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Rehabilitating the Defendant in the Reptilian Era:

A Neurocognitive Approach

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INTRODUCTION

Reptilian adverse examination of defendant witnesses often represents the most stressful, vulnerable time of a trial for both witness and defense counsel. For the witness, surviving the cognitive and emotional chess match of a Reptile plaintiff attorney's manipulative pattern of safety and danger questions is often a daunting task. For defense counsel, feelings of helplessness and powerlessness are common, particularly when their witness is getting pounded with textbook Reptile attacks on the stand. If the defense witness is well-trained and survives the Reptile attack, the ability to rehabilitate the witness is now crucial to ensuring their credibility and believability at the jury level. Because so much attention and worry has been directed toward halting or derailing the Reptile attack during adverse examination, witness rehabilitation is now (erroneously) perceived as a relieving, non-threatening, "easy" part of the trial for both witness and defense counsel. This is because the witness and attorney now possess total control of the information that is presented to the jury, free of manipulative influence from opposing Reptile counsel. Unfortunately, this false sense of security can lead to unbalanced witness preparation efforts that result in ineffective defense testimony at trial. Specifically, the intense focus on defeating the plaintiff Reptile attack during witness preparation has led to an unusual and counter-intuitive phenomenon in civil litigation: defense witnesses performing BETTER on adverse examination than they do during rehabilitation.

Unfortunately, by the time the defendant witness is thoroughly prepared for the impending Reptile attack, many defense attorneys are running out of time or simply considering the job done.

There is no denying that defense witness performance during rehabilitation testimony has suffered since the rise and spread of Ball and Keenan's[1] Reptile trial methodology. After several highly-publicized and high-dollar verdicts, the defense bar has finally started to take Ball and Keenan's Reptile tactics seriously. Defense attorneys are realizing that witness preparation requires a greater time investment than it has in the past, as teaching witnesses how to avoid falling victim to the Reptile attack takes considerable time and effort, even with experienced and highly intelligent witnesses. Unfortunately, by the time the defendant witness is thoroughly prepared for the impending Reptile attack, many defense attorneys are running out of time or simply considering the job done. Thus, the needed preparation for rehabilitation of the witness is neglected. This lack of preparation has led defendant witnesses to make avoidable mistakes during what should be the time for the witness to provide critical testimony necessary to combat the plaintiff's themes of safety and danger. Now that a scientifically-based counter-attack has been constructed to effectively derail the Reptile attack on defense witnesses[2, 3], solutions to new problems with defendant rehabilitation must be discussed.

After intense preparation for Reptilian adverse examination, many defense attorneys calmly tell their witness, "Rehabilitation is when I toss you 'softballs' and you crush them out of the park; don't worry, you will be great." What many defense attorneys do not understand is that their witnesses are highly vulnerable during rehabilitation efforts. Witnesses can make dangerous cognitive, emotional and communication mistakes that can severely hurt their credibility with the jury. This is particularly true after surviving a Reptilian attack on adverse examination, as the witness experiences an overwhelming sense of emotional relief, thus distracting them from meeting their objectives when being questioned by defense counsel. Furthermore, defense attorneys are also highly susceptible to cognitive and strategic errors during rehabilitation efforts that can inadvertently set up their witness for disaster. Neither witness nor attorney is safe during rehabilitation questioning, as both are vulnerable to committing key errors. This paper is designed to (a) educate defense attorneys about the three common errors that can damage witness credibility during rehabilitation efforts, and (b) provide defense attorneys with a plan to prepare for and conduct rehabilitation questioning more effectively.

REHABILITATION ERRORS

ERROR #1: JUROR COGNITIVE SATURATION

Both defense witnesses and attorneys vastly overestimate how much information jurors can process during testimony. Thanks to the persistent growth of portable technological gadgets (smartphones, tablets, etc.) that provide people with constant and near instantaneous information, juror attention span has declined from poor to atrocious. Specifically, the human brain has become so reliant on technology to provide multiple sources of information that sustained attention and concentration to a single source of information has become difficult for most people. Attentively listening to a witness testify and effectively processing that information now creates a unique neuropsychological challenge for jurors that was absent before the tech age. Therefore, both defense attorneys and witnesses need to understand jurors' neurocognitive limitations and ensure that information is being presented to them in the correct fashion. Otherwise, valuable information may be missed, lost or forgotten.

Jurors struggle to maintain focus during witness testimony, particularly during long, complex answers. Therefore, the goal of rehabilitation should be to promote juror cognitive digestion and prevent cognitive saturation. Cognitive "digestion" refers to the maximum amount of information that a juror can process without becoming overwhelmed, while cognitive "saturation" refers to information that exceeds the brain's processing limits and is ultimately lost. To avoid cognitive saturation, defense attorneys must ensure that their witnesses are delivering information in a way that doesn't exceed jurors' cognitive capacity limitations.

Specifically, when information is delivered to a jury, it can either be "chunked" or "streamed." The human brain is designed to effectively process smaller "chunks" of information, rather than long, continuous streams of information. The best examples of chunking include phone numbers, social security numbers, and combination locks. All of them have numbers with dashes between them, resulting in numbers being "chunked" together in groups, rather than one long stream of numbers. This results in enhanced memory capacity as the dash allows the brain to digest before processing the next chunk of information. This pause, even if only for a second, allows the brain to digest the information and prepare for subsequent information. In contrast, serial numbers and product identification numbers are good examples of information streaming, as these numbers are presented as long, continuous strings of data with no dashes or spaces. Trying to memorize such numbers is nearly impossible, as the continuous stream of information causes short term memory (STM) to become quickly saturated.

In testimony, answers can be delivered in digestible chunks if the length of answers persistently stays under five seconds ("the five-second rule"). Answers that exceed five seconds are considered a form of information streaming, and therefore overwhelm short-term memory (cognitive saturation), resulting in information being lost rather than being appropriately processed and transferred into long term memory (LTM) (see FIGURE 1).

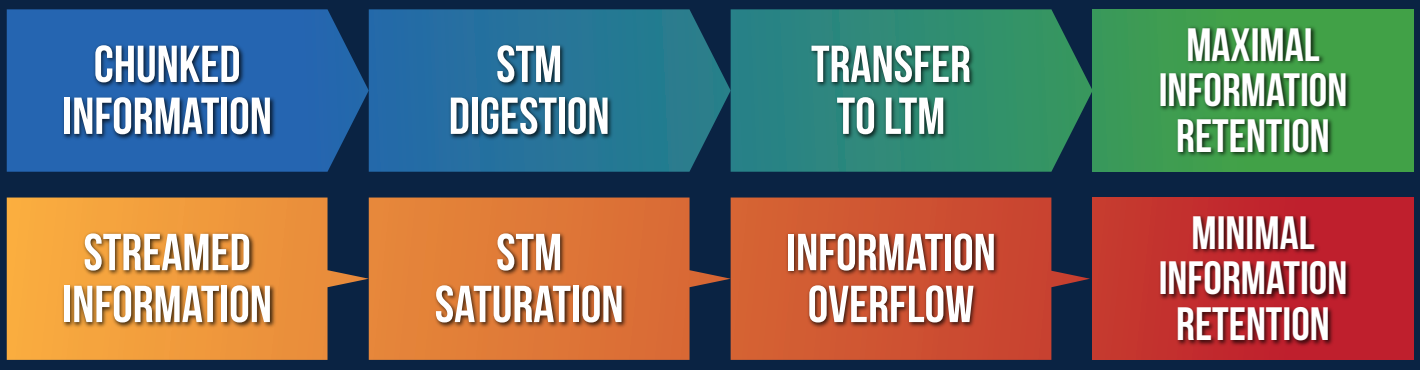

Figure 1: "Chunking" Information (effective) vs "Streaming Information (ineffective)

When information is streamed, short-term memory becomes saturated, or "full," preventing subsequent information from being processed and stored. Instead, the overflow information is lost and cannot be recovered. Consider the following examples of information chunking and streaming.

CASE EXAMPLE: MEDICAL MALPRACTICE

"Streaming" Information: (ineffective)

Question: Doctor, please explain to the jury what Heparin is?

Answer: Heparin is an anticoagulant that prevents the formation of blood clots. It is used to treat and prevent blood clots in the veins, arteries, or lung. Heparin is also used before surgery to reduce the risk of blood clots. You should not use this medication if you are allergic to heparin, or if you have uncontrolled bleeding or a severe lack of platelets in your blood. Heparin may not be appropriate if you have high blood pressure, hemophilia or other bleeding disorder, a stomach or intestinal disorder, or liver disease.

"Chunking" Information: (effective)

Question 1: Doctor, please explain to the jury what Heparin is?

Answer: It is a medication used to thin a patient's blood.

Question 2: How exactly do physicians use Heparin?

Answer: We use it to treat and prevent blood clots in the veins, arteries, or lung, particularly before surgery to reduce the risk of blood clots.

Question 3: Is Heparin safe for all patients?

Answer: No. If a patient has uncontrolled bleeding or a severe lack of platelets in their blood, Heparin can be dangerous.

Question 4: Are there other instances in which the use of Heparin may be inappropriate?

Answer: Yes, Heparin may not be appropriate if a patient has high blood pressure, hemophilia or other bleeding disorder, a stomach or intestinal disorder, or liver disease.

Long, complex answers by witnesses may be authentic, truthful and important, but they can be highly ineffective at the jury level. This may result in critical information being lost or forgotten, which can have dramatic effects in the deliberation room. However, jurors usually process more concise answers (under five seconds) very effectively, resulting in maximum information retention. Additionally, the slower pacing that is achieved when witnesses provide information to jurors in digestible chunks allows the attorney to work with the witness to ensure defense themes are repeated, further increasing juror retention of the key arguments in support of the defendant's case.

Chunking of testimony is particularly important in courtrooms that allow and encourage note-taking, as this activity can distract jurors from effectively processing information during rehabilitation questioning. If witnesses persistently adhere to the five-second rule, it allows jurors to listen and take notes simultaneously without becoming overwhelmed. Therefore, it is critical for both the witness and defense attorney to undergo juror cognitive training to gain a better understanding of the capabilities and limitations of the juror brain, and how to properly formulate questions and answers to enhance juror comprehension.

ERROR #2: EMOTIONAL VOLUNTEERING OF INFORMATION

A savvy attorney should have his/her questions strategically ordered, providing both the witness and the jury with a road map, or blueprint, to the case. The ability to stick to that plan and present jurors with the proper order of information helps jurors effectively understand the defense story. However, defense witnesses often develop the burning desire to jump ahead of the attorney and bring up important information that has not been asked for yet, particularly after surviving a treacherous Reptile attack on adverse examination. This problem is emotionally-based, as many witnesses are highly motivated to "win" the case during their testimony. When a witness jumps ahead of the questioner, it has three detrimental effects on the jury. First, it appears that the witness is over-advocating the defense position, thus potentially damaging credibility. Second, the witness-attorney team appears disorganized, as the witness is not directly answering the actual question the attorney asked. Finally, it can confuse jurors and inhibit proper comprehension of key case information. This ultimately results in frequent interruptions from the attorney to get the witness back on track, which can damage jurors' perceptions of the entire defense team.

An example of how a witness can jump ahead of the questioner and bring in information that the questioner intended to come out later in the questioning is as follows:

Question: How many air traffic controllers are required to be in the tower at any given time?

Answer: In higher traffic situations it is ideal to have more than one, but in this case the traffic had just picked up when the incident occurred and the controller on duty was very experienced, plus another controller was on his way back from a required break.

In this example, while the information about who was in the tower during this incident is indeed very important to the case, the witness has delivered it to the jury at the wrong time. This not only can confuse jurors, but also can create the appearance of disorganization within the attorney-witness team. The attorney's plan was to first educate the jury about laws and requirements for staffing of the tower, then educate them about the experience level of the controller in charge during the incident, and then describe how required breaks affect staffing later on in the questioning. However, the witness deviated from the plan and introduced this information immediately. This is an emotional error on behalf of the witness, as high levels of witness motivation can result in decreased patience and poise.

Some witnesses, particularly named defendants, think they must win the case themselves, and therefore tend to try too hard. To prevent this damaging error at trial, witnesses require emotional control training from a qualified litigation consultant to ensure they stay on course throughout their examination. Witnesses need to understand that the attorney must be in the driver's seat and guide them down the correct path, as an attorney's carefully developed strategy wins cases, not witnesses. Additionally, witnesses must also understand jurors' cognitive needs, and develop the motivation to improve juror comprehension rather than fulfilling their own emotional needs during rehabilitation testimony.

ERROR #3: FAILURE TO USE THE PRIMACY EFFECT

The first three minutes of a witness' testimony is more valuable to jurors than testimony that is delivered towards the middle and end of the examination. This important neuropsychological timing effect is precisely why attorneys should not start their witness rehabilitation by covering the witness's education and work history, as that information is better placed in the middle or end of the testimony. Rather, the most effective way to examine a witness during rehabilitation questioning is to start with questions that go right to the heart of the case, as jurors will value that information more than subsequent information. This is known as the primacy effect, meaning jurors perceive information presented early in an examination as more valuable and meaningful than information presented in the middle or at the end. This is a very powerful neurocognitive tool that few defense attorneys utilize because they erroneously assume that primacy and recency effects are similar. While recent information tends to be better remembered by jurors, it is certainly not valued similarly as the juror brain places great significance on early information (vs. later information). As shown in Figure 2 below, the recency effect only impacts juror memory recall, while the primacy effect improves both memory and meaningfulness of the information[4].

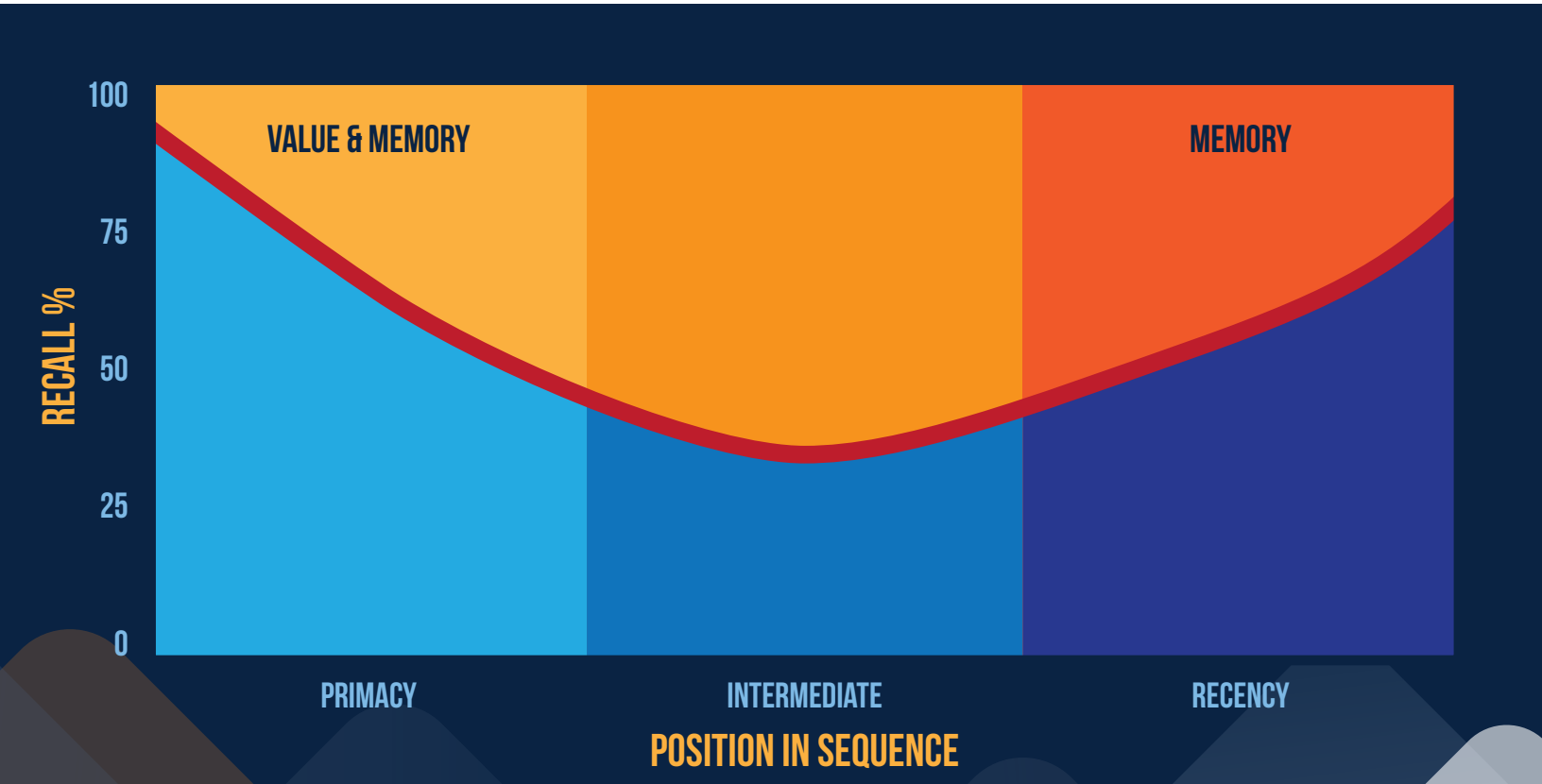

Figure 2: Primacy and Recency's Effect on Recall

For example, in medical malpractice cases, defense attorneys usually ask the following question at the end of the rehabilitation testimony: "Doctor, was your care of Mr. Smith appropriate and reasonable in this case?" Of course, the physician delivers a firm, confident "YES" to the jury. Most defense attorneys do this because they want to end on a high note, assuming that placing this important information at the end will have a powerful influence on jury decision-making. However, this is not the best strategic approach, as this question is THE pivotal question in the case. Instead, this question should be the very first question out of the gate, with a few follow up questions allowing the witness to explain why the care provided to Mr. Smith was reasonable and within the standard of care. That is what the jury wants and needs immediately, rather than later in the examination. This is especially true in a Reptile case, as jurors are starving for explanations after a well-trained witness shuts down multiple Reptilian attacks on adverse examination. Defense attorneys often state "I want the jurors to get to know my witness, so I start with the biographical questions; I want to 'wow them' with my client's impressive education and training." In reality, jurors don't care where the witness went to school or what honors they have attained. Jurors' primary concern is about the defendant's conduct and decision making, and asking those key questions immediately in the rehabilitation phase takes full advantage of the primacy effect[4].

Some witnesses think they must win the case themselves, and therefore tend to try too hard.

Reptilian questioning, characterized by leading, closed-ended questions focusing on safety and danger rules, allows for very little explanation, if any, from the witness. In that circumstance, jurors are craving explanations regarding the defendant's conduct and decisions once the defense attorney approaches the podium to begin rehabilitation efforts. For example, in a lawsuit alleging negligence of a bus driver who was driving in the far left lane of a major highway at the time of the accident, the Reptile attorney may spend considerable time asking the bus driver questions about whether it is safer to drive in the far left lane with higher speed traffic or the far right lane with slower traffic. If the witness answers by stating that it depends on the situation, he is unlikely to get the opportunity to explain his statement further. Thus, it would be up to the defense attorney to ask very early in rehabilitation, "Can you tell the jury why it was reasonable for you to be driving in the far left lane at the time of this accident?" By giving jurors what they desire immediately, the defense team can considerably increase the meaningfulness and influence of the defendant's most important testimony.

CONCLUSION

Reptile plaintiff attorneys have been increasing the stakes in litigation by boldly requesting extremely high damage numbers and successfully convincing jurors that a high verdict is necessary, not to make the plaintiff whole, but to ensure the safety of the community[1]. Defense counsel preparing to combat a Reptile plaintiff attorney who is requesting tens of millions of dollars must make the client aware of the increased risk and take the necessary steps to mitigate that risk. The best way to mitigate the risk is to fully prepare all witnesses prior to testimony, as this must be at the core of the defense team's effort when large damages are on the line.

The need for advanced, scientifically-based preparation of defendant witnesses is especially profound as Reptile attorneys have been placing significantly greater attention on the defendant throughout trial. Rather than attempting to evoke sympathy from jurors by emphasizing the injuries of the plaintiff, Reptile attorneys strive to anger and motivate jurors by centering the case on the actions and decisions of the defendant[3]. With the plaintiff's focus of the case on the defendant, the defendant's testimony, while it has always been of great importance to jurors, is even more critical during a trial against a Reptile attorney. Thus, rigorous preparation of the defendant's testimony, both on adverse examination and rehabilitation is imperative to a successful defense in the Reptile era.

Some attorneys who prefer not to vigorously prepare their witnesses for rehabilitation questioning often state that they want to avoid the witness appearing "coached" while on the stand. Some trial attorneys tend to forget what it was like to have never stepped into a courtroom. Most witnesses do not have the litigation experience or the skill of thinking on their feet, like a trial attorney. Thus, nerves and emotion can take over and cause the witness to make numerous mistakes. If witness training is performed appropriately, with the same vigor and attention as adverse examination, the witness will not appear "coached" but rather "confident."

The human brain is designed to effectively process smaller "chunks" of information, rather than long, continuous streams of information.

From the jurors' perspective, rehabilitation of a defendant witness is arguably the most important part of a trial as the party being accused of negligence or causing harm has the opportunity to explain their conduct and decisions. However, the three errors of juror cognitive saturation, emotional volunteering of information, and failure to use the primacy effect can significantly impair juror comprehension of key case issues, as well as negatively impact jurors' perception of the defense team. To prevent these problems, and to enhance the quality of rehabilitation questions and responses, it is imperative that defense attorneys take a step back and reevaluate their trial preparation plans. In the short term, it is wise to retain a qualified litigation consultant to evaluate witness responses to promote juror cognitive digestion, as well as assess the attorney's order of questioning to ensure proper use of the primacy effect. A qualified consultant should have advanced training in the areas of cognition, memory, attention and concentration, communication science, and emotion. In the long term, attorneys should receive training in these areas by attending CLE's from litigation consultants who have expertise in the neurocognition behind jury decision-making.

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