



By **Eric Gillett**

As many of you know, Reptile Theory, as a litigation strategy, slithered into existence in 2009, made popular by David Ball and Don Keenan in their book, *Reptile, The 2009 Manual Of The Plaintiff's Revolution*. Since then, thousands of lawyers, both plaintiff and defense, have employed the tactics promoted by this book.

Without going into too much detail, the "Reptile Theory" was originally a litigation strategy that attempted to tap into a juror's fear and anger to obtain greater awards of damages. By tapping into these feelings of fear or anger, a jury might award damages to punish and deter the defendant's behavior even though punitive damages were not warranted or allowed. Crafting a narrative that the defendant's conduct was a threat to safety of the general public, awarding damages to protect the community at large became the unstated subtext, based on emotion and not necessarily on rational thoughts.

Many plaintiff's lawyers find this strategy very helpful. And some defense lawyers do as well. Oftentimes in a negligence lawsuit, where a plaintiff's comparative negligence is significant, these same feelings of fear and anger are employable against a plaintiff. And while most of the literature surrounding the Reptile Theory involves trial strategies, the theory is also useful in mediation.

Mediation provides each party the opportunity to present to a mediator, opposing counsel, a representative from an insurance company, and an opposing party a vision of the trial that might yet be. In other words, if you don't settle, this is the case that we will present to a jury. And since almost all cases are resolved before trial, unleashing the emotional reactions espoused by the Reptile Theory at mediation may be your best opportunity to do so.

The Reptile Theory is based on the idea that humans are hardwired to prioritize their survival instincts, which are closely tied to feelings of fear and anxiety. The theory posits that by appealing to these instincts during a trial, attorneys can increase the chances of winning over a jury by making them feel personally invested in the outcome of the case. This is accomplished by presenting evidence and arguments that frame the defendant's conduct as a threat to the safety and well-being not only of the plaintiff but also to the community at large, and by emphasizing the importance of holding the defendant accountable for their actions.

While the Reptile Theory is primarily focused on winning trials, its principles can be applied to mediations as well. In fact, the benefits of using

# Has a Reptile Slithered into Your Mediation? How to Use It to Your Best Advantage

the Reptile Theory in mediation may be even more pronounced, as mediations are often characterized by a lack of emotional investment on the part of the parties involved. By framing the opposing party's conduct as a threat to safety and community well-being, attorneys can tap into the same primal instincts that the Reptile Theory relies on, and trigger a visceral, emotional reaction on the part of all the players participating in the mediation. This may result in their feeling more invested in the outcome of the mediation.

One of the key benefits of using the Reptile Theory in mediation is that it can help to overcome the psychological barriers that often stand in the way of a settlement. Mediations often involve a process of give-and-take, where each side is trying to get the best possible outcome for themselves. The so-called "give and take" rarely proceeds in a manner or at the pace acceptable to both sides. Relatively large offers are met with small counteroffers. Both sides may be offended and lose interest in continuing the mediation. These barriers can lead to a sense of mistrust and suspicion between the parties, which can make it difficult to reach a settlement. To break down these psychological barriers, the precepts of the Reptile Theory can be employed to change the dynamic and get the mediation back on track.

Another benefit of using the Reptile Theory in mediation is that it can help to frame the plaintiff's demands in a more compelling way. By emphasizing the importance of holding the defendant accountable for their actions, attorneys can create a sense of moral urgency around the plaintiff's case and make it more difficult for the defendant to justify a lowball settlement offer. This can be especially effective in cases where the defendant is a large corporation or institution, as it can create a sense of public pressure that the defendant may be reluctant to ignore.

I saw this employed in a mediation earlier this year. I spent several hours working with both parties, both before and during the actual mediation, to understand their positions and communicate those positions to opposing counsel and their clients. As is often the case, both parties came into the mediation with preconceived stopping points. As it became clear that there was likely a divide too wide to bridge based on these stopping points, I began to reframe the discussion in each room around who the parties were, both personally and in their communities. The conduct of each party had the potential to evoke an emotional reaction with a jury. After a couple of rounds where this was dis-

cussed, the hard stops on dollars began to soften. It became clear fairly quickly that these new narratives allowed each room to rethink their stopping points. The ongoing mediation moved the parties closer and by the end of the day the case settled.

Of course, as with any legal strategy, there are potential downsides to using the Reptile Theory in a mediation. One risk is that the strategy may come across as manipulative or exploitative, especially if either party feels that their emotional state is being deliberately manipulated to achieve a different outcome. Great care must be taken to present this new narrative in a way that emphasizes how natural it will be for a jury to accept it. Once that is accomplished, it only takes one to believe enough in the Reptile Theory to understand how a jury will take that information and employ it in their damages discussion.

The Reptile Theory can be a powerful tool in the hands of skilled attorneys and can be especially effective in

mediation. Both plaintiff and defense attorneys can employ the tactics although doing so badly can backfire and cause a rift, making it even more difficult to resolve the case short of trial. But for those attorneys who are able to master this strategy, the benefits can be substantial. ■

*Eric Gillett is a founding member and managing partner at Preg, O'Donnell & Gillett. Follow him on LinkedIn at <https://www.linkedin.com/in/eric-gillett>. He is licensed in Washington, Oregon, and Alaska. He has tried dozens of cases to verdict and mediated hundreds more. A navigator of resolutions, he is a commercial mediator and can be contacted through his legal assistant, Jasmine Reddy, at 206.287.1775 or [jreddy@pregodonnell.com](mailto:jreddy@pregodonnell.com). You can also reach him through his website at [www.gillettmediation.com](http://www.gillettmediation.com) and his email at [eric@gillettmediation.com](mailto:eric@gillettmediation.com) While in person mediations can be arranged with all participants fully vaccinated, Zoom mediations are also available and encouraged.*

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