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## Facing The 'Reptile' In The Courtroom

By **Daniel Siegal**

Law360, Los Angeles (February 12, 2018, 7:40 PM EST) -- Over nearly a decade, a "reptile" has slithered into tort cases across the country, accompanying the much-discussed plaintiffs-side strategy that defense attorneys say cold-bloodedly manipulates jurors with fear to land outsize verdicts — but whose creators say it's not aiming to scare anyone but the defense bar.

The Reptile arose in the book "Reptile: The 2009 Manual of the Plaintiff's Revolution" by attorney Don Keenan of The Keenan Law Firm and jury consultant David Ball of Malekpour & Ball, which promises to show attorneys how to reach their jurors' "reptilian brain" and land large verdicts whenever dangerous conduct is alleged.

Its creators say the litigation strategy has landed over \$8 billion in settlements and verdicts for plaintiffs over the past nine years, and it has been seen by both plaintiffs and defense attorneys as pushing a wave of high-dollar verdicts in traditionally low-value personal injury and other tort cases.

Here, the attorneys and consultants who came up with the Reptile is, and their opposition from the defense, discuss what the method is, and how it works.

### Where Did the Reptile Come From?

Keenan and Ball, aided by research from fellow plaintiffs attorneys Gary C. Johnson and James E. FitzGerald, released the book, which retails for \$95 on their website, in 2009.

The website promises plaintiffs attorneys, and plaintiffs attorneys only, that the book will make the impact of tort reforms on juries negligible, using "the jurors' most primitive instincts of safety and self-preservation."

Keenan said the idea for the book originated when he was staying at his beach house in Florida talking to his neighbor, "a very high-end Republican operative," about what "persuasive philosophy" he used to help win elections.

Keenan had worked with Ball before, and the two embarked on a yearslong series of focus groups and similar testing around the country, before realizing they had discovered an incredibly effective approach, Ball said.

As for finding out what the Reptile actually is, if you're not a member of the plaintiffs bar, it's not as easy as heading to the local bookstore. Potential customers on the official Reptile website are asked for their law firm name and their bar number, what percentage of their firm's work is on the plaintiffs side, and whether they've already attended a Reptile introductory seminar. And the few secondhand copies available online are marked up by hundreds of dollars.

When asked to describe the meat of their methods, neither Ball nor Keenan are giving out many details, preferring to emphasize that their method works and comports with both the letter and spirit of the law. And both vehemently deny that their method is based on scaring juries into given out panic-inflated verdicts.

"The people that do not understand the Reptile, that do not want the Reptile to be used, they have to demonize. They want to tell the judge, 'All they want to do is scare the jury,'" Keenan said.

Ball said that “a scared jury is no help at all” to a plaintiff — they won’t respond actively, which is what the plaintiff wants.

“It’s not news a dangerous doctor, a dangerous dog is dangerous,” he said. “What the Reptile does is it gives [jurors] the opportunity to make themselves safer.”

On Ball’s website, however, he touts the value of getting “right to the reptilian brain,” saying that when a juror believes they are making a decision that will impact their very own security and safety, “the reptilian brain takes over and the reptile never loses.”

Bill Kanasky Jr., vice president at litigation psychology consultant Courtroom Sciences Inc. and a specialist in opposing the Reptile, said no matter the Reptile’s origins, there is no doubt that it made an impact when it arrived on the scene.

“They had hit on many large verdicts in cases where nobody expected a large verdict, so there was some panic in the insurance defense world and corporate America,” he said.

Kanasky, who spoke to Law360 with attorney Matthew Moffett of Gray Rust St. Amand Moffett & Brieske LLP, his partner in a series of talks focused on defeating the Reptile, said that while the Reptile may not be snake oil, it also isn’t what Keenan and Ball say it is.

Kanasky said the Reptile at its heart is a batch of aggressive and clever trial tactics wrapped in a “very sexy neuroscientific sales pitch” that doesn’t hold up to closer scrutiny.

In a 2014 article for a journal published by DRI, formerly the Defense Research Institute, Kanasky argued that Keenan and Ball have their terminology wrong, anyway, as fear responses in humans don’t actually arise in the “reptile brain.”

Moffett noted the book itself is focused much more on the tactics themselves than the purported scientific basis that underlies them.

“Call it clever marketing or a clever catchphrase, it sounds intriguing and engaging, but when you read ‘Reptile,’ they spend two pages out of the entire book on the science,” he said. “And there’s no peer-reviewed articles cited.”

### **How the Reptile Works**

Ball said that the defense has consistently misinterpreted what the Reptile actually is, because he and Keenan have kept their true methods close to the vest.

“A defense attorney can’t go, a defense trial consultant can’t go to the seminars, and 95 percent of what we do is in the seminars,” he said.

Ball said that even if the defense bar were to figure out the true nature of the Reptile, it wouldn’t help them stop it, because it reliably gets jurors to feel that a hefty verdict will make them and their community safer.

“Even if they knew every detail of it, there’s nothing much they can do about it, because they are there protecting people who did dangerous things, who hurt people,” he said. “We are the only ones saying, in a civil case, that the safety lies in helping our client, safety lies with giving us a verdict, and it’s true.”

Keenan added that another key for the Reptile is that by focusing on the defense, it takes the pressure off of plaintiffs attorneys to feel their client has to be perfect, and instead can still work while admitting that a plaintiff might be partially at fault.

“If you have a bad fact in your case don’t try to cover it up, gaslight it,” he said. “All of our clients have pre-existing injuries, don’t run from that ... so do our juries.”

Moffett and Kanasky, however, said the real key to the Reptile was the rise of young people in so-

called Generations X and Y, who started to fill jury boxes after the turn of the millennium and proved unreceptive to plaintiffs attorneys' earlier tactic of seeking sympathy for their injured client.

"These two pools of people have zero sympathy for everyone," Kanasky said. "They figured out how to connect to the Gen X and Gen Y juror."

Moffett said that Keenan and Ball realized that instead of seeking sympathy for a hurt plaintiff, attorneys could aggressively attack defendants as facilitating or engaging in dangerous conduct — and the standard defense tactic of denying any wrongdoing and attacking the plaintiff's proof would seem evasive in this context.

"The old way of defending a case, which was, 'We don't have to prove we didn't do anything wrong, they have the burden of proof, we'll just sit back and say at the end of the case they didn't prove it,' that doesn't work for the defendant anymore," he said.

Moffett and Kanasky noted that the Reptile method starts long before trial, especially in depositions, when plaintiffs attorneys are encouraged to get defense witnesses to agree that nonspecific "safety rules" are important — and then use this admission as a cudgel at trial as witnesses explain any unsafe conditions or behavior at play in the underlying incident.

Kanasky added that one advantage Reptile-using attorneys have is their willingness to spend money to prepare in the early phases of a case, which their opponents can be reluctant to match.

"One thing I will hand to these Reptile folks, they've done their homework," he said. "They do mock trials, they do focus groups, knowing most defense and insurance companies won't do the same."

### **The Reptile Farm**

While attorneys might debate the details of the Reptile, there's no debating that Ball and Keenan met a willing audience.

The original 2009 book sold like hotcakes, according to Ball, and he and Keenan turned the book into a cottage industry that encompasses live and online seminars that cost from \$450 to \$800, according to their website.

Keenan said he has expanded his Reptile teachings into multiday trial workshops and a booming book of co-counsel and consulting arrangements in his practice, where he takes on cases and teaches the primary attorneys to apply the Reptile to that specific case.

Keenan noted that now that he's offering trial workshops where attorneys are focusing on their own specific cases, those attorneys can charge those fees — up to \$1,200 — to their clients.

Keenan said that Reptile Keenan Ball is a nonprofit, however, and that while it is intended to make money, all of the profits go back into building up the method, including keeping a full-time lawyer on staff for research.

"We've got us one hellacious overhead," he said. "Have we made a profit, in several of those years, probably yes."

### **Handling the Reptile**

In the meantime, many defense bar lawyers and consultants such as Moffett and Kanasky have taken on the task of offering an antidote to the reptile.

Moffett said that attorneys relying heavily on the reptile have on occasion found themselves in "a little hot water" with the courts for their tactics, pointing to the 2016 California Court of Appeal case *Regalado v. Callaghan*.

In that ruling the appellate court, while affirming a landscaping employee's \$3 million jury trial win against the owner of a home where he was injured while working, said that the plaintiff's attorney's exhortation to the jury during closing arguments that it was "acting to keep the community safe" was

improper. However, it found the remarks were too brief to be prejudicial.

Defense attorneys can't always count on trial courts to stop plaintiffs attorneys from using the reptile methodology, however, and Moffett said that the biggest key in defending the Reptile is going on the attack rather than trying to counterpunch.

"Today's jury sits there and they want to know why this side should win and they want to know why this side should win," Moffett said. "Defense attorneys have to try their case ... they have to explain why they should win."

Moffett added that by being aggressive not just at trial but well before trial, with mock trials, focus groups and specific witness training, a defendant can get to settlement discussions with enough leverage to avoid going to trial and risking a huge verdict.

Kanasky noted that the Reptile works by framing a case for a jury in such a way that they associate the defendant with dangerous conduct, and that an active response is needed to reframe the trial in a context that works for the defendant.

"You don't defend the case by being defensive, you defend the case by attacking," he said. "You have to try the case on a brand new battleground instead of picking up the ball where they left off."

--Editing by Brian Baresch and Breda Lund.

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