

Outsmarting the Lizard

By John R. Crawford
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To confront the reptile theory head-on, you need your witness to do three things: (1) understand the “reptile theory,” (2) prepare, and (3) follow four rules.

Strategies for Responding to Reptile Theory Questions

Since its explosion onto the scene after the 2009 publication of David Ball and Don C. Keenan’s book *Reptile: The 2009 Manual of the Plaintiff’s Revolution*, the “reptile theory” has frustrated and annoyed defendants and their

attorneys. And if Ball and Keenan’s devotees are to be believed, the theory is responsible for many large verdicts. The tactics described in the book have become widespread, and it is almost unavoidable in accidents that involve commercial motor vehicles.

The science underlying the theory has been debunked many times. See Ben Thomas, *Revenge of the Lizard Brain*, Guest Blog, *Scientific American* (Sept. 7, 2012), <http://blogs.scientificamerican.com/guest-blog/2012/09/07/revenge-of-the-lizard-brain/> (last visited Nov. 5, 2015). The theory remains effective, though, thanks to its ability to simplify a case and effectively present a plaintiff’s version of events. While there are ways that defense counsel can work to keep the reptile out of a courtroom, there is no guarantee that every judge will prohibit adversaries from asking specific questions during depositions or during trials when

witnesses testify. So what is a defense attorney, particularly a defense attorney for a commercial motor carrier’s safety director, supposed to do when confronted by a reptile theory line of questioning?

The answer is that you need a safety director to do three things: (1) understand the “reptile theory,” (2) prepare, and (3) follow four rules.

A Field Guide to North American Reptiles

Many articles have described the basics of the reptile theory in great detail. Reading those articles may be helpful, but they have more information than a safety director needs to know. To prepare for a deposition or trial testimony, a safety director should have a general understanding of the theory and understand what a plaintiff’s attorney will try to get the safety director to say.



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In brief, the theory calls for convincing jurors that a defendant's conduct is a threat to the jurors' safety. That concern for their own safety, according to the theory, will trigger the jurors' primitive "lizard brain" and overwhelm the other, more logical, parts of their brains. With the "fight or flight" portion of their brains in charge, jurors will look for a path to safety. That path, a plaintiff's attorney hopes, will lead jurors to render a large verdict against a defendant that threatened their safety.

When questioning a safety director, attorneys applying the reptile theory to a case attempt to (1) establish that a safety rule exists that protects a plaintiff and the jurors; (2) prompt a safety director to admit that a driver (or a company) violated the rule, putting both the plaintiff and the jurors in danger; and (3) admit that people and companies should be responsible for their actions, allowing the jury to punish the defendant for threatening their safety.

A plaintiff's attorney will spend the most time on establishing the safety rule. The rule must actually prevent danger, protect jurors, be easy to understand, and seem almost to draw upon common sense. A plaintiff's attorney wants this rule to be so clear that a safety director would have to be stupid or dishonest to disagree with it. A plaintiff's attorney wants this safety rule to be black and white, deal in absolutes, and leave no room for responses such as "it depends."

There are, of course, real safety rules that meet this standard: "It is never okay for a truck driver to drive during rush hour when he or she is so drunk that he or she cannot drive in a straight line." But cases that fit these extremes rarely happen. When they do, defendants will almost always admit liability. If a safety director will testify, the odds are good that a plaintiff's attorney will have to work to establish a black-and-white safety rule.

Practice Makes Permanent

Nobody enjoys being deposed or testifying in court, and preparing to give that testimony is almost as unpleasant. But being prepared to face a reptile theory line of questioning is important. Deposition preparation should take place at least a day before the deposition and should involve a mock deposition. Many of the standard rules of depositions apply: know your subject, listen, reflect, and then answer.

There are two major differences between regular questions and reptile-theory questions. First, reptile-theory questions do not have anything to do with what a safety director knows about a particular accident. The questions are not about a driver, the driver's history, a company's practices, or a safety director's job. Those are the subjects that a safety director knows about, and most safety directors are prepared to talk about those subjects. Instead, the questions are about the "safety rule," and a safety director needs to know which safety rule, or rules, a plaintiff's attorney will focus on. A good defense attorney should be able to anticipate the questions that a plaintiff's attorney will ask and prepare a safety director to answer them.

Second, responding to reptile-theory questions involves violating a common rule. Most attorneys will tell their clients to keep answers as short as possible, sticking to "yes" or "no" whenever possible, and not to volunteer information beyond the question that has been asked. That is exactly what reptile-theory questioning counts on.

A safety director for a commercial trucking company should expect a series of questions along the following lines:

- Safety is always a top priority, right?
- A prudent person does not needlessly endanger anyone, correct?
- There are rules of the road designed to keep people, such as [plaintiff] or any other driver, safe, correct?
- Those are safety rules, right?
- Violating a safety rule is never prudent, correct?
- There are specific rules that a commercial truck driver must follow, correct?
- Like the federal rules governing hours of service?
- And you agree that the hours of service rules are in place to ensure the safety of everyone on the highway, right?
- They are intended to prevent fatigued drivers from operating commercial vehicles, correct?
- And fatigued drivers operating commercial motor vehicles are a safety concern for everyone on the road, right?
- Commercial drivers have to maintain daily log books, correct?
- The logs are to ensure that drivers are following the hours of service rules, right?

- And that is to make sure that drivers are taking the required stops to get rest, right?
- Because a fatigued driver is a safety risk?
- Do you agree that if someone violates a rule, that person should be held responsible for his or her actions?
- Do you agree that if someone violates a rule and causes an accident, that per-

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son, or company, should be responsible for the damages the accident caused?

How does someone avoid answering "yes" to these questions? Follow the rules.

The Rules

Four rules will spoil a plaintiff's attorney's reptile theory-based questioning if your safety director defense witness sticks to them.

Rule #1—Never Say "Yes"

Reptile-theory questions are actually designed to allow a plaintiff's attorney to testify, with a defendant's witness simply answering "yes" in response to all of the questions. A plaintiff's attorney wants to get into a rhythm and provoke "yes" answers to the easy questions to establish a pattern. Criminal defense attorneys use this tactic in cross-examining witnesses, and it is very effective. A defense witness should simply never answer "yes." Even if there is no choice but to agree with the question that has been asked, the witness should offer a complete sentence response that at least restates the question. If a plaintiff's attorney starts to insist on a "yes or no" answer, prepare your witness to begin answers with a response such as, "Well, it depends. I do not think that I can answer 'yes or no' to that question. Would you like me to explain why?"

Rule #2—The "Safety Rule" Is Never Simple

Plaintiffs' attorneys want to ask simple questions to show that a "safety rule" is also sim-

ple. The entire theory depends on a simple safety rule. But almost no rule is simple and absolute. With few exceptions, each decision that a person makes involves some safety risk, and almost every rule has an exception. Take the common question “safety is a top priority, right?” It is hard to say that it is not. A witness directed to answer “yes or no” will say “yes.” But consider what that question really means. When you cut potatoes with a knife to make dinner, you will use a sharp and potentially dangerous tool. If safety is always the top priority, then you would never cut food with a knife. In short, “it depends.”

Rule #3—The Defendant’s Conduct Was Reasonable

Again, an attorney using the reptile theory does not want to gain information about an accident; instead the attorney will try to testify about a safety rule. But by asking hypothetical questions, the attorney also gives up some control over the testimony. The attorney expects a “yes” response to every question. If a witness can avoid that trap, then the questions create an opportunity to lay out the defense case. This is valuable in a deposition and even more valuable during a trial. A particular defense “message” will be case specific, but it will always involve the position that a defendant acted reasonably.

In negligence cases, a jury is supposed to decide if a defendant acted “reasonably.” A plaintiff’s attorney will attempt to replace the vague “reasonableness” standard with a clear and simple safety rule. Any time that a safety rule can be undercut, it should be. Know your message and work it into every answer where it might fit: commercial truck drivers are trained and tested, regulations are based on generalizations and do not always apply to each individual situation, and drivers faced with a specific situation have to rely on their training and experience to make reasonable decisions.

Rule #4—Do Not Answer Damages Questions

A plaintiff’s attorney will almost certainly ask a question about whether a person who causes damage should pay for that damage. It is hard to say “no” to that question, so do not say it. Instead, a defense witness should let the lawyer know that the question sounds like one that should be answered by lawyers.

Sample Questions and Answers

Knowing the four rules, here are some sample answers to typical “reptile” questions.

Q: Safety is always a top priority, right?

A: That is a very broad question, so I guess that I have to say, “It depends.” Firefighters risk their own safety all the time. A police officer speeding to get to the scene of the crime puts other people’s safety at risk. People driving to work at rush hour are creating a safety risk. Heck, chopping potatoes for dinner is a safety risk. Every decision is a calculation.

Q: A prudent person does not needlessly endanger anyone, correct?

A: A lot of people get in their cars and drive to work in the morning. If they stayed home, they would not be endangering anyone, but is that needlessly endangering someone? Doctors are prudent people, but they still perform elective surgery. Reasonable people assess every situation and try to make the best decision that they can.

Q: There are rules of the road designed to keep people, like [the plaintiff] or any other driver, safe, correct?

A: Not always. Some rules of the road, like rules about tire chains or weight limits, are designed to protect the road surface. Other rules are about saving fuel. And I think that most people can probably think of a rule or two that does not seem to have any purpose.

Q: Those are safety rules, right?

A: Again, some rules are about safety, but I do not think that all of them are.

Q: Violating a safety rule is never prudent, correct?

A: That is another broad generalization that cannot really be answered with a “yes or no.” It depends on the specifics of each situation. Say a man is driving his pregnant wife to the hospital to have a baby. He gets stopped at a red light, but he can see that there is no traffic coming from any direction. Making a left turn on that red is a violation of the rule, but it might still be a prudent or reasonable decision.

Q: There are federal rules governing hours of service that commercial drivers must follow, correct?

A: Not all commercial truck drivers need to follow the hours-of-service rules.

Q: You agree that the hours-of-service rules are in place to ensure the safety of everyone on the highway, right?

A: That is subject to debate. And to what extent compliance with or violation of an hours-of-service rule by a particular driver will affect the safety of a particular person on a highway is unknowable.

Q: They are intended to prevent fatigued drivers from operating commercial vehicles, correct?

A: Again, that is a complicated question that needs a detailed answer. The federal government passes broad rules based on studies and statistics. They do not come to every driver, test them, and decide which rules are appropriate for the driver. They do not know when a certain driver is going to be fatigued so they rely on generalizations. Everyone knows that it is possible to get five or six hours of sleep one night and feel rested enough to safely operate a car the next day—ask anyone who has had a baby. But everyone also knows that there are days when eight hours of sleep is not enough. Maybe someone is getting sick. So the federal government picks some sort of average. It does not mean that every driver who follows the rules is not fatigued, and it does not mean that a driver who is outside the limits is fatigued. And again, there are different rules for different kinds of drivers. There are exceptions for drivers in Alaska, short-haul drivers, and drivers who work in oil operations, to name a few. The same person could do all of those jobs at different times and the rules would be completely different. A driver might be compliant with the Alaska rules and in violation of other rules. That does not mean that the driver is fatigued in Minnesota, but would not be fatigued in Alaska.

Q: And fatigued drivers operating commercial motor vehicles are a safety concern for everyone on the road, right?

A: Every driver needs to be aware of his or her own condition and make the decision not to drive if he or she feels fatigued, even when that person is in compliance with the hours-of-service rules.

Q: Do you agree that if someone violates a rule and causes an accident, that person, or company, should be responsible for the damages the accident caused?

A: That sounds like a question for a lawyer. I am a firm believer in personal responsibility, but I will leave the legal questions to you lawyers.

Actual Answers to Questions Posed by a Reptilian Plaintiff's Attorney

Safety directors and drivers are frequently the target of reptile-theory questions. Below is an exchange between a plaintiff's attorney and a safety director regarding hours-of-service regulations, fatigued drivers, and the risk to the public during a deposition.

Q: Is it correct to say that the Department of Transportation, the Federal Motor Carrier system implemented the hours of service regulations because they want—they didn't want drivers to be driving drowsy or fatigued? Do you agree with that?

A: I wouldn't know how somebody would feel and I have no data that would support it that is currently—that would support that question.

Q: Do you now agree that [your] drivers who regularly violate hours of service regulations, the safety regulations, increase the risk to the public of drowsy or fatigued driving? Do you agree with that statement?

A: I can't give you an answer on that. I can tell you that I agree that they're not in [compliance], but each driver—you or I can get in a vehicle and you can drive 12 hours and not be fatigued. I can drive ten and I could be fatigued. So just because they go over their hours of service does not necessarily mean that they're fatigued. I'm not a specialist in fatigue factors, nor are you or anybody else.

Q: Do you believe that when your drivers over drive their hours of service, safety regulations, that they're increasing the risk to the public because of drowsy or fatigued driving, yes or no?

A: You're asking me to answer for every single driver in the industry or the fleet. That is a broad question. I can't answer that.

The attorney posing the above reptile-theory questions expected the safety director to agree that the hours-of-service regulations were implemented to prevent fatigued driving, that drivers who violate the regulations were at a higher

risk of fatigued driving, which in turn, would create a risk to the driving public. Instead of answering "yes" to those questions, the safety director pointed out that no two drivers are the same and the extent of someone's fatigue would depend on the particular driver. He also noted the broad nature of the questions and the difficulty he had answering for every driver in the industry. As a result, the attorney did not have the answers that he needed for his "reptile theory."

In another deposition involving the owner of a trucking company, the following exchange occurred.

Q: Would it be fair to say that one of the purposes of the DOT's hour of service rules is to provide drivers with better opportunities to obtain more sleep?

A: I'm not an expert in that field. I have no idea why they changed that rule.

Q: I'm wondering if you agree that because of the danger that these large trucks pose to the public, that the drivers of these trucks are held to a higher standard of care in operating them than is the operator of a passenger car?

[Objection. Misstates the law.]

A: I think it's best to ask the people that wrote the law why—why they have the different regulations for the commercial truck drivers versus a passenger car.

Q: Well, can we agree that they're more highly regulated because they pose greater danger on our highways than a passenger car? Can we agree on that?

A: Not necessarily.

Again, the attorney asking the "reptile" questions expected that the company owner would simply agree that large trucks posed a greater danger to the public than passenger cars, and therefore, there are more regulations and a higher standard of care for truck drivers. The company owner properly responded by disputing those claims and noting that he could not answer for those who had written the regulations.

Conclusion

The reptile theory has changed the standard rules for depositions and trial testimony. While a safety director or a driver still needs to listen carefully to each question, he or she should no longer strive to keep answers concise by answering "yes" or "no," but instead, should be prepared to say, "It depends. Can I

explain?" Furthermore, when possible a deponent should be prepared to point out that the purpose and the effectiveness of some safety rules and regulations are subject to debate, that they deal in generalities, and that the effect of violating a safety rule or regulation will depend on the specifics of each case and each driver. 