

THE RECORDER

COMMENTARY

Using and Disrupting Reptile Theory as a Trial Strategy

Elisa Reiter and Daniel Pollack | October 10, 2023



[Reptile theory](#) is a trial strategy that focuses on using fear and anger to motivate a jury to dislike a defendant so much that it will award an unwarranted large verdict to the plaintiff. It focuses on safety and security issues by seeking to have jurors envision themselves caught in the same situation that the plaintiff suffered, engaging the most primal part of a juror's mind. How is this done? The [attorney evoking reptile theory](#) attempts to motivate jurors to believe that if a defendant's

actions are allowed to continue, then the community at large – perhaps even including the jury itself – will risk facing danger. Such attorneys are steering the jury’s mind to a [fight or flight](#) response.

Reptile theory may also be considered as a corollary to [polyvagal theory](#). Stephen Porges introduced the idea of polyvagal theory in 1994, based on the vagus nerve’s impact on emotional regulation, social connection, and fear response. Attorneys who invoke reptile theory are appealing to base emotion. The [ventral vagal](#) helps individuals feel safe. Those employing reptile theory want their listeners to feel anything but safe. Attorneys who use reptile theory are communicating with their listeners’ [dorsal vagal](#), the part of our nervous system that simply shuts down in the face of fear. The sympathetic portion of the vagal system is what commands us toward flight or fight when faced with trauma. Our neuroception determines which part of the polyvagal system is most impacted by what we see, hear or experience.

People who seek justice at the courthouse have often suffered some type of traumatic event. Some trial attorneys try to appeal to that portion of a juror’s mind that is motivated by fear. The idea is to stir up the jurors’ minds to the point of eliciting a verdict that sends a message to the other side: “Make them pay until they hurt – to compensate me for my hurt.”

How do [attorneys defend against reptile theory](#)? By invoking the non-reptilian sector of jurors’ minds. Attorneys are well served to focus on the facts and details of a case, rather than on emotion. In addition, defense attorneys may explain the tactic to jurors in opening or closing statements and appeal to jurors’ senses of fairness and impartiality.

[Christina Marinakis, J.D., Psy.D.](#) notes that the human brain has three primary operational areas:

1. **Reptilian complex**

The reptilian complex includes the brainstem, cerebellum and hypothalamus. These are the most basic and earliest of brain structures. We share the reptilian complex with other animals. Even reptiles have this structure. Parts of the brain in the reptilian complex control our basic life functions – when we are hungry, when we breath, and survival instincts. If survival faces a threat, the reptilian complex takes over, and sometimes overpowers our ability to assert logic.

2. **Paleomammalian complex**

The paleomammalian complex includes the limbic system and hippocampus. Other mammals have this structure as well. The paleomammalian complex is what controls our higher emotions. Those emotions include separation anxiety and the ability to communicate with others.

3. **Neomammalian complex**

The neomammalian complex, made up mostly by the cerebral cortex, is thought to control our ability to assert logic and other analysis. This part of the brain is what we rely on to do math and science, and allows us to use reason to solve difficult problems.

[Kenneth D. Chestek](#) opines that “... our brains are more apt to process, and retain, negative information as opposed to positive information.” “[Your brain is like Velcro](#) for negative experiences and Teflon for positive ones.” Bad stimuli

apparently can net positive results in the courtroom. [Chestek](#) contends that “fear sells,” adding that: “[r]eaders are attuned to negative information for the same reason that the negativity bias is evolutionarily adaptive: you need to know about the bad stuff that might cause you harm. We cannot escape the reptile buried deep within our psyches.”

How can an attorney respond to their opponent’s attempt to instill fear?

1. Argue the facts.
2. Challenge the science inherent in the party’s expert witness’ testimony.
3. Argue the applicable law.
4. Illustrate how the plaintiff’s acts or omissions may have been a proximate cause of injury.
5. Present your own expert witnesses.
6. Educate, prepare, and woodshed your witnesses. Prepare them to stand up to shaming tactics employed by the opposition.
7. Develop your own theme of the case, and thereby control the narrative.
8. Tell a more compelling story through your witnesses and cross-examination.
9. Object to the opposition’s attempts to persuade a jury through emotion.
10. Turn the focus back on the other party, and how that party may have contributed to the injuries alleged.

As Prof. Chestek notes:

To the extent that ‘stakes are high’ in every decision a judge has to make, perhaps it is possible for a judge to learn to spot biases and overcome them. However, psychological research into judicial biases to date has suggested

that most judges are still subject to the same types of cognitive biases that the rest of us are.

While reptile theory is embraced by some trial lawyers as an effective strategy, other attorneys prefer not to feed into such [negativity bias](#). The jurors must focus on the trial at hand, not succumb to arguments that they should place themselves in one party's position – an [improper device known as the “Golden Rule.”](#) In [U.S. v. Palma](#), the court noted that the “...so-called ‘golden rule’ argumentasks the jurors to place themselves in the position of a party,” concluding that such an attempt "is universally condemned because it encourages the jury to `depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.'"

Jurors should not veer away from neutrality and decide a case based on personal bias. They should focus on the evidence. Toward that end, and to thwart reptile theory, attorneys must appeal to logic rather than to emotion.

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