilant in identifying, understanding, and addressing reptile tactics throughout the discovery phase. The reptile strategies that plaintiffs employ in discovery are often the same strategies that they will utilize at trial. Defending your case with reptile theory in mind during discovery increases the likelihood of a successful outcome in combatting reptile tactics at the trial stage.

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