

Reptile II: It Depends

By Jonathan W. Brogan, Esq. As those of you who read my earlier article regarding reptile theory and its pervasive use by the plaintiff's bar understand that this theory, though not scientifically valid, is dangerous to defendants in cases involving safety and reasonable care. Cases that involve medical malpractice, trucking and/or auto accidents, and products liability matters can be open to "reptiling" and its powerful psychological message. As has become clear as more and more plaintiff attorneys employ reptile theory, it is most effective in discovery in destroying legitimate liability defenses to complicated issues of liability and safety. Reptile theory is a psychologically specific tactic employed to get a witness to admit to general safety theories and then tie that witness down to more and more precise safety theories until they are so flummoxed that they admit that the specific result in your case was the result of a failure to follow eminently reasonable safety rules and that the claimed damages could have been easily prevented by simply following a more prudent and safe course. Reptile theory consists of the plaintiff's counsel presenting the defendant witness a series of general safety questions to which almost any person would agree. For instance, "any person who is driving a motor vehicle beyond the posted speed limit puts other drivers on the road in danger?" Or, "it would be wrong to needlessly endanger someone, correct?" "Everyone must try to avoid increasing dangers for others, right?" From these general questions, a witness is then tricked into placing themselves, and maybe the company they represent, into absolute inflexible stances that admit the actual circumstances of the case and negate the witness' judgment. The plaintiff's attorney goes from "safety is your top priority, right?" to "if you see (a), (b) and (c), the safest thing to do would be (x), correct?" And "if you didn't do (x) then someone will be in danger, right?" As many have seen, these reptile questions can present unsuspecting defendants, or safety managers, with insoluble psychological decisions. Most people want to be agreeable, even in testifying at deposition. They want the opposite side to like them and to, hopefully, ask them less difficult questions as a result of liking them. So, when presented with general safety questions like "you have a duty to put safety first?" or "safety is your first priority, right?" they want to agree because what reasonable person wouldn't agree. But, a simple way of dealing with these broad general questions is to understand where they are leading. The plaintiff's attorney is trying to lead the witness to more specific safety questions about the unique circumstances in the ongoing case. Once the broad base is established, then the safety principle is drilled down to the actual claim being made. It is ingenious, and insidious. There are a variety of fascinating and intricate psychological factors at work in reptile theory. Numerous psychologists have studied reptile theory and its use of psychology to get agreement to things that witnesses know not to be as simple as they are being presented. The key in managing the reptile inquiry is to respond to it at each level of questioning. When the general safety questions start, the answers must also be general, not specific. A witness must be prepared that he does not have to agree with everything that the plaintiff's attorney says even if it sounds perfectly reasonable. When presented with a general safety agreement such as safety is priority number one, the witness must respond by questioning the question and asking such questions as safety in what regard or blunting the request by simply saying safety is important but there are a variety of issues in each situation that may go into an issue of safety. Or simply "In general, yes, safety is an important priority." Once the general safety questions are parried and answered correctly, then the more specific questions can be dealt with head on. Many times the plaintiff's attorney will go from these general safety questions to a specific safety question and ask whether, in every situation, one must do something in order to be "safe." The response to that question necessarily has to be "it depends." Because in almost every situation it does depend on specific circumstances, the whole picture and the complete safety situation that the person is involved. For instance

if a person is accused of speeding but they are exceeding the speed limit by some small amount, they are not necessarily responsible for an accident where someone cuts in front of them while they have the right of way. Certainly it would have been better had the person been driving at the speed limit, for the defense of the case, but the actual accident was caused by the other driver who failed to yield the right of way and pulled out in front of a visible vehicle. The plaintiff's attorney wants to go from the general safety rule that speeding is unsafe to the specific issue of the person speeding being a significant contributing cause to the accident, even though what really caused the accident was the other driver's inattention and failure to follow the rules of the road. A driver who is entering into a roadway without the right of way must yield to oncoming traffic, whether it is speeding or not. Traditionally witnesses have been reminded that at deposition "answer the question and don't argue with the other attorney." Reptile practitioners know this and exploit those instructions. A witness should be instructed to listen to the question and answer what is asked but if the answer is "it depends," or the question itself has a premise that is false, the witness must push back against the reptile plaintiff's attorney's simple misdirection. Understanding "reptile" questions, and proper responses, is difficult. First, witnesses have to be aware of reptile theory and how it is used. We have several articles regarding reptile theory, and we use those to help prepare witnesses. Next, once the witness understands what might be coming towards them, the specific questions that might be asked in a deposition need to be rehearsed with the witness and the witness needs to be helped to avoid falling in the traps of general to specific safety absolutes. Additionally witnesses have to be warned and told that they are not there to agree, they are there simply to provide truthful and accurate testimony to factual questions. Questions that present large safety philosophies are always leading to questions regarding the safety practices in the case at hand. Telling the plaintiff's attorney he is incorrect or that the answer to his question depends on the situation, immediately disengages the reptile theory. It is clear that in depositions where reptile theory has been disengaged through honest answers and a good understanding of the actual facts, not the facts invented by the other side, it is ineffective. Reptile theory was designed to maximize settlements. Traditional witness preparation, where the witness is instructed to "answer the question" and not engage with the other attorney, simply plays into reptile theory and its insidious psychological trap. Witnesses must be familiar with reptile theory, how it is presented, and when the trap is being laid. Once aware that there is a trap, then one will be able to avoid it. The best reptile defense is to simply point out that each situation is different and "it depends."