The most prominent website on the workings of the reptile strategy is sponsored by two individuals, David Ball and Don Keenan, who teach attorneys the tactic in a series of seminars, CDs, and the like. The site features a rolling set of constantly updated numbers, the update on the left noting the current total of “reptile verdicts and settlements.” Even in an era of vast numbers, the total is daunting: $6,372,695,578 (November 6, 2015).

In its basic form, the reptile theory asserts that an attorney can prevail at trial by speaking to, and then scaring, the primitive part of jurors’ brains, the part of the brain they share with reptiles. The reptile strategy purports to provide a blueprint for succeeding at trial by applying advanced neuro-scientific techniques in pretrial discovery and then in the trial itself. Note, though, that Wikipedia does not concur: “However, this hypothesis is no longer espoused by the majority of comparative neuroscientists in the post-2000 era.” Still, its proponents claim that the reptile strategy does work, and almost invisibly—remaining under the radar to both claims professionals and defendants.

So the basic goal for the plaintiff’s counsel is to trigger a fear reaction in a juror’s brain, at the primitive, reptilian brain level. Then, the theory goes, the juror will respond instinctively, bypassing any more sophisticated evaluation of the facts or the law—and then award a large verdict, just to keep the terror depicted by plaintiff’s counsel at bay.

If you hear a defendant say he was “reptiled,” it means that his lawyer was caught off guard and unprepared for the strategy, and also that the verdict or settlement was more than what was expected, based on the facts.

Notably, David Ball has had a 30-year career in professional theater. He claims to be a pioneer in adapting methods of film and theater presentation for use at trial. In the reptile strategy, there is a focus on theater: “reptile” aims to turn up the volume of drama in a courtroom. It is commonly used in several different kinds of cases, such as product liability, and medical professional liability (MPL) is counted among them. The common denominator is a personal injury, typically a significant one.

Ball and Keenan do not sell their products to defense attorneys, so getting copies of the actual materials is difficult. The best source for some limited information on their strategy is their website, www.reptilekeenanball.com.

‘Reptile’ in practice

Reptile themes always center on community safety, juror safety, and personal danger. So when you see that in claims and litigation, you can probably assume that someone is using the reptile strategy.

The danger for the defense is that reptile attorneys usually begin to collect evidence early on, before the defense team starts its work—before a claim has even been opened. If you hear plaintiff’s attorneys talking about safety issues, instead of focusing on the actual adverse event, or if the claimant seems to be focusing on irrelevant information, that could even give you a false sense of security—thinking that you’re dealing with someone who doesn’t really know what he’s doing.

The reptile strategy, in use, involves two kinds of rules: safety rules and “umbrella rules.” These become themes for the entire claim, and the entire litigation. The plaintiff’s attorney then presents...
“[T]he idea makes a weird kind of intuitive sense. We’re bundles of instincts and inhibitions and desires that don’t fit neatly together. It’d be comforting, in a way, if we could pin those conflicts on little lizard brains—just name those ancient demons and drive ’em out, like we did in simpler times.”


evidence to show that the defendant violated these rules, and this evidence supposedly triggers the reptilian part of the brain, which in turn motivates jurors to give oversized verdicts, in an effort to protect society—and themselves.

Safety rules are basically equivalent to rules of the road that apply in auto accidents, and standards of care in MPL. These rules are always specific to the claim. In contrast, the umbrella rule is broader, and the purpose of it is to include every one of the jurors within the scope of the rule, in order to make the juror feel that he himself is threatened by violation of it. In MPL, the umbrella rule might be something like this: doctors should not needlessly endanger patients by not following safety rules.

The umbrella rule thereby extends the threat of a violation beyond the person injured to everyone who gets medical care—just about all of us.

Claims professionals should try and envision how a case will appear, in a trial. It’s always the best defense against potential use of a reptile strategy to treat the claim fairly and honestly, from the beginning. Then the plaintiff’s attorney isn’t going to have an excuse to use these strategies once it proceeds to litigation.

So, if there is a case of liability where only damages are being considered, it might be wise to settle the claim for what it’s worth, instead of needlessly stringing out the settlement process. It also means that when you get into litigation, in order to defend against reptile strategy being used against you, you might even consider stipulating the liabilities in the case; this way, none of these safety rules or umbrella rules can come into play.

Determine the safety rule at issue

The claims adjustor should also determine the particular safety rules that apply to his case—the practices and procedures of the insured—so he can fully understand if a safety rule was actually violated. It is very difficult to argue that a safety rule was violated, if everything was done according to state-of-the-art practice, and in addition, in conformance with the highest standards available.

Claims staff may be in such a hurry to complete the initial investigation of a claim that they may be rushing through a recorded statement or be hasty in taking testimony from the people involved. But they have to consider, how is this recorded statement, how is this testimony, going to look if it is ever read to the jury?

To see if you’re getting set up in the claims stage for a reptile strategy, when you’re thinking about the theory of liability against your insured, consider: is plaintiff’s counsel using an overly broad theory of liability, or an overly broad theory of negligence? If they are using one of these, you might suspect that a reptile strategy is in the offing.

Countering the broad statements

In a negotiation (and also at trial), if the plaintiff’s counsel is referring to overly broad statements, you want to drive them back to the facts of this particular case. You have to show the plaintiff’s attorney why this case is different—and therefore the umbrella rule does not apply, since this scenario is unique.

You also need to work with the insureds. Stress the importance, when they are giving statements (especially prior to a deposition, when they will be coached a little bit more), that in the discovery stage, they need to refrain from making any absolute statements. And they should never agree with the plaintiff’s counsel’s broad-brush assertions. The answer to every question is, “It depends on the circumstances.”

So if the plaintiff tries to say, “Shouldn’t floors be mopped every two hours?” The answer is, “Well, it depends on the circumstances—what is the volume of people moving across them?”

It is also important to speak with the risk managers, asking them, for example, what loss control procedures do you use? And, what items are on the safety checklist? Also ask about what they do to bring the level of care up to the highest standards. Armed with this knowledge, you can fight back effectively against any umbrella statements.

With these principles in place, you can avoid the court- room deployment of the reptile strategy.