

JOHN LIERMAN TALKS REPTILE THEORY IN ARIZONA ASSOCIATION OF DEFENSE COUNSEL ARTICLE

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Defeat the Reptile by Not Being Defensive

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Cross-examination is kind of like fencing. Just as a fencer learns to be *en garde* to parry thrusts of an opponent's foil, nearly any witness can learn to defeat "reptile" cross-examination. "Reptile" denotes an insincere, even dishonest, set of questions that plaintiffs lawyers use against unwary defendants. I do not use the terms "insincere" and "dishonest" lightly, and I do not mean to impugn anyone's character, but reptile questions are fundamentally dishonest and once people realize just how dishonest they are, they see the trap. With training, anybody can learn to be *en garde* against reptile tactics.

Reptile questions are supposedly about safety. Reptile tactics are supposed to work on juries by triggering supposedly primitive, thus reptilian, instincts in jurors to protect themselves and their communities from the sort of harm a defendant is alleged to have caused. Maybe they work that way on juries, and maybe they don't.

Reptile tactics definitely work on defendants though. They work on defendants by making them think about their own sense of right and wrong. That is why I said reptile questions are "supposedly" about safety. They are not really. Safety might be what plaintiff counsel wants the jury to be thinking about, but it is not what the questions are about. The questions are about the defendant's virtue. Whatever reactions reptile questions trigger in a jury, what they trigger in defendants is the desire to stand up for their own virtue.

That is why reptile tactics work so well on defendants. While most people are happy to defend their own virtue, defendants accused of a tort are often dying to do it and have been doing it with friends and family ever since the lawsuit was filed. Defendants, merely by virtue of being defendants, are mentally positioned to defend what they did and why they did it, and to insist that whatever they did, they were being good and decent people at the time. So, when a plaintiff lawyer asks for their personal positions on matters of safety, most defendants are eager to testify that they are totally in favor of safety and promote it in their daily lives.

Of course, the whole thing is a trap. The idea is to have a defendant create a personal safety standard that nobody can ever attain. Once that is done, it is merely a matter of parading the defendant's own testimony about safety in front of the jury and showing the jury how egregiously the defendant fell short of his own standard. Unfortunately, any defendant is a subject matter expert on the subject of his own virtue, so once a defendant testifies about his lack of virtue, no other witness's testimony can do much to counteract it.

In my experience, it has never worked to try to stop clients from defending themselves on the stand. For one thing, sometimes they did not do what they are accused of doing and the truth must be told. But for another, it never seems to get very far trying to get defendants not to be defensive. They just are.

What does seem to work is to train clients to spot the dishonesty hidden in the typical line of reptile questions. Taking that approach has yielded a pretty consistent record of success in depositions for all sorts of tort cases.

First, I put my clients through a sample run of reptile questions. I use the same series of questions, with minor variations, no matter what the case is actually about. I use the same questions for two main reasons. One is that, at least in my experience, plaintiffs' lawyers use pretty much the same questions no

matter what the case is about, so why change it up. The other reason is that, because during reptile questioning what is on trial is the defendant's virtue, the particular facts do not make a lot of difference so the questions can be much the same.

My first question is always, "As a [the client's role or job] you don't want anyone to get hurt because of your [related activity], do you?" Both blanks get filled in with whatever the client was supposedly doing, or responsible to be doing, at the time of the alleged tort. Lots of times the activity is something with an obvious connection to an alleged injury, like "driving," or "mopping," or "removing a kidney," but the question works for less obvious activities too, though occasionally some artistic license is needed.

This first question always gets the needed answer, which is "No, I don't want anyone to get hurt." Getting the right answer is one reason to ask this question first. Most clients, knowing they are in training, are already looking for a catch, and my method only works if you get the client rolling in the right direction. This question never fails because there is only one right answer and everyone knows it. Plus, I have seen plaintiffs' counsel do the same thing, and it worked for them too.

Also, ask this question first because it (benevolently) tricks the client into thinking that lawyers are dummies after all and all the questions will be this easy. That is important. Reptile questions work because they seem absurdly easy to answer – a misconception that proper witness preparation will dispel, a task I find easier to accomplish if I lull the client into complacency myself.

Most importantly, ask this question first because you get your clients thinking about their virtue. That is what plaintiff counsel wants to happen and, for proper preparation and training, defense counsel needs to accomplish the same thing.

After the first question, I move to the main body of reptile questions. These are questions I have heard plaintiffs' lawyers use in depositions myself, for the most part: "Would you agree that you should do everything you can to minimize the risk of anyone getting hurt because of your [the activity used in the first question]?" "Isn't one of a [client role]'s greatest duties to protect safety of [some suitable class of people, e.g., other drivers, co-workers, customers]?" "You would agree that a [client's role] should make the safety of [that suitable class of people] the number one priority, right?" "Safety is always the top priority, isn't it?" "If safety is the top priority, other considerations have to give way to safety, right?" "You agree you should do everything possible to promote safety?" "You at least agree that you would never compromise safety over budgetary concerns?"

These questions may not be perfect and you may have better ones, but they are pretty good. I have never had a client get through all of these questions without agreeing to something. When a client hesitates, I do what I see plaintiff counsel doing to coax the needed answers, for example re-phrasing a question to begin with the words, "But you would at least agree," etc. It is amazing what you can get out of someone if you present the question as a compromise position, whether or not it really is a compromise. Again, plaintiffs' attorneys do it all the time.

After getting all the yeses I can, I tell clients they just stepped into a trap, and explain what the trap is: that by answering in the affirmative, they painted themselves into a corner so tight that no matter what they did, they messed up. I then walk them through the many astonishing things that they just agreed to, asking them to think what it means to agree to do "everything possible," or to do anything "always." If they agreed never to compromise safety over budgetary concerns, I am ready with examples of safety devices or practices that would reduce risk of injury but at stupendous costs. Cars that can go into space, personal bodyguards, and armor for everybody are favorite examples. The examples are absurd, but absurdity is the point.

By this time, clients recognize that a trick has been played. Obviously, you do not want to come off like you were being mean, but I have never had a client take it that way if I explain that these trick questions are ones that I have actually seen used against my clients. That way, I am not dreaming up a bunch of devious questions, I am letting them in on their opponent's secret weapons. Often, they see without being told that the trick questions have a lot in common but I focus on two things: the questions ask them to rank safety, and the questions demand absolutes – the "always" and "everything" elements. Frequently, they have already figured that out for themselves.

But this is only half the battle. Even clients who perceive that something went wrong do not yet understand why something went wrong, which means they will likely miss the trap if the questions get worded differently. Equally importantly, at this point most clients are not yet ready to give different answers because they still want to stick up for their own virtue and they do not see anything dishonest in the questions themselves. That comes in the second part of the training, where I go to a second set of questions something like this. I start off, "You drove to our meeting today?" Usually they did but if not then I fall back to some other recent driving they have done, whatever it may have been. Then, I ask, "I'm guessing you never exceeded a speed of fifteen miles per hour?" They did, of course, so I continue, "Is that because you are a selfish person who does not care about anyone's safety, either yours or that of others?" Clients usually laugh, and sometimes are not sure whether to be offended.

I go on, "But you are aware that 'speed kills,' as the saying goes?" They are aware. I elaborate, "In fact, everyone knows that, right? Interstate 10 between Phoenix and Tucson now has a speed limit of seventy miles per hour much of the way and on a regular basis we have serious accidents on Interstate 10, accidents we could eliminate if we reduced the speed limit on the interstate to fifteen miles per hour, but we don't do that, do we? Why don't we do that?" The answer I give, if the client has not already said it, is that we don't lower the speed limit on the interstate because we want to get to Tucson in two hours, not two days. And then I give the punchline, which of course you have seen coming: "So you see, we do not always put safety first. We do not make all considerations give way to safety always. We, as a community, balance safety alongside other priorities, such as profitability and even mere convenience.

So far, no client has failed to see the sense of that. To drive the point home, I change the focus to local driving, pointing out that on a regular basis we see collisions with people getting hurt that we could practically eliminate if we lowered the speed limit everywhere to fifteen miles per hour. I ask why we do not do that, which leads to the one location where we do: school crossing zones, a great opportunity to show how circumstances can change the balance between safety and other priorities. The commonplace transition from a “normal” speed limit to a brief period at fifteen miles per hour, then back to “normal” is something all of us have seen, and helps clients realize that circumstances determine – and change – how we prioritize safety.

All this brings clients to the place I wanted them to be: thinking about safety as something in balance with – even in tension with – other concerns and recognizing that to be the right way to think about safety. I have never had a client not get it after working through the traffic examples. Even the occasional client who frankly admits to speeding, and thinks he has defeated the example, is brought up short if I ask, “Do you speed in school zones?” So far, nobody has admitted to speeding in school zones. So far, everybody eventually sees that, however they answered the trick “reptile” questions, in reality they actually practice safety in tension with other factors as dictated by circumstances at the time.

I have never had a client who was not able, after getting through the speed limit interview, to reflect back on the reptile questions and comprehend the dishonesty of those questions. They all see the insincerity of questions asking them to rank safety in the abstract. They see how the trick worked by setting them up to brag about how virtuous they are and make them feel guilty if they gave any other answer. They see the trap and they see how the trap works. Sometimes they get angry at the duplicity of the questions. It is a satisfying moment.

Most clients then want to know what to do with reptile questions. In my opinion, the less clients say the better because, whatever reptile questions trigger in jurors’ brains, in defendants’ brains they trigger the desire to defend their virtue. Thus, longer answers inevitably wander into explanation, and explanation feeds the beast. Plaintiff counsel will ask the witness to explain even more, or to give examples, and will keep teasing things out looking for something to exploit. All the while, the witness sounds, and is, more and more defensive.

To avoid that mess, I instead drill clients on two stock answers designed to avoid taking the bait. First, in response to any question that seeks to rank safety or create some kind of “always,” “everything” absolute, I teach clients to respond, “Safety is part of everything I do.” And in response to follow-up questions attempting to articulate how safety is part of everything, to respond, “It depends on the circumstances.” Any other follow-ups can generally be met by reverting back to one of those two answers. These answers avoid ranking safety, which is what plaintiff counsel is desperately trying to make him do. It can be incredibly satisfying to watch a plaintiff attorney slog through his entire list of reptile questions only to be met, over and over again, with “Safety is part of everything I do.” It is like watching breakers hit the rocks. Well-trained defendants find themselves enjoying the moment as well, as they realize they are actually in control. Plaintiff counsel will flail, trying to think of ways to coax out an admission that ranks safety number one, or agrees that safety is “paramount,” whatever that means. If your client is well prepared you can sit back, object to form, and wait until, exhausted, plaintiff counsel at last moves on.

Reptile questions seem like they are about safety, but to defendants, they are about whether they are good and decent people. That is why they can be so effective. To prepare clients, first help them recognize that reptile tactics are a dishonest attempt to make them feel like terrible people if they resist ranking safety as their top priority. Expose that dishonesty by demonstrating that in real life we think about safety in tension with everything else, not as an absolute that nobody can ever attain. Finally, provide clients with a more honest and ethically satisfying way to stand up for themselves without creating a false standard for their own conduct.

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About the Arizona Association Of Defense Counsel:

The [Arizona Association of Defense Counsel](#) (AADC) is a non-profit organization that is composed of defense attorneys who practice primarily in the area of civil defense litigation. AADC is dedicated to the education of its members and the judiciary and increasing community awareness of positive aspects of the legal profession.