

The WILD WEST OF RISK

HOW TO OUTSMART THE SNAKE: DEFENSES TO THE REPTILIAN LITIGATION STRATEGY

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 47th Virtual Conference & Expo


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SUMMARY

Christie B. Swiss is the managing partner of the firm's San Diego office. Her practice focuses on general civil litigation, public entity liability, civil rights, architect, engineer, and lawyer professional liability, construction law, business litigation, employment law, and appeals. She has represented public entities in civil rights, police excessive force, false arrest, malicious prosecution, inmate civil rights, wrongful death, design defect, professional personal injury, and child abuse and child death cases. She has represented design professionals in all areas of their practice, including negligence and contract claims. In employment law, she has handled sexual harassment, wrongful termination, social security, age- and gender discrimination, and class action litigation. She has tried multiple cases to verdict in both state and federal courts.

Ms. Swiss is currently a member of several professional organizations, including the San Diego and North County Bar Associations. She is an affiliate member of The American Institute of Architects San Diego and Palomar Chapters and an affiliate member of the American Council of Engineering Companies San Diego Chapter. She has authored numerous articles on subjects involving her work and is a frequent lecturer for the local chapters of many architectural, engineering, and public entity risk management organizations.

Ms. Swiss has also been named by Super Lawyers as a Rising Star in Southern California in 2018, 2019, and 2020, in San Diego in 2019 and 2020. Ms. Swiss has received an [Rising Star](#)™ rating from Martindale-Hubbell®, the highest rating that organization bestows, for both ethics and ability.


Ms. Swiss received her Juris Doctor cum laude from Indiana University McKinney School of Law, her Master's degree in French literature from Bryn Mawr College, and her Bachelor's of Business Administration in Marketing and French from the University of Notre Dame.

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Megan Lieber is a trial attorney in the firm's Oakland office. Ms. Lieber's litigation practice focuses on public entity liability, civil rights, professional liability, construction law, general casualty and business litigation, employment law, and insurance coverage. She has represented public entities in civil rights and child abuse cases. In employment law, she has handled wage and hour violations, wrongful termination, and disability discrimination. She has also represented design professionals in all areas of their practice, including professional liability and contract claims. Ms. Lieber is active in several professional organizations, including the San Diego chapters of PARMMA and RIMS.

Ms. Lieber received her Juris Doctor from Gonzaga University School of Law and her Bachelor of Arts in Political Science from Loyola Marymount University.

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Overview of the Reptile Theory

- Classic Reptile: emotional response to danger and get the jury to protect the community by decreasing danger.
- Set guidelines up as a simple rule, and if violated, punish the defendant.
- Brings simple concepts, binary, yes/no rules, in a complex situation.
- Aggressive strategy that takes away reason. Takes an aspirational rule and equates it with violation of the law and demands punishment.
- The Reptile works.

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Why Are We Here?

- Get the jury to “do the right thing” by
 - Protecting the community
 - Decreasing danger
 - Convince the jury that criminal and civil courts have the same purpose: community safety

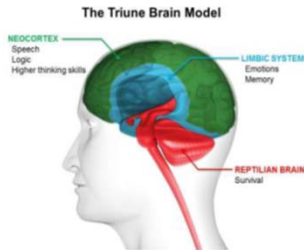
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The Science

- 3 Distinct Parts of the Brain
- 1. Neocortex (capable of language, logic, and planning)
- 2. Limbic System (focused on emotion, reproduction, and parenting)
- 3. Reptilian Brain (primitive and survival-based; “fight or flight”)



The Triune Brain Model

NEOCORTEX
Speech
Logic
Higher thinking skills

LYMBIC SYSTEM
Emotions
Memory

REPTILIAN BRAIN
Survival


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What is the Focus?

- The focus of the case is the conduct of the defendant, not the injuries of the plaintiff.
- The belief is that jurors are not interested in the plaintiff's injury, even when severe.
- Instead, plaintiff attorneys engage jurors by demonstrating how the conduct in question endangers the juror or the juror's family.




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Reptilian Brain - Effect

- The reptile litigation strategy feeds on the reptilian brain's tendency that drives our behavior so that even when we think we are acting based on language and the logic, we are unknowingly responding to the commands of the reptilian brain.
- The strategy relies on the fundamental concept that the reptile brain is conditioned to favor safety and survival



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Plaintiff's Goals

- The plaintiff's goal is to motivate the jury to protect the community at large by promoting future safety.
- Reptile litigation strategy focuses on the defendant's **failure to conform with general safety principles**, rather than focusing on standard of care or specific harm
- Focus is on anger
- Idea is to make jurors believe the worst about defendant and its record of safety.






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How Reptile Strategy Works

“Safety Rule + Danger = Reptile”

- Plaintiff attorneys identify a safety rule and show the jury that defendant’s violation of that rule puts themselves and the community in danger
- This awakens the jurors’ reptile brains, motivating them to equate justice in this case with their own security
- “Truck drivers must be qualified to drive their rigs to protect everyone in the community”
- “A doctor must not needlessly endanger his patient”




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To “Awaken The Reptile,” A Safety Rule Must...

- (1) **Prevent danger**
- (2) **Protect people in a wide variety of situations**, not just someone in plaintiff’s situation
- (3) Be in **plain English**
- (4) **Explicitly state** what a person must do or not do
- (5) Be **practical** and **easy** for someone in defendant’s position to have followed
- (6) Be one that the **defendant will either agree with or reveal him or herself as stupid, careless, or dishonest in disagreement**

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Needless Endangerment is Always Negligence

- “An architect must follow the building code, or he is needlessly endangering others.”
- “A manufacturing company must provide danger warnings, or it is needlessly endangering the public.”
- “A driver must maintain attention at all times, or he needlessly endangers others on the road.”

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Defending Against the Reptile



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REPTILE THEORY IN THE WAKE OF COVID-19

Plaintiffs' Arguments

- Pandemic increases sympathy as it is a reminder that life is more important than money
- Increased sense of community, safety and fear
- "This could happen to you."

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REPTILE THEORY IN THE WAKE OF COVID-19

Defendant's Arguments

- Viable argument that pandemic may weaken "reptile" effectiveness
- World is more complicated than safe vs. unsafe.
- Most people forced to make complicated decisions in responding to coronavirus and performed a risk benefit analysis. Generally, individuals prioritized safety and health **BUT** among other important considerations
- While safety is important, it is not so simple a solution.
- Hospitals and frontline workers seen in the most positive light

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Written Discovery

Plaintiff will present written discovery questions that appear to be simple and obvious to any reasonable person.

- "An officer must only use reasonable force"
- "The City is not allowed to endanger the public needlessly"
- "Patient safety must always be a physician's highest priority"
- "A social worker is obligated to protect the Constitutional rights of parents and children"
- "Traffic Rules are in place for the safety of the community"

- Plaintiff will then present your signed and verified responses at deposition in an effort to lock you into a safety rule that goes above and beyond what the legal standard is


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Responding to Written Discovery

- Answers to generic rule statements cannot be a simple "yes/no" or "admit/deny"
- The response should include all appropriate objections and the correct legal standard
- **Request for Admission No.1:** An officer may only use force that is necessary to accomplish a lawful purpose.
- **Response:** Deputies are allowed to use force that is objectively reasonable to perform their duties
- **Request for Admission No.2:** Unnecessary force is excessive and unlawful.
- **Response:** Officers shall use force which is objectively reasonable. Unreasonable force is that force which is unnecessary or excessive given the circumstances presented to the officer at the time the force is applied. Unreasonable force is prohibited.
- **Request for Admission No.3:** Before using force against a person, an officer must consider whether the person poses an immediate threat to the safety of the officer or others.
- **Response:** Officers are authorized to use only that amount of force that is objectively reasonable to perform their duties

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Responding to Written Discovery

- **Request for Admission No.4:** Admit traffic rules are in place for the safety of the community.
- **Response:** A person must use reasonable care in driving a vehicle.
- **Request for Admission No.5:** Admit that you should not endanger others by violating traffic rules.
- **Response:** A person must use reasonable care in driving a vehicle. The failure to use reasonable care in driving a vehicle may constitute negligence.
- **Request for Admission No.6:** Admit that when you fail to follow traffic rules and injure another person, you are responsible for their damages.
- **Response:** A person must use reasonable care in driving a vehicle, and the failure to use reasonable care in driving a vehicle may constitute negligence. A determination of negligence is dependent upon the specific facts of each individual case.

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The Discovery Fight

- The plaintiff's attorney will work hard to destroy your client at deposition, so that they can win at mediation or trial.

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Reptile Style Depositions




- Plaintiff attorneys use depositions to get unfavorable admissions from defense witnesses regarding safety rules
- Defense witnesses are often trained to not volunteer anything unnecessary, only answering yes or no with no explanation or caveats provided.
- This strategy boxes witnesses into a corner which they cannot escape, unless they lie, backtrack or admit fault

- The idea is that plaintiff attorneys will steer witnesses to:
 - First, agree with general safety and danger avoidance principles;
 - Then, agree with more specific safety and danger avoidance rules; and
 - Finally, be forced to admit to violating the rules they just agreed with.

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Understand The Threat

Often the defendants are professionals who want to second-guess themselves because they want to be better next time.

- **Q:** Shouldn't you want drivers on your streets to be safe at all times?
- **A:** Yes, of course!
- **Q:** It is the job of the police to protect the community, right?
- **A:** Absolutely!


But that's not the legal standard!!!

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How Do We Defend Depos

- Prepare witnesses for risky global safety questions
- Assure witnesses that they are not lying or betraying their professional identity and training when they offer an answer that provides a caveat
- Teach witnesses that attacks on credibility are unfounded (i.e. they are not incompetent just because they disagree with opposing counsel)
- Train witnesses that opposing counsel will never be a source of approval
- Tell witnesses that attacks are not personal, even if it sounds like they are (it is opposing counsel's job to attack you in this adversarial context)




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Remote Depositions in the Era of Covid

- Become familiar with technology
- Conduct preparation sessions via video. Make sure deponent enables video. It will help deponent to watch themselves testifying
 - Ideally use the same platform as deposition.
- Build confidence - Ex. break up preparation sessions into several mini-sessions, practice cross-examination and feedback closer to deposition date
- Facial expression and posture more important than ever
- Objections

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Reptile At Play

GENERAL LIABILITY

- You would agree that the City considers safety the top priority?
- You agree that danger is never appropriate?
- You want to keep people safe?
- Does the City agree that it must follow its policies and procedures when doing their work?
- Do you agree that if someone fails to follow the City's policies and procedures when doing that work and that failure causes injuries to someone, then they should be found responsible?

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REPTILE AT PLAY

Auto Liability

- You have been driving for over 20 years?
- You understand that there are certain rules that you must follow while driving?
- These rules exist to protect the public?
- Violation of these rules hurts people?
- Violation of these rules kills people?
- Person who violates these rules should be held accountable?

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How to Respond at Deposition

10:07:11	Department's 10:16 60:7
D	department-wide 9:2
E:14	depend 24:14
4	depending 63:23
1	depends 13:11,13,19 14:14
2	24:14,14 30:20,20,21
4,19 39:6	34:25,25 35:1,2,3,4,5,5
9 65:23	36:1 41:14 48:4,4,18,19
	49:14,17 60:5
	deposition 1:14 2:14 5:14
	10:21 66:1

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Responding at Deposition

- Never just say "yes" or "no."
- A plaintiff's attorney wants to get into a rhythm and provoke a pattern of "yes" answers to simple questions
- Even if there is no choice but to agree, answer with a complete sentence that restates the question
- Safety rules are not absolute and the proper action depends on multiple factors and considerations.
- Ex. "Safety is one of our goals. We strive for safety." "There is always some element of danger in this job. But we attempt to reduce and minimize the risk."

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Zoom Arbitration Strategy

- Trial by zoom!
 - Arbitration: 1 decision-maker
 - Employment dispute: not document heavy
 - Limited witnesses
- Reptile Strategy seemed less effective
 - More Zoom = less patience and tolerance for gamesmanship
 - Push to get down to business and drill down on most pertinent questions
 - Fewer objections sustained in arbitration is both a sword and shield


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Trial Strategy

- Motions in Limine
 - Use prior specific statements and questioning made by opposing counsel as examples of categories of arguments that should be excluded.
 - *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 305
 - *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764-765
 - *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582
- Voir Dire
 - Plaintiff will use reptile to frame Plaintiff's narrative. Do not wait until trial phase to push back and frame defense narrative.
 - Ask - Was the prospective juror in favor of shutdowns until a vaccine was developed? Did he or she support limited opening while trying to mitigate risk?

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Trial Strategy

- Keen defense attorneys will recognize the Reptile Strategy with the Plaintiff's seemingly innocent foundational questions regarding general topics
- Examples: (1) "Does the Police Department have a set of core values?" (2) "What is the Mission Statement for the Sheriff's Department?" (3) "Isn't it the primary responsibility of the Jail Deputies to keep the inmates safe?"
- **The key is to assert the appropriate objections to re-focus the questions on the specific incident**

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How to Apologize

- A well-made apology may stimulate some level of forgiveness - or a defense verdict
- Respecting the social norm is a powerful element and may charm jurors.
- **A defendant's apologetic posture can defuse jurors' anger by acknowledging respect for community safety standards**
- **Without admitting liability, credible remorse is a powerful way to set the Reptile at rest, because it means the danger is not likely to repeat itself.**


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Trojan Horse Method

- "Presentation Skills: Trojan Horse Method is a small group workshop where you learn a discipline method of mastering presentation skills. The training will engrain patterns in your mind. These patters will allow you to think less and be present more, once mastered."
- Emotional Congruence
- *Ortega v. County of Los Angeles*

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CONCLUSIONS

- Prepare the client and witnesses about reptile tactics early in the litigation
- Focus the case on the Plaintiff and the specific facts of case
- Identify and emphasize standard of care in simplified way
- Consider well made apology to defuse juror's anger and acknowledging safety standards

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QUESTIONS

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