Reptile: IT AIN'T BRAIN SURGERY

"The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box." Atticus Finch ("To Kill a Mockingbird" by Harper Lee).

There is nothing new about either counsel for defendants or plaintiffs using the art of persuasion to influence a jury. Some might call it jury manipulation, or playing to existing prejudices. On the plaintiff side we have certainly heard of various methods of influence, from Gerry Spence, Rick Friedman and others, who claim to fight for the little guy against big defendant distortions.

Starting in 2006, an LA attorney (Don Keenan) and a jury consultant (David Ball) teamed up to develop a self-proclaimed "plaintiff's revolution", and in 2009 came out with a manifesto called "Reptile". The heart of this revolution—and the manifesto—is to appeal to the part of the juror's brain that reacts to fear. This instilled fear then influences or even controls the rest of the brain—the parts that think and feel. The idea is to get the juror to feel that what has happened to the plaintiff before them could happen to them—and thus they need to do something to protect him or herself and the community. The "science" behind this is a suggestion that if you generate fear in a juror (mostly, the fear that what defendant did to plaintiff could next be done to that juror or his/her family), the primitive reptilian part of the brain will take over and resolve the issue ("protect the community"), with the reward being a release of pleasure-giving dopamine. In a courtroom, the protection comes in the form of a large, punishing verdict.

Discussions to date in the legal and scientific community play down the reptilian takeover, with the subsequent dopamine rush. As some commentators rightly suggest, defendants should be wary of juror anger, not fear.

As to public entities, it is no secret that frequently the defense posture is that the entity has set up rules and procedures which, if followed, benefit the community—and but for the plaintiff's (or some other person's) misbehavior, there should be no finding against the entity. The theme is generally one of responsibility, and the best approach to potential juror anger is to be up front and show that the entity is doing all that it can (and then some) given its limited resources. And as for fear, give the jurors a sense of resolution—if there IS a problem to be fixed, don't shy away from a discussion as to how the entity has acted to improve or fix the situation. There would be nothing to fear, but fear itself, so to speak.

The plaintiff's "Reptile" approach (whether playing to juror fear, or anger) is to take the theme of "responsibility" and turn it upside down. Instead of the defendant offering a path to responsible behavior (street signals/speed limits/signage, environmental regulations, child protective services), the plaintiff will argue that the entity instead acted in a way that has impacted the safety of not only the plaintiff before you but also YOU, juror, and your children. The defendant, in contrast, would show that the jurors wouldn't be in the same position as the plaintiff, because the plaintiff made unwise decisions that created the peril.

Fundamentally, Reptile is not all that different from other persuasive techniques used by both sides in the past. The difference is in the marketing of this approach—requiring a cult-like adherence to the methods set forth in the book-- and in particular "releasing the Reptile" from day one. It takes the Golden Rule that would normally be brought out at trial, and goes deeper. It is also a gimmick to sell books!

OF NOTE: the authors of "Reptile" DO NOT use as examples public entity cases—it is easy to go after insurance companies and the medical profession, but tougher to go too heavy against public entities using the concept of "safety rules" (particularly involving law enforcement and other public safety groups). We ARE susceptible to a few areas, as noted below.

What IS the "Golden Rule"?

Just about every religion has a variation of the "Golden Rule," which is all about empathy and the ethic of reciprocity. (A satirist view: whoever has the gold, makes the rules).

Stated in the positive, you should treat others as you would want to be treated. (Negative: do not treat others in ways that you would not want to be treated—sometimes referred to as the "Silver Rule"). Thus, in litigation, the Golden Rule is used to bring a juror mentally into the position of the plaintiff—feeling their daily pain—and agreeing this would not be something they would want to have to endure, not for X dollars an hour/day/month/year.

The "Reptile" approach uses the Golden Rule as a springboard, but it does not stop there. Rather, the plaintiff's bar hopes to get the jury to not only place themselves in the shoes of the plaintiff, but to then punish the defendant on behalf of the community at large—and in doing so, helping to avoid similar misfortune on themselves or their families. The idea is, in essence, a community slap down of the defendant.

Protecting Against the Use of the "Golden Rule"

First and foremost, defense counsel must make a record.

If you know it is coming, mention it is your Trial Brief—and don't be timid about it, hit it head on and reference the "Reptile" book by name and author—and file an In Limine brief with authorities against use of the Golden Rule, including CACI instructions. (The approach in the In Limine motion is not about the book, but about potential attorney misconduct—seek to block any "Golden Rule" or community conscience arguments and also block irrelevant "safety" rule questions inserted in place of a recognized standards of care). It is particularly helpful to your motions to cite to instances in depositions where plaintiff's counsel appears to be adhering to the Reptile manifesto. You need specifics, however—just asking the Judge to block a "Reptile" approach is meaningless, and gives no course of practical action to be taken by the Judge.

CACI 100—preliminary instruction, similar to CACI 5000, and includes "Do not let bias, sympathy, prejudice, or public opinion influence your verdict."

CACI 113—deals with Bias. This is a great instruction to use when addressing the jury in voir dire, and to combat "Reptile" in closing; get them away from the Golden Rule/fear approach and back on deciding the case only on the facts presented in evidence. May be safe to say to the jury to not let your biases or fears be manipulated by any side.

CACI 3925 states: "The arguments of the attorneys are not evidence of damages. Your award must be based on your reasoned judgment applied to the testimony of the witnesses and the other evidence that has been admitted during trial."

CACI 3924 states (No Punitive Damages) "You must not include in your award any damages to punish or make an example of [defendant]. Such damages would be punitive damages, and they cannot be a part of your verdict. You must award only the damages that fairly compensate [plaintiff] for [his/her/its] loss.

CACI 5000—essentially the same as CACI 100, and likewise buried in this concluding instruction (and be sure to ask for it!) is: "You must not let bias, sympathy, prejudice, or public opinion influence your decision." See the sources section following CACI 5000-jurors must avoid bias. "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution." (Weathers v. Kaiser (1971) 5 Cal.3d 98, 110).

Has Reptile Worked?

Like any other fad—or cult—you have scary true believers and you have blind spot skeptics. Those who follow Reptile adamantly frequently get tripped up by Golden Rule rulings against them—they have invested so much in the theory that any chink in the armor becomes fatal. On the defense side, a cocky attitude that a jury has to see through all of this, or worse yet, an ignorance about what is happening—an ignorance for government defense attorneys frequently sheltered by immunities and the underlying and unstated "juror as taxpayer" preservation—can likewise present a rude awakening when the verdict is read.

As a science, the idea of three parts of a brain and all being controlled by a reptilian core has been called "insane" by one science writer, and has no real basis in modern neuroscience. The brain operates as a whole.

The theory holds up as a unifying theme to trial work, however, and it gets results. Adherents to the Reptile manifesto claim verdicts approaching a total of $5 billion; an LA trial attorney commented that the Reptile methods "lead with justice and the well-being of the community—the two founding fundamentals of western law." Reptile is more of a motivational tool box—with the goal of getting the jury to care about the plaintiff on such a personal level that they will cherry pick the evidence and utilize selective listening and rationalization.

One such tool—perhaps the most important one in the Reptile tool box—is the use of "safety". The Reptile book spends a great deal of time discussing medical malpractice cases, and getting jurors to toss out legal standards of care and replace them with a more simplified "safety rule". The goal for the plaintiff is to show the immediate danger (what the defendant did), how that was contrary to the acknowledged "safety rule" and how a fair and powerful verdict will lead to diminishing that danger to the benefit of the community.

Government entities are ripe for a "Reptile" approach. As noted in Keenan's book, the Reptile prefers one side—and that is the side of the plaintiff. As the book notes frequently, the Reptile is about community—that is, YOU, juror, and YOUR family, and that the courtroom is the arena to deal with threats to community safety. For a government entity, its defense has always been and always will be wrapped around a motive of public good within limited resources—in fact, we ARE the community. The view we wish the jury to take is one of responsibility—that the entity has rules, regulations, approaches that look after OUR community as a whole, and but for the irresponsibility of the plaintiff or some other third party, there would not have been the claimed injury.

Does that still work, in light of on-going public debate about government waste, City of Bell corruption and a general belief that government is too big and pensions are too generous?

Government functions ripe for a Reptile approach include:

1. Dangerous Conditions of Public Property: the number one goal of roadway oversight is public safety—today, the plaintiff is hurt by a road defect, tomorrow it could be you, or your newly licensed kids. "Safety Rules" usually arise out of non-mandatory standards (especially design standards) which the plaintiff and his/her expert will argue provide the safety rules for roadway design and maintenance. It kicks off with a PMK (likely the entity's traffic engineer) confirming that the number one goal for roadway management is public safety.
2. Removal of Children from Parents: classic Reptile fear of social workers acting as child snatchers...are your children next? Isn't the removal of the child and his or her placement in a strange facility, harmful? What is the rush to removal?
3. Law enforcement vehicle accident with innocent third party...reckless driving endangers the community. Officer Smith, isn't it your job to ensure that the rest of the motoring public operates their vehicles safely? Does this not apply to you?

The "safety" approach does not work as well with police-power related matters (or firefighters, deputy district attorneys etc.), as generally speaking the jury is more forgiving of those who put themselves front and center in defense of public safety—and usually the plaintiff is not in a position to stake out the moral high ground. The Golden Rule has its limits, after all.

None of this is particularly new. Plaintiffs have always played the "uncaring bureaucracy" card at trial, and argued that the matter is bigger than just what happened to this particular plaintiff. They have and always will continue to confuse the jury about the use of roadway design standards. In child removal cases, they shift the focus from parental behavior to overall department policies and procedures, and then ask: what was the exigency? The difference with Reptile is the depth of this "safety" approach—it

is not only THE theme of the case, it is plaintiff's mantra, which they beat loudly and continuously, so that the jury repeats it when they start deliberations. It may not be true science (brain chemistry, primeval fear evoked), but it is an effective path for using the art of persuasion/manipulation.

As government defendants, we are expected by the public and by the jury to fight back. The jury needs to be on guard against undue manipulation, and the defense should not shy from calling plaintiff's counsel out on the use of the "Reptile/Golden Rule" approach whenever possible. And as a public entity, the jury wants to hear what we have been up to—what we did, why we did it and how we can improve upon it. Nothing beats a good narrative—we are, after all, storytellers—and as long as we stay within the boundaries of truth and reasonableness, and present a narrative that fits within the world as jurors know it, we need not fear the Reptile.

This workshop is intended to provide examples of how plaintiffs may play out a Reptile approach to a case—from the filing a complaint to closing argument—and suggestions on ways to fight back.

In the end, we should thank Keenan and Ball—this plaintiff manifesto may be the kick in the pants the government defense attorneys need to shake them from complacency, and once again develop trial strategies that get the truth to the jurors and verdicts born of the strength of evidence (and yes, from the common sense of, and for, the community) and not out of fear.

Use Reptile to renew vigor to government defense—now THAT is a manifesto!

Persons Most "Knowledgeable"

CCP section 2025.230 states:

"If the deponent named is not a natural person, the deposition notice shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent."

Somewhere along the way the statutory allowance of noticing persons who are most qualified to testify became a notice for persons most "knowledgeable." Now at trial, some poor mid-level engineer asked to step into a deposition to talk about signalization and who doesn't have all of the answers is paraded to the jury as the "person most knowledgeable in all of the County" and he/she doesn't know x, y or z. In reality, the entity was asked to designate someone "most qualified" to testify "to the extent of any information known or reasonably available to the deponent." (This DOES impose an obligation on the person named to make reasonable inquiries of others to find out pertinent information he or she may not know that is related to the topic).

Even if you are producing someone who is knowledgeable about the requested topic, defense counsel should reply with an objection to the use of the term "most knowledgeable", and repeat the language of the statute (and repeat it at the beginning of the deposition).

Interestingly, while the 2013 amendments to the CCP limit depositions to 7 hours, this limit does NOT apply to DMQs (Designated Most Qualified) deponents. (CCP section 2025.290(b)(5): time limit does not apply to "any deposition of a person who is designated as the most qualified person to be deposed under Section 2025.230."). Additionally, the deposition of a DMQ can be used for any purpose, even if the designated DMQ is available to testify. (CCP section 2025.620(b)).

There is also no limit to the number of topics for a DMQ deponent.

Worst case scenario: DMQ deponent subjected to an endless, videotaped deposition eventually worn and tired agrees with plaintiff's counsel that the entity certainly believes in safety first, and should therefore follow x, y and z policies, and did not do so (at least, not to the letter) in this instance. Plaintiff now has a nice video clip to play for the jury throughout the trial.

So what do you do when you get a notice for "PMKs" and 50 topics?

1. Object to the term "PMK" and cite to the code section.
2. Object to the number of items, and ask that the topics be limited to some reasonable number on par with the severity and complexity of the case (might be 2, could be 5). Consider objecting to the topics listed as failing to " describe with reasonable particularity the matters on which examination is requested" pursuant to CCP section 2025.230.
3. If or when the plaintiff refuses, move to stay the taking of the depositions and to quash the notice under CCP section 2025.410, or in the alternative other relief (limit of DMQs, time limit of depositions). Note the language of CCP section 2025.290(c), which states that nothing in section b (which excluded DMQs from the 7 hour deposition time limit) "shall be construed to affect the existing right of any party to move for a protective order or the court's discretion to make any order that justice requires to limit a deposition in order to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, oppression, undue burden or expense."

Meanwhile, in anticipation of DMQ depositions going forward, sit down with the designated deponent(s) and run through the likely "safety" questions to be asked. Prepare them to be straightforward and honest, including the limitations of their knowledge on topics to be raised. They are "most qualified" but this does not mean they MUST speak to every issue, or provide answers to every question—as long as they made reasonably inquiry. Of course, you don't want a series of "I don't know" responses—to the Reptile, this is music; imagine how well a series of videotaped "I don't know" responses will play to the Reptile argument that not only the plaintiff but the community at large may fall victim to an uncaring government.

THE BIG PICTURE

The Reptile manifesto, as noted, is just one more approach by the plaintiff's bar to squeeze money out of a poor case. Public entities must fight back! Look at the lay of the land in California:

The trial bar "allowed" tort reform under Prop 51, but that has resulted in boxing deep pocket defendants into settlement in cases with high economic losses and only 1 percent liability.

The deadline for filing summary judgment motions—generally a useful tool for defendants—was tightened, giving the plaintiff plenty of time to review the defense motion, conduct discovery and file an opposition with materials gathered since the time of the motion filing. It is hard to combat with a "reply" brief.

As noted above, the 7 hour deposition limit does not apply to deponents designated "most qualified" to address a topic. "Most Qualified" deponents are historically on the defense side (entities, corporations). The plaintiff's counsel—not being paid by the hour—certainly wanted a limit on depositions of their clients and witnesses, but not on the fishing explorations of the "most qualified".

Similarly, there are no limits to requests for production—usually, a plaintiff tool against a defendant entity or corporation. (Not to mention Public Record Act requests).

The saving grace for entities remains the Tort Claims Act, and the numerous immunities in the government code—including and especially trail, regulatory signage and design.

I urge the support of a proposed amendment to Prop 51 (Civil Code section 1431.2), which will limit public entity liability to only it's percentage of fault for ALL damages.