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Early Anti-Reptile Tactics May Save Millions of Dollars

The role of the litigation psychologist, and why it matters.

By Bill Kanasky, Ph.D., George Speckart, Ph.D., and Alyssa Parker, Ph.D.

The role of the litigation psychologist, and why it matters.

The introduction of "Reptile Tactics" (Ball and Keenan, 2009) has been associated with a noteworthy approach to cross-examination of witnesses by plaintiffs that is particularly relevant in the context of the present discussion. Ball and Keenan have operationalized a system of phrasing and structuring cross-examination questions that lulls the witness into a state of complacency and induces the witness to agree to broad and general "safety rules" that ultimately trap the witness into admitting malfeasance or negligence by virtue of the violation of such rules. We use the term "operationalized" because what Ball and Keenan have accomplished is not new or inventive but rather a systematic way of organizing questioning which in some form has existed in the past, but in their framework can indeed represent a pernicious trap that has ensnared many defense witnesses, with over $7.3 billion in resultant damages claimed by the authors in 2017.

Witnesses unprepared for reptile techniques and the psychological warfare that occurs in deposition frequently make admissions that ultimately force defense attorneys to settle over case value or risk going to trial.

One of the Reptilian plaintiff attorneys' primary goals is crystal clear: destroy the credibility of key defense witnesses, particularly during videotaped deposition testimony (Kanasky 2014 a, b). Therefore, the path to effective witness testimony must start very early in the case, while also remaining important at all points in the litigation timeline. Unfortunately, poor witness performance during depositions is ubiquitous, as many defense attorneys use actual depositions to evaluate a witness' cognitive, emotional and communication abilities, rather than systematically assessing these factors prior to the deposition (Kanasky 2010).

In a recent wrongful death commercial truck accident case, Courtroom Sciences' Litigation Psychologists were contacted to "fix" key witnesses prior to trial. Those key witnesses had not been properly prepared to deal with a reptile attack during deposition, and a savvy reptile plaintiff attorney was able to elicit not just admissions of negligence, but gross negligence under oath. Although all remaining witnesses received advanced neurocognitive training and were taught how to avoid falling for reptile tactics, the admissions of earlier witnesses were too critical and damaging for the case. The plaintiff attorney's initial settlement offer of less than $10,000,000 was withdrawn and the case went to trial, resulting in a plaintiff verdict of over $35,000,000. Sadly, the mistakes made by the witnesses were avoidable had they been properly prepared prior to deposition. More importantly, this is not a rare occurrence.

During discovery, the Reptile plaintiff attorneys knows that each deposition has an economic value to the client they are attacking. Strong effective depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher payouts in claims during settlement negotiations. Therefore, the deposition setting is a critical battleground with potentially heavy casualties for a client in the form of large checks being paid to the adversary. In fact, almost half of Ball and Keenan's Reptile material focuses on "winning" a case at mediation, rather than trial. Specifically, the authors argue that creating "head danger" for the defense attorney (i.e., creating a fear of "losing one's head" or "heads rolling" at the law firm) and finding the insurance carrier's "fear button" (i.e. if the case goes to trial and we lose, I fear losing my job) is what ultimately forces the defense to settle for a price that exceeds the true value of the case (Kanasky, 2014).

In a contract case with over $20 million in exposure, one of the present authors was discussing a catastrophic deposition videotape of a key defense witness with the client, who was livid. The client was asked, "How was the witness prepared?" He tossed over a 12-page document and said, "They [the lawyers] gave him this to read." At that point, the damage had been done and there was no way to mitigate the loss.

In another case, a mock trial was being carried out for a major insurance carrier, where the causes of action included bad faith. Nonverbal behavior of claims adjusters in videotaped deposition excerpts was so horrendous that the trial team decided that, after mock juries awarded an average of $190 million, the witnesses should just be kept away from the trial, outside of subpoena range. The team decided to re-test the case, with another identically-matched panel of mock jurors, with the same arguments, themes and evidence, and with Q&A of the witnesses read into the record instead of showing the deposition videotapes. In other words, with the second panel, the only difference was the deletion of the witnesses' nonverbal behavior from the "psychological equation." The second panel awarded an average of $2 million. *Of the $190 million awarded by the first panel, $188 million of that amount was attributable to the nonverbal behavior of the claims adjusters.*

Ultimately, the answer to "Why should you care?" is money. Let's be honest, money is the cornerstone of the entire civil litigation system. If civil litigation was really about truth, justice and the American way, our world would be much different and Litigation Psychologists may not even exist. The strategic leverage brought to bear by a qualified litigation psychologist creates a direct financial benefit by suppressing settlement figures as well as damages at trial. The battle over witness credibility is at its foundation a battle over money, and the use of a litigation psychologist pays for itself many, many times over in settlement and trial outcomes. We have been told by insurance carriers that systematic witness training has resulted in substantial increases in the percentage of defense verdicts obtained; decreases in settlement amounts paid out; and even increases in loss reserves at the insurance company. By the same token, plaintiff attorneys flood Ball and Keenan's Reptile courses for the same reason --money. Fortunately, effective defenses to the Reptile approach have been developed, refined and subsequently utilized effectively by defense counsel nationwide (Kanasky 2014 a, b; Kanasky and Loberg, 2017). These anti-Reptile tactics focus on areas of neurocognitive training of key defense witnesses; strategic voir dire designed to program and re-prime jurors for defense themes during trial; and more aggressive opening statement approaches that quickly put the plaintiff, the plaintiff attorney, an empty-chair party, and/or alternative causation on trial. All of these newly developed techniques are heavily grounded in principles of neuropsychology, cognition, and emotion, that go well beyond what a legally-trained attorney could provide to a witness.

The battle over witness credibility is at its foundation a battle over money, and the use of a litigation psychologist pays for itself many, many times over in settlement and trial outcomes.

Unfortunately, a disturbing trend in the industry appears to be the practice of "psychology" by non-psychologists, such as those with backgrounds in political science, public policy, communication, and even acting coaches. (A background in "political science" is not a background in science!). The legal industry has a proclivity toward using practitioners based on liking or relationships rather than qualifications – a practice that can ultimately create serious compromises to a trial team's ability to operate effectively – and economically (Speckart, 2008). Happily, it is not difficult to investigate the backgrounds of professionals using simple tools such as Google Scholar and some basic, commonsense questions. The first step, however, is an understanding of the role of the litigation psychologist, and why it matters.

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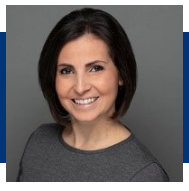

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