DEFeating THE Reptile: Strategies for Dismantling the Plaintiff’s Revolution

By Thomas M. O’Toole, Ph.D.

Back in 2009, a former theater director named David Ball and a zealous plaintiff attorney named Don Keenan published a book called Reptile, describing it as “the 2009 Manual of the Plaintiff’s Revolution.” The book purports to unlock the secrets of the black box and unleash an army of well-equipped justice seekers (e.g. plaintiff attorneys) to carry the torch of our forefathers and protect the legal system from tort reformers who continue to dangerously infringe upon the safety of Americans by limiting legal remedies for victims around the country.

In reality, the book cobbles together a few effective strategies for persuasion under the guise of an interesting metaphor allegedly grounded in science. Its vague references to findings in the field of neuroscience give the theory an allure that suggests the authors have somehow uncovered deep dark secrets about jury decision-making. The presentation of the theory is pure gimmick despite its reliance on a few sound principles of persuasion. Yet Reptile has somehow outlasted the lifespan of most gimmicks and still appears to strike fear into some defense attorneys around the country who, in some instances, have filed motions with the court in attempts to preclude plaintiffs’ attorneys from engaging in “reptilian” tactics at trial.
The purpose of this article is to finally put *Reptile* to bed by analyzing its strengths and weaknesses and identifying specific strategies for defense attorneys looking to defeat plaintiffs engaging in any Reptilian practices.

**THE FUNDAMENTALS OF REPTILE**

Ball and Keenan claim the book rests on the foundations of sound science, yet fill most of its pages with hyperbole and cheesy metaphor. In fact, the “scientific” discussion is mostly reserved for the book’s forward where they credit neuroscientist Paul MacLean’s theory of the triune brain for serving as the springboard for the strategies discussed throughout the book. In all, the book devotes approximately 2½ pages to the “science.” In later chapters, the authors cite their own research with, for example, a twenty-person focus group as the unequivocal proof that “this stuff works.”

MacLean’s triune brain theory was a model of the brain that divided it up into three essential components, one of which he labeled the “reptilian complex” or the “R-complex” for short. Ball and Keenan take the R-complex and run with it, at least on a metaphoric level, describing it as a house of unconscious, survivalist instincts that supersede logic and emotion in decision-making scenarios where our safety or survival is in question. Describing this superiority, Ball and Keenan note, “the Reptile invented and built the rest of the brain, and now she runs it.” Consequently, their advice surmounts to getting “the juror’s brain out of fritter mode and into survival mode.”

At the core of the theory are two basic neuroscience principles: 1) when faced with fear or survival threats, key parts of our brain, presumably the amygdala, nucleus accumbens, and others, go haywire and we have an incredibly difficult time coping with this activity; and 2) the brain’s built-in reward system administers dopamine (the brain’s pleasure drug) when we are offered, and make, decisions that relieve this fear-induced brain activity. Ball and Keenan state, “control dopamine and you control the person.”

The authors offer little to support their application of the triune brain theory to trial preparation strategies beyond conjecture and personal anecdote. To be
fair, there are a few vague references to focus groups throughout the book, although no data or methodology is provided.

**THE STRENGTHS AND WEAKNESSES OF REPTILE**

**The inherent righteousness of the plaintiff’s case.** While less informative for strategy development, this weakness should be noted. The fundamental proposition that pervades Reptile is that all plaintiffs are victims of some terrible injustice that only continues through litigation as defendants game the system, malign the victim, and encourage jurors to not follow the law in order to render a defense verdict. In fact, the authors suggest the conspiracy is so vast that it has resulted in a powerful and effective tort reform movement that has significantly limited plaintiffs’ opportunities for justice. While this theme is most likely an attempt instill confidence and passion into insecure and self-doubting plaintiff attorneys, the message is frankly offensive since it suggests that defendants, by nature, are evil antagonists interested in doing wrong and avoiding the consequences of such acts. The fact remains that there are many plaintiffs out there who use litigation as a lottery ticket and there are many defendants (including large corporations) who work hard to do things the right way. The overzealousness of this message puts plaintiff attorneys in danger of exuding an arrogant courtroom persona born out of an unjustified sense of righteousness in their case.

**The influence of dopamine.** Research has consistently demonstrated the strong influence of dopamine on human decision-making. Reptile appropriately highlights the implications of this research. However, little to no research has examined how elements of communication and presentation, particularly within the litigation context, interact with the parts of the brain responsible for dopamine releases. The book’s authors conveniently skip this issue and instead draw assumptions that their recommended thematic frameworks will result in the desired dopamine releases. In reality, the neuroscience is an unnecessary distraction on this issue, introduced perhaps to give the argument an appearance of cutting-edge science. One need not place individuals into fMRI machines and examine physical brain activity in order to understand that people tend to make decisions they can feel good about. Psychological satisfaction is an essential component of any persuasive appeal. People generally avoid making decisions that lack psychological appeal. In other words, jurors want to render a verdict
they can feel good about. This does not provide the plaintiff a unique advantage. Instead, it is a simple message to both sides that an effective thematic framework requires psychological satisfaction. This tends to come more naturally to plaintiffs where cases often have built-in psychological appeal. Conversely, defendants tend to put themselves in a bind by deploying “yah, but” strategies (i.e. strategies that are defensive in tone). There is little to feel good about in embracing a “yah, but” defense. Consequently, defendants need to work hard to develop affirmative case theories that present an entirely different (and competing) theory of the case that provides its own unique psychological satisfaction. Defense attorneys can begin this process of strategy development by asking themselves, “what can jurors feel good about in rendering a verdict for my client?”

**Defense bias.** Ball and Keenan mistakenly refer to the focus on a plaintiff’s personal responsibility as “defense bias” when in reality, it is merely a variation of a dated psychological principle called “just world theory.” Just world theory is a cognitive theory that essentially says that adverse outcomes tend to be perceived by others as a consequence of the individual’s choice. Applied to jury decision-making, it suggest that it is easier for jurors to attribute disturbing outcomes to the plaintiff’s decision-making than it is to acknowledge that such disturbing events could happen to them. In other words, jurors psychologically protect themselves from having to recognize the possibility of horrible things happening to them by concluding that the outcome was a product of the plaintiff’s choices. This allows jurors to feel better by concluding that they would “never make such choices” and consequently, they would never have to suffer such disturbing outcomes. Here, Ball and Keenan highlight an extremely effective defense theme: personal responsibility. Personal responsibility is a core, divisive American value that evokes strong beliefs about the world. It is extremely difficult for plaintiffs to overcome defense strategies that effectively tap into this value. Unfortunately, many defendants go on the attack with this value before they have earned the right to do so, which undermines or eradicates its effectiveness, instead risking juror backlash. This is where defendants need to improve their case presentations. A simple technique is to start with an undisputed fact that substantiates the focus on the plaintiff’s personal responsibility. This proves something to jurors, which in return, provides the defense with the credibility to subtly begin to attack the plaintiff. Ideally, this strategy involves a pattern of undisputed facts that show a pattern of poor choices by the plaintiff. It does not take much to establish a pattern. Three or four facts are sufficient if woven together effectively within a persuasive thematic framework that focuses jurors on the plaintiff’s personal responsibility.
Audience-centered communication. This principle dates back over two thousand years to Aristotle and Plato. Juror decision-making is grounded in their own personal beliefs and experiences. Persuasive appeals that conform to these beliefs and experiences are significantly more likely to be accepted than those that go against what jurors have personally experienced and want to believe. However, Ball and Keenan only address one dimension of this issue. The other element is the communication process itself. Consider, for example, the 1990 “tapping” experiment by the Stanford psychology department. Graduate student Elizabeth Knight conducted a study involving a simple game in which she divided participants into two groups: tappers and listeners. The tappers were assigned the task of selecting songs from a list of well-known songs such as “Happy Birthday” and “Jingle Bells.” They were then instructed to tap the song out on the table, making no other sound but that of the tapping. The listeners were asked to guess the song the tapper was tapping. The interesting part of the study arises from the fact that the tappers were asked beforehand to guess the rate at which the listeners would guess the correct song. The tappers optimistically predicted that the listeners would guess correctly half of the time. However, the data revealed that listeners guessed correctly only 2.5% of the time. This study highlights a fundamental communication error to which we are all susceptible: blaming the audience for our own communication inadequacies. The tappers overestimate the effectiveness of their communication because they could hear the song in their head as they tapped. However, the listener only hears the tapping and is not privy to the song in the tapper’s head. Attorneys need to judge the quality of their trial presentations by how it will be perceived, not how it is intended. This is an important distinction that can be overcome through structure, organization, effective transitions and sign-posting, and the incorporation of visual communication.

The exploitation of hypocrisy. Ball and Keenan argue that plaintiffs should capitalize on opportunities to exploit hypocrisy where defendants tout their commitment to safety. Jurors hate hypocrisy, they argue. The issue is much broader than mere hypocrisy, however. Instead, it is a matter of focus.
Defendants who place themselves at the center of their “narrative” or theory of the case make themselves the center of focus. This is an extremely poor strategic choice since the human tendency is to become more critical with greater focus. Defendants should NEVER make themselves the central focus of the case. For example, do not spend valuable time in opening highlighting tangential, positive things the defense has done. This implicitly tells jurors the case is about the defense when the defense really needs the case to be about the plaintiff. Verdicts are products of what jurors choose to talk about in deliberations. Jurors are not going to spend hours of deliberation talking about how great a defendant is. Consequently, if jurors are talking about the defense in deliberations, the discussion is likely to critically focus on the conduct of the defendant, which only fuels anger and motivation to punish the defense. Instead, defendants need to make the case about the plaintiff and craft a presentation that leads jurors to go back to deliberations and talk about the plaintiff.

**Anger, not fear, drives plaintiff verdicts.** This is one area where Reptile is fundamentally wrong. Ball and Keenan suggest that the most effective plaintiff case theories are those that instill fear in jurors. Not only does this unnecessarily raise the bar for plaintiffs (fear is difficult to instill in a litigation setting), but it is an incomplete recommendation at best. Jury verdicts are a product of one of two things: 1) a desire to compensate the plaintiff; or 2) a desire to punish the defendant. Certainly, fear may factor into the desire to punish the defendant, but a fear appeal alone does not necessarily achieve the goal of motivating jurors to punish. Based on over a decade of experience analyzing hundreds of mock jurors, shadow juries, and actual juries, I would argue that verdicts intended to punish are not born out of an instinctual desire to relieve oneself of threats and fears, but instead are the product of a perceived violation of a core principle. For example, there are frequent, large plaintiff verdicts where the issues in the case in no way presented a threat to the community or the individual juror. This distinction is important to note because anger-driven appeals rely on a much broader array of strategies than do fear appeals.

**A simple and clear presentation that allows jurors to craft their story of the case.** Everyone can agree that simplicity and clarity in presentations are vital. Simple and clear presentations that allow jurors to arrive at conclusions on their own are much more effective than presentations that attempt to force-feed a story to jurors. Defense attorneys are not “storytellers” despite
the popular slogan. Almost thirty years ago, two prominent jury scholars (Pennington and Hastie) published some experiments showing that jurors make sense of cases by constructing a narrative about the case. However, there is a subtle, but critical distinction between jurors making sense of a case through narrative and an attorney being a storyteller. Stories emerge all the time in deliberations when the attorney has done anything but tell a story. In fact, attorneys have few, if any, opportunities to be a storyteller at trial before closing arguments and jury research has consistently shown 70%-90% of jurors make up their mind about a case long before closing arguments. Furthermore, “telling a story” requires trust in the storyteller. It asks the audience to “take our word for it.” Unfortunately, for defendants, particularly corporate defendants, jurors are not inclined to believe the defense and “take their word for it,” especially after the plaintiff has just presented a sympathetic and compelling story in its opening. The real science and art of litigation strategy development is fact selection. Every case can boil down to three to five key facts. The best defense strategies are those that select the three to five key facts that tell jurors everything they need to know about the case. In other words, those three to five key facts take on symbolic value beyond just their immediate evidentiary value and the lay a foundation that allows jurors to arrive at a natural defense-oriented “story” of the case on their own. Once these three to five key facts are identified, they can narrow (and consequently, simplify) the case presentation.

**Logic is the servant.** Ball and Keenan dismiss the role of logic in jury decision-making, aggressively recasting the old “elephant v. rider” paradigm. While this outright dismissal exaggerates the nature of the relationship, it is fair to say that different principles activate different logical structures. Consequently, competing thematic frameworks often necessitate competing logical frameworks. In other words, logical argument is relative to motivation: if someone wants to believe something, he or she can usually find a logical path to reach the desired conclusion. In academia, this is called motivated rationality. The point Ball and Keenan never quite make, but probably intended to make, is that jury instructions and the verdict form are a means to an end. Motivated jurors can typically find a way to construe jury instructions and the verdict form in a way that allows them to achieve a desired verdict. What Ball and Keenan fail to acknowledge is that the road to this desired verdict can be rocky for their advocates. Stumbles and momentary loss of confidence along the way during deliberations can

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undermine the credibility of these advocates and reverse momentum in deliberations by providing opportunities for opposing advocates to seize control of deliberations. Consequently, it is incumbent upon attorneys who have effectively motivated jurors to serve as advocates for their clients in deliberations to outline an easy path for these advocates by demonstrating how the logical structures of the jury instructions and the verdict form can be used to reach the desired end.

**Attorneys often abandon themes during testimony.** Ball and Keenan correctly note that many attorneys often ineffectively (or completely fail to) nurture their thematic frameworks during witness testimony. For defendants, cross-examination is an important opportunity for this theme development. It allows the defense to start establishing key themes and arguments during the plaintiff’s case-in-chief. The shortcomings of many defense attorneys relate to the failure to adopt strategies that focus on making elements of thematic framework prominent throughout cross-examination. Structure and repetition are a simple way to make themes more prominent. For example, if a key issue is the plaintiff’s poor choices, a defense attorney might consider developing twelve cross examination questions that focus on the series of poor choices and asking these questions in the exact same order, using the exact same language, to all relevant witnesses. This simple repetitive structure helps jurors internalize the framework. After about the fifth witness, they will know which question is coming next after an attorney has asked the first three questions of the twelve question pattern. This is a sign of success.

**Themes are important outside of trial.** The traditional mindset of many attorneys relies on a dichotomy between jurors and other types of decision-makers such as judges, arbitrators, and mediators, the latter two of which tend to be retired judges. No matter how often some notable judge lectures attorneys on the fundamentals of human persuasion and basic writing, there continues to be a belief that judges hold some special power for logic and reasoning that excels well beyond that of the ordinary person. In other words, there is a belief that judges hold some innate power to overcome the lowly emotional and irrational influences prevalent in lay decision-making. The shortsightedness of this belief cannot be overstated. First, it’s inconsistent with empirical research. The famous study by Kalven and Ziesel that examined judges’ and jurors’ case leanings, showed alignment between the two in approximately 86% of cases. That’s remarkably similar leanings for groups of folks believed to be so fundamentally different in their decision-making processes. If we want to get scientific about it, evidence in the field of neuroscience also calls into question this dichotomy. Studies of patients who suffered deficits to the “emotional” parts of their brains (i.e. emotions were
disabled, leaving a purely logical being) revealed individuals left with purely logical brains were incapable of making decisions. They would spend half a day trying to decide whether to write with a blue pen or a black pen. In other words, even if judges could be the purely rational beings attorneys sometimes fictionalize them as, the result would be quite different from what one would expect. These studies show that emotions are a critical and central part of the human decision-making process whether one is a judge, juror, arbitrator, or mediator. Consequently, the same thematic frameworks that guide case presentation at trial should be deployed in court briefing, arbitration, and mediation. At the end of the day, any trier-of-fact requires motivation and a psychologically-satisfying reason to find in favor of the client.

**Jury selection.** Ball and Keenan are fundamentally wrong about effective jury selection strategies. Their primary focus appears to be on building a bond with jurors and developing themes during voir dire. First of all, jurors are not persuaded in jury selection. They lack the necessary context and, frankly, the juror who is persuaded within the short timeframe of voir dire is likely to change his or her mind again over the course of trial. The reality is that theme development during voir dire only reveals adverse jurors to the other side. For example, obtaining agreement with a theme in voir dire through either verbal or nonverbal communication on the part of the jurors flags those jurors for the other side, making the other side’s job much easier. Personally, I receive about half of the information that goes into making peremptory choices from the other side’s voir dire because they engaged in such tactics. Jury selection is a vital and limited opportunity at trial to remove bias jurors who may exert adverse influence in deliberations. Any strategy that veers from this focus is borderline malpractice. On a final note, attorneys can “bond” with jurors by being efficient and respectful during voir dire. Jurors’ time is valuable. The perception that an attorney may be wasting it in an effort to sell themes poses a threat to such bonding.

**Incorporate scripture into the case.** Ball and Keenan argue that attorneys should use scripture in their trial presentations because scripture teaches “the ultimate rules” and carries “the imprimatur of God.” While there may be some venues where this strategy fits the venire, generally speaking, this is not a wise strategy. Jurors are much savvier consumers of persuasive appeals than *Reptile* gives them credit for. The most effective appeals are those that focus on the case facts and testimony and use a presentation framework that
naturally evokes core principles or rules through this focus. Jurors are less persuaded (and sometimes become skeptical) by tangential appeals that lead them to conclude an attorney is merely trying to manipulate them.

**Refining the *Reptile* Theory and Strategy**

The overarching strategy in *Reptile* has some appeal, but is not the most effective strategy for plaintiffs. I raise this issue, not for the purpose of providing advice to plaintiff counsel, but rather to help defendants appreciate how the *Reptile* strategy can be modified to pose a significant threat in terms of liability and damages.

The most effective plaintiff cases are those that adopt a referendum approach. A referendum approach sidesteps the plaintiff’s burden on its specific theory of liability and instead focuses jurors on the way the defendant conducts its business. It is designed to induce anger by showing the flawed way in which the defendant conducts its business, leading jurors to conclude that a message needs to be sent to the defendant in order to change the way it acts. This article previously discussed motivated rationality, which is the term for the backward reasoning process where jurors who find a logical explanation for what they want to believe. Under the referendum approach, plaintiffs focus jurors on all of the frustrating acts by the defendant, often including acts that have no bearing on the incident in question, leading jurors to believe the defendant “must have” been negligent.

Effective referendum strategies focus on establishing patterns of the defendant’s conduct. Patterns are important because they are much more persuasive. Furthermore, patterns are easy to establish. It only takes three or four things to establish a pattern in the minds of jurors. This strategy is particularly effective because plaintiffs often establish patterns based on what a defendant did not do, which opens up a world of endless opportunities and puts the defendant on the defensive (i.e. rather than focusing on its affirmative case theory, the defense has to spend valuable time explaining why it did not do a long list of things). Even in instances where a defendant worked very hard to ensure, for example, the safety of its product, there’s always something the plaintiff can point to or simply make up and say the defense failed to do it. Paired with hindsight, plaintiffs can easily make this item appear as something that should have been painfully obvious at the time, even when there is no reason why the defendant should have considered it at the time.
The result of this referendum approach is that defendants often face a reverse burden of proof where they now have to prove to the jury that they did everything the right way. This puts the focus in deliberations on the defendant at makes the plaintiff's burden of proof on each element of its claims an afterthought. In short, this is a strategy that leads to large damage awards for plaintiffs.

**Strategies for Defeating Reptile Trial Presentation**

Below are empirically proven strategies that have effectively overcome the appeals inherent in the Reptile approach to a plaintiff's case presentation. Each of these items should be given careful consideration within the context of the case.

**Prepare your witnesses.** Both the Reptile and the referendum strategy thrive on unprepared or underprepared witnesses. Jurors make decisions about the character of a defendant with their eyes and ears. In other words, they closely watch and listen to representatives of the defense who take the stand. In doing so, they are particularly attentive to the defense witnesses’ demeanor. When verbal and nonverbal behavior conflict, research shows jurors will rely on the nonverbal behavior. That means, no matter how well a witness words his or her answer, if he or she engages in nonverbal behavior that leaves jurors with a negative perception of the witness, the substantive answer is largely meaningless. In short, jurors have difficulty rendering verdicts against people they like and have no hesitation to render devastating verdicts against people they don’t like. The people tell jurors a lot about a case and the parties. A well-prepared defense witness violates the expectations of a Reptilian case theory and makes it much more difficult for plaintiffs to establish sufficient motivation for jurors in the deliberation room.

**Develop and deploy a controlling idea.** There are few presentations or articles I author where I do not reinforce the importance of the controlling idea. It is vital to any case presentation. Robert McKee, the authority on Hollywood screenwriting, coined the term “controlling idea,” a concept that cleverly illuminates the role of themes. Here’s what he says about it:
“A true theme is not a word, but a sentence—one clear coherent sentence that expresses a story’s irreducible meaning...it implies function: the controlling idea shapes the writer’s strategic choices. It’s yet another creative discipline to guide your aesthetic choices toward what is appropriate or inappropriate in your story, toward what is expressive of your controlling idea and may be kept versus what is irrelevant to it and must be cut. The more beautifully you shape your work around one clear idea, the more meanings audiences will discover in your film as they take your idea and follow its implications into every aspect of their lives. Conversely, the more ideas you try to pack into a story, the more they implode upon themselves, until the film collapses into a rubble of tangential notions, saying nothing.”

Attorneys should begin the strategy development process by identifying the case’s controlling idea. It should be stated in a single, value-laced sentence (with as few dependent clauses as possible) and tell the trier-of-fact everything he or she needs to know about the case theory. Narrowing the case theory down to one-sentence is difficult, but not impossible. Remember, if everything is important, nothing is important. The controlling idea forces the trial team to make difficult choices that will simplify the case. The result is a framework that guides the decision-making process throughout discovery and trial.

To develop and identify a controlling idea, take out a legal pad and start writing single sentences that capture the fundamental story of the case. Write as many variations as possible and approach the controlling ideas from different angles and different values. Then identify the sentence that best captures the central value and overarching aesthetic of your theory of the case.

**Focus the case on the plaintiff.** This has already received some discussion in this article. A verdict is a product of what jurors choose to talk about in deliberations. Jurors will not spend hours of deliberation praising the focus of their discussion. Instead, they will criticize it and, over time, momentum against the focus of their discussion will develop. This momentum builds to agreement in leanings at which point jurors find a way to render the verdict they want to render, often through a practice of reverse-engineering the verdict form. Defendants need to craft presentation strategies that place the focus on the plaintiff and his or her burden of proof without going on the attack. The focus on the plaintiff’s burden of proof is effective when the
defense can cast doubt on the plaintiff, which is why key fact selection is so important. This article has previously addressed the importance of selecting three to five key facts that become the focus of the defense’s presentation. These facts should tell jurors everything they need to know about the case and, at the same time, shift the focus of the discussion back on the plaintiff.

**Identify a simple standard for deciding the case.** The best physical evidence I have seen for dopamine releases in jury deliberations are the “aha” moments jurors have when they finally stumble onto something that helps them make sense of the otherwise complex issues in the case. Fifty years of research on effective persuasion reveals people take the simplest path to a conclusion. Consequently, whichever side provides the easiest (and most satisfying) path is likely to prevail. One strategy for accomplishing this is by boiling the entire case down to one or two questions for the jurors to decide. In other words, while the verdict form and jury instructions may imply a long list of questions the jurors have to answer to reach a verdict, an effective case presentation says there is really only one or two issues that need to be determined in order to decide the case. This provides a clear and simple route for jurors.

**Identify procedural hurdles the plaintiff must overcome.** Ball and Keenan argue that logic is subservient to the reptile. While true in some respects, this drastically understates the influence procedural hurdles can have during deliberations. For example, a well-armed defense advocate who is prepared to speak effectively about the plaintiff’s unique burden of proof on each individual element of the claim can, at a minimum, make the path to a plaintiff verdict, significantly more difficult during deliberations, which can prevent the plaintiff from ever gaining momentum in deliberations. In instances where a plaintiff advocate is not well equipped to respond to these procedural hurdles, he or she may be forced into inarticulate arguments that detract from his or her credibility, which can actually cause the momentum of deliberations to shift in favor of the defendant. There is a social phenomenon in deliberations where jurors do not like to be aligned with certain individuals, such as an individual who holds offensive beliefs or generally appears to lack competence when he or she passionately argues for the plaintiff. In rare circumstances in mock deliberations, I have witnessed advocates simply give up in the face of numerous hurdles. It’s the
“wear them down” strategy. Finally, the defense advocate can use the procedural hurdles to demonstrate the plaintiff’s failure to meet his or her responsibility under each element of the claim and steer the group towards a defense verdict.

**Eliminate or reduce the perceived threat of danger.** While this article previously argued that anger, not fear, exerts more influence on plaintiff damage awards, the element of fear or a threat should be addressed. At a minimum, this can contribute to anger towards the defendant. Simple strategies for reducing the perception of a threat focus on the infrequency of adverse events and the critical role the plaintiff’s choices played in causing the adverse event. These also constitute prime opportunities for the incorporation of graphics. Often, the visual representation of the infrequency of adverse events is more impactful than the verbal presentation alone.

**Create structure to undermine the need for a referendum.** Often, the referendum approach is so effective because jurors perceive a lack of structure for adequately recognizing and addressing threats or safety concerns. Defendants need to demonstrate to jurors that an adequate structure with reasonable redundancies is in place to protect against future threats.

**Consider an admission of liability in extraordinary cases.** Sometimes the real dispute in the litigation is over damages, not liability. In some circumstances, a defendant’s insistence on fighting liability can send a message that the defendant “still doesn’t get it.” An admission of liability can remove aspects of the case that generate fear and anger, and instead focus jurors back on the plaintiff by making it a case about a reasonable damage award for the plaintiff.
About the Author

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