courtroomsciences.com

Reptile Theory at Deposition: Extinct or Evolved?

By: Bill Kanasky Jr., Ph.D. and Steve Wood, Ph.D.

REPTILE THEORY AT DEPOSITION: EXTINCT OR EVOLVED?

After being regularly exposed to Reptile tactics for nearly 15 years, how are defense witnesses *STILL* being "Reptiled" at deposition, resulting in costly nuclear settlements and crushing verdicts? The truth is that defense witnesses are still getting Reptiled by well-trained plaintiff attorneys because the defense bar never fully understood the Reptile Theory as a whole, much less the deposition-specific Reptile attacks used against their witnesses. Comments such as, "*Reptile is just a regurgitation of the golden rule*," have been echoing throughout law firm hallways since 2009, with accompanying eye rolls. After billions of dollars of Reptile settlements and verdicts, here is the bad news: Reptile tactics have not only been highly effective, but they have also evolved and are here to stay.

This article examines the misunderstandings of Reptile Theory and exposes the psychological principles plaintiff attorneys use to achieve disproportionately high dollar settlements and trial verdicts.

MISUNDERSTANDINGS OF REPTILE THEORY

It is well-known that Reptile Theory has wreaked havoc for defendants in civil litigation since its debut in 2009 and has only grown since then. Shockingly, the Reptile Theory remains widely misunderstood by defense attorneys, the insurance industry, and corporate legal departments. Over the years, we have heard comments such as, *"These tactics appeal to the primitive reptilian parts of jurors' brains, enticing them to punish defendants," "Plaintiff attorneys are trying to scare jurors into a verdict," "Reptile tactics force jurors into illogical fight or flight survival decisions,"* and *"The goal of Reptile Theory is to enrage jurors."* Behind closed doors, plaintiff attorneys cheer at the defense bar's misunderstanding of Reptile Theory because it allows them to continue their highly successful tactics with impunity.

Many on the defense side still lack the proper understanding of the Reptile Theory, even though it has been debunked and fully exposed over the last decade.[1] The Reptile code, which is just an intensive and aggressive plaintiff litigation strategy seductively packaged in neuroscientific gift wrapping, has been cracked. Yet, defendant witnesses still persistently agree with textbook Reptile questions at depositions. This occurs because the witness brain has neurocognitive vulnerabilities that often go unaddressed by defense counsel, as they do not have formal training in neuropsychology.

THE TERM "REPTILE" ITSELF IS MERELY A BRILLIANT MARKETING PITCH TO MEDIOCRE PLAINTIFF ATTORNEYS WITH AN INSATIABLE DESIRE TO OBTAIN TRAINING TO LEARN HOW TO HIT THE LITIGATION LOTTERY.

Reptile Theory is a tactical, laser-focused litigation strategy designed to take advantage of the slow, reactive, and arguably broken insurance defense approach to litigation. It has little to do with jurors' brains and everything to do with outmaneuvering the defense at every phase of litigation to create strategic and economic leverage. The pseudo-scientific Reptile sales pitch acted as a red herring to distract from its true intent, and the defense bar took the bait hook, line, and sinker. The term "Reptile" itself is merely a brilliant marketing pitch to mediocre plaintiff attorneys with an insatiable desire to obtain training to learn how to hit the litigation lottery. And Reptile has been a successful movement within the plaintiff's bar for nearly 15 consecutive years. The defense has defeated the Reptile on many occasions, but the Reptile has an overall win/loss ratio that is undeniably impressive.

REBRANDING THE REPTILE THEORY

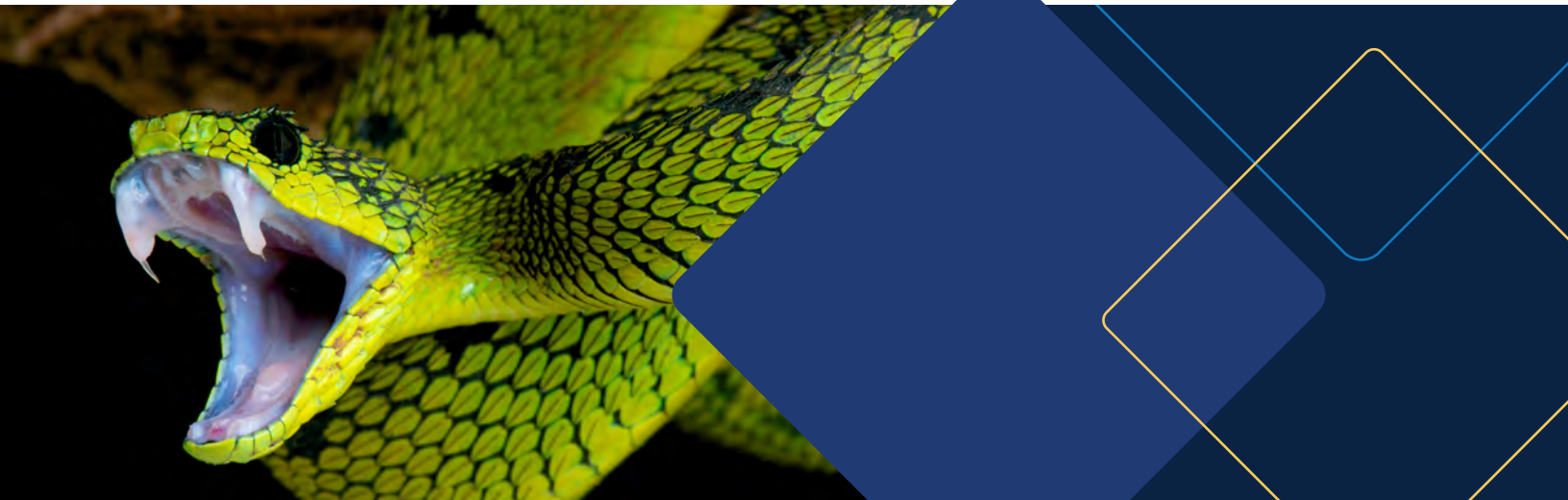
After many years of success, one day, the Reptile brand went "poof…" and disappeared. It vanished. The once ubiquitous and powerful Reptile machine became mysteriously extinct overnight. There is no longer a Reptile revolution website, no more Reptile courses, and the only Reptile books being sold are used ones on resale websites. Googling "Reptile Theory" will lead you to obsolete articles and many dead ends. What in the world happened? Two things: 1) Contentious litigation between original Reptile members that led to a nasty business divorce[2] and 2) a full post-divorce rebranding effort to rebuild and strengthen the original product. Reptile has now been rebranded as the "Edge" brought to you by the Keenan Trial Institute (KTI)[3] and directed by original Reptile co-founder Don Keenan. Examination of the KTI website shows a university-like training system for plaintiff attorneys, rich with courses at both "undergraduate" and "graduate" levels and plenty of books and other training resources (including a podcast that is open to the public.) It is essentially Reptile, rebranded and on steroids, and will be referred to as the Edge throughout this paper.

REPTILE HAS NOW BEEN REBRANDED AS THE "EDGE" BROUGHT TO YOU BY THE KEENAN TRIAL INSTITUTE (KTI) AND DIRECTED BY ORIGINAL REPTILE CO-FOUNDER DON KEENAN

While the Reptile label may be officially retired and out of service, Reptile tactics are not extinct by a long shot. The Reptile has evolved and continues to be used by many plaintiff attorneys nationwide. At deposition, the foundational Reptile tactics are alive and well and are now wrapped in a new concept: establishing a "Hit List." KTI offers "Hit List Training," a methodology whereby plaintiff attorneys strategically create plans to elicit various admissions from defense witnesses to set up the foundation for effective opening statements and cross-examinations at trial.

The Hit List admissions are designed to come from three areas: 1) unfavorable case facts, 2) inadequate professional conduct or decision-making relative to industry standards (hypotheticals), and 3) liability and causation of harm (fault). Plaintiff counsel's primary objective is obtaining key "yes" answers to statements in these categories, as this will set the case up for an unbalanced settlement or catastrophic verdict.

Plaintiff attorney Brent Crumpton stated on an episode of KTI's podcast, Fridays with Keenan's Cutting Edge, that "Hit List training is a game changer; it allows you to end the case before the defense ever understand what happened."[4] Another KTI podcast guest expressed, "If the defense depositions are not taken appropriately, it is a recipe for disaster at trial."[5] Therefore, it is clear the key battleground in civil litigation is the deposition phase of discovery—it is the lynchpin to the formulation and future of the case. The days of cleaning up deposition testimony at trial are over.



EDGE TACTICS DURING DEPOSITIONS

While colossal verdicts against defendants are indeed scary, they are statistically rare. Importantly, the Edge works at trial with jurors *if and only if* they have been deployed effectively during the deposition phase. Thus, this paper will focus on the foundational Edge tactics used at deposition, as this is an area where defendants face persistent vulnerability and often surrender strategic and economic leverage to plaintiffs.

It should be noted that the following discussion regarding the Edge tactics is our interpretation of the Edge process based upon our experience and studying hundreds of deposition transcripts. We are not intending this discussion to be a recitation of the Edge materials. KTI takes great care to protect its "special sauce" to ensure that their information does not fall into the hands of the "Black Hats" (their term for what they perceive as unscrupulous defense attorneys who will do anything for their client).

Here is the Edge cross-examination plan at deposition:

- Plaintiff's counsel presents defendant witnesses with a series of general safety or danger rule questions.
- The witnesses instinctually agree to the safety or danger rule questions because it supports their highly reinforced belief that safety is always paramount, and danger should always be avoided.
- The witnesses then continue to agree to additional safety or danger rule questions that link safety or danger to specific conduct, as it aligns with their previous agreement to the general safety or danger rules.
- The witnesses begin unknowingly and inadvertently entrenching themselves deeply into an absolute, inflexible stance that omits circumstances and judgment.
- Plaintiff's counsel then presents case facts to the witnesses which creates internal discomfort, as these facts do not align with the previous safety or danger rule agreements.
- Plaintiff's counsel then illuminates that the safety or danger rules, which have been repeatedly agreed to under oath, have been violated and that harm has been done as a result.
- The defendant witnesses regrettably admit to negligence or causing harm, as the perception of hypocrisy has been deeply instilled.
- The emotionally battered witnesses admit if they had followed the safety or danger rules, harm would have certainly been prevented.

In short, the Edge deposition tactics are specifically designed to bait defense witnesses into an inescapable hypocrisy trap. According to Ball and Keenan's 2009 Reptile manual this hypocrisy trap is perilous for the defendant because, "Once the Reptile suspects significant hypocrisy, she swings into combat mode. She makes our emotions vomitorially (sic) repulsed. And she makes us cheer when the hypocrite is brought down. She offers us a ton of Dopamine when we help demolish the hypocrite – i.e., she makes us feel very, very good."[6] Exposing the defendant's hypocrisy is so important that Ball and Keenan devoted a whole chapter (Chapter 9) to the topic in their book.

EDGE "RULE" QUESTIONS

The Edge attorney uses four primary "rule" questions to lure unsuspecting defendant witnesses into agreeing to their "Hit List" questions. The four questions are classified as:

1. **General Safety Rules**
   (broad safety promotion)
2. **General Danger Rules**
   (broad danger/risk avoidance)
3. **Specific Safety Rules**
   (safe conduct, decisions, and interpretations)
4. **Specific Danger Rules**
   (dangerous/risky conduct, decisions, and interpretations)

Manipulating defendant witnesses into agreeing with these four types of questions is the lynchpin of the Edge cross-examination methodology, as the agreement creates intense psychological pressure during subsequent questioning of key case issues. Absent this psychological pressure, the Edge attorney's odds of success drop exponentially. Therefore, the Edge attack requires painstaking effort to both construct and order the questions in a manner which fully capitalizes on the natural biases and flaws of witnesses' brains.

The Edge attack during deposition is specifically designed to exploit the defendant witnesses' cognitive and emotional vulnerabilities. As such, traditional witness preparation techniques are not sufficient for the psychological warfare that witnesses endure during Edge style questioning. A neurocognitively-based training system and counter-attack strategy is required if defendant witnesses are to defeat the Edge attorney during deposition.

PSYCHOLOGICAL ATTACK OF EDGE ATTORNEYS

At its core, the power of the Edge approach comes from "spreading the tentacles of danger." Jurors must be made to believe they are "guardians of the community's safety." Therefore, deposition questions must go to foreseeability because foreseeability defines a defendant's duty. Once this duty is determined, Edge attorneys must establish their clients were foreseeable victims, and the defendants violated their duty.

To assist in spreading the tentacles of danger, the deposition approach entails getting witnesses to agree to safety-or-danger statements that heighten the defendants' duty to the public beyond a level of reasonableness. Once witnesses are locked into inflexible safety-or-danger positions, plaintiffs' attorneys highlight case facts that show the defendants violated their prescribed duty of care.

Over the years, this deposition approach has proven to be devastating to witnesses. However, once you understand the psychological principles being applied, this approach becomes less mystical and easier to prevent. In this article, we examine the psychological attacks plaintiffs' attorneys use in depositions to obtain harmful testimony from defense witnesses.

The four devastating psychological weapons used against witnesses in depositions are:

- **Confirmation Bias**
- **Anchoring Bias**
- **Cognitive Dissonance**
- **The Hypocrisy Paradigm**

PHASE ONE: CONFIRMATION BIAS

Confirmation biases are errors in witnesses' information processing and decision-making. The brain is wired to interpret information in a way that confirms existing attitudes or beliefs, while simultaneously rejecting information that counters these attitudes or beliefs. This cognitive bias appears during depositions, as witnesses often struggle to say "no" or disagree with a line of questioning because of emotional and psychological challenges. Edge attorneys rely upon these cognitive challenges to entice witnesses into a dangerous agreement pattern.

One component of confirmation bias is cognitive schemas. Cognitive schemas are mental organizations of information that help guide individuals' behaviors, attitudes, and beliefs. Cognitive schemas are powerful because they often relate to our identity as people and assist us throughout our daily lives. As a result of these schemas, the safety movement in many industries (e.g., health care, trucking, and products) has conditioned witnesses to automatically accept any safety principle as absolute and necessary, while simultaneously avoiding danger and risk. Specifically, years of repeated safety seminars, safety publications, and continuing education classes provided by employers have created powerful and inflexible cognitive schemas. This is one reason why "safety is our top priority," "safety first, safety always," and similar slogans are plastered all over company websites and marketing materials.

Therefore, when witnesses are asked about safety issues during a deposition, automatic agreement occurs as a function of the brain working to confirm its cognitive safety schema. Edge attorneys have discovered that they can use witnesses' confirmation bias to their advantage because it virtually guarantees agreement to safety or danger questions.

HERE'S HOW IT WORKS:

- Edge attorneys illuminate defendant witnesses' safety or danger cognitive schemas with their line of questioning.
- Witnesses have no choice but to agree with safety questions, as cognitive schemas are strongly related to an individual's self-value and identity. In other words, disagreement with a cognitive schema is burdensome, if not impossible, as deviating from their internal value system proves uncomfortable—no one likes to view themselves or their actions as anything but "safe."
- Edge attorneys then ask additional general safety-or-danger rule questions, which forces further agreement from the witnesses and increases the cognitive momentum of agreeing with the Edge attorneys' questions (also known as getting on the "Yes train").

EXAMPLES OF GENERAL SAFETY AND DANGER RULE QUESTIONS (ANY CASE TYPE):

- Safety
  - "Safety is your top priority, correct?"
  - "You have an obligation to ensure safety, right?"
  - "You have a duty to put safety first, correct?
- Danger
  - "It would be wrong to needlessly endanger someone, right?"
  - "You would agree that exposing someone to an unnecessary risk is dangerous, correct?"
  - "You always have a duty to decrease risk, right?"

These repeated agreements lock the witnesses into an inflexible stance, allowing Edge attorneys to move to Phase Two of the attack: linking safety or danger issues to specific conduct, decisions, and interpretations.

PHASE TWO: ANCHORING BIAS

Anchoring bias refers to the cognitive tendency to rely heavily on early information (the anchor) when making decisions. Anchoring bias occurs during depositions when witnesses use an initial piece of information to answer subsequent questions. Various studies have shown that anchoring bias is very powerful and difficult to avoid. In fact, the 1996 study, "A new look at anchoring effects: basic anchoring and its antecedents," which appeared in the *Journal of Experimental Psychology: General*, showed that even when research subjects are expressly aware of anchoring bias and its effect on decision-making, they are still unable to avoid it.

Edge attorneys cleverly use initial agreement to general safety-or-danger rule questions to create an "anchor" that forces witnesses to continue agreeing with subsequent questions designed to link safety or danger rules to specific conduct, decisions, or interpretations. This sophisticated psychological approach manipulates witnesses by forcing them to repeatedly focus on their cognitive schema alignment rather than effectively processing the question's true substance (and motivation).

EXAMPLES OF SPECIFIC SAFETY-AND-DANGER QUESTIONS IN A MEDICAL MALPRACTICE CASE:

- Safety
  - "If a patient's status changes, the safest thing to do is call a physician immediately, right?"
  - "If a patient is having chest pain and shortness of breath, the safest thing to do is to send them to the ER immediately, correct?"
  - "If a patient's oxygen saturation drops to 82%, and you are on-call, the safest thing to do to protect the wellbeing of the patient is to come to the hospital ASAP, right?"
- Danger
  - "Documentation in the medical chart must be thorough; otherwise, a patient could be put in danger, right?"
  - "You would agree with me that when a Troponin value is elevated, the patient is in imminent danger, correct?"
  - "Doctor, when you order a test or labs, you'd agree with me that you should review the results immediately, because any delay would put the patient at risk, right?"

EXAMPLES OF SPECIFIC SAFETY-AND-DANGER QUESTIONS IN A TRANSPORTATION CASE:

- Safety
  - "To ensure safety as a commercial truck driver, you must follow the federal rules governing hours of service, correct?"
  - "Another safety rule requires daily inspection of the truck and trailer, such as brakes, correct?"
  - "And you agree that if someone violates those safety rules and causes an accident, then they should be held responsible for their actions, correct?"
- Danger
  - "Commercial drivers must maintain daily logbooks to ensure other drivers on the road are not put in danger, right?
  - "You would agree with me that when a commercial driver has exceeded the speed limit, other drivers on the road are put in danger, right?"
  - "A commercial driver who places others in danger should be held responsible for the harms and losses caused, right?"

These subsequent agreements to specific safety-or-danger rule questions accomplish two key Edge attorney goals: It forces the witnesses to become deeply entrenched in an inflexible stance on safety issues; and it sets the stage to introduce case facts in a powerful manner to create psychological discomfort.

PHASE THREE: COGNITIVE DISSONANCE

Cognitive dissonance is the mental discomfort people experience whenever their behaviors, attitudes, and beliefs are inconsistent with their conduct, decisions, or interpretations. Cognitive dissonance can occur in many areas of life, but it is particularly evident in situations where individuals' behaviors conflict with beliefs that are integral to their self-identity and profession.

Edge attorneys purposely generate cognitive dissonance by highlighting case facts that show the witnesses' conduct, decisions, or interpretations contradict their cognitive schema regarding safety or danger. Repeated contradictions result in witnesses experiencing psychological distress. Importantly, the amount of cognitive dissonance produced depends on the importance of the belief—the more personal the value is, the greater the magnitude of the cognitive dissonance. Additionally, the pressure to reduce cognitive dissonance is a function of the magnitude of said dissonance. Hence, Edge attorneys purposely lay out multiple safety-or-danger questions to increase the magnitude of dissonance between the safety-or-danger admissions and the witnesses' conduct, decisions, or interpretations of the case.

During depositions, there is a clear transition from general and specific safety-or-danger questions to case-specific ones. Once witnesses have agreed to the safety-or-danger rule questions, Edge attorneys start presenting case facts that do not align with the safety-or-danger rule answers. Edge attorneys strategically place the case fact questions directly behind several safety-or-danger rule questions. As the case fact questions are delivered to witnesses, their brains sense the contradiction between the case facts and their previous testimony, leading to cognitive dissonance. The ordering of the questions is crucial, as presenting case fact questions too early in the sequence will not produce cognitive dissonance. Therefore, Edge attorneys will purposely delay the delivery of case questions to ensure that the safety-or-danger rule questions have been agreed to first.

PHASE FOUR: THE HYPOCRISY PARADIGM

The final and most powerful Edge attack is the hypocrisy paradigm. Getting people to advocate positions they support but do not always live up to maximizes the level of cognitive dissonance. During Edge depositions, when the attorneys directly accuse the witnesses of putting someone else in danger and causing harm, the attorneys' questioning generates shame and threatens the witnesses' sense of integrity. Hypocrisy is an intense threat to one's identity and self-esteem and creates extreme psychological discomfort. Therefore, Edge attorneys, as a form of manipulation, repeatedly point out how the witnesses have failed to live up to their professional standards. The hypocrisy fuels further cognitive dissonance, often generating feelings of shame and embarrassment.

EXAMPLES OF HYPOCRISY PARADIGM QUESTIONS IN A MEDICAL MALPRACTICE CASE:

- "Failing to call a physician at 4 pm was a safety rule violation, correct?"
- "And if you would have called a physician, it would have prevented my client's stroke, right?"
- "Nurse Jones, failing to call a physician immediately at 4 pm was a deviation of the standard of care, wasn't it?"

IN A TRANSPORTATION CASE EXAMPLE QUESTIONS INCLUDE:

- "Failing to perform a complete vehicle inspection prior to your travel was a safety rule violation, correct?"
- "If you would have performed a vehicle inspection, it would have prevented my client's injury, right?"
- "By failing to perform a vehicle inspection prior to your travel, a violation of the safety rule, and endangering other drivers, including my client, you were negligent, weren't you?"

After fostering shame and embarrassment through hypocritical behavior, Edge attorneys have emotionally battered witnesses to a point where they concede defeat and admit negligence.

DERAILING THE EDGE ATTACK AT DEPOSITION

Properly training witnesses to withstand Edge attacks requires a sophisticated reconstruction of the original cognitive schema, followed by a rebuilding of a new adjusted schema built upon an understanding of the role of circumstance and judgment. Once the new cognitive schema is firmly in place with no signs of regression, witnesses will be immune from Edge attorneys' safety or danger rule attacks.

The cognitive schema reconstruction process is no easy task and requires advanced training in neurocognitive science, communication science, personality theory, learning theory, and emotional control. Cognitive restructuring training methodologies exist that have proven effective even against the most well-trained Edge training attorney. The result: reasonable settlements and defense verdicts at trial, as the true "game-changer" is a highly trained defense witness who is immune from Edge tactics.

The goal of Edge attorneys is simple: create economic leverage. They strive to force clients to settle a case for far more than the realistic value by manipulating the witnesses into delivering damaging testimony. The economic impact of being "reptiled" is staggering, resulting in millions of dollars of unnecessary payouts to undeserving plaintiffs and their attorneys. The Edge methodology is pure psychological warfare designed to attain plaintiff attorneys' economic goals. As such, defense counsel and their clients need to supplement their traditional witness preparation efforts with sophisticated psychological training to specifically derail the perilous Edge attacks.

Advanced neurocognitive witness training can completely ruin savvy Edge attorneys from controlling witnesses' answers and steering them towards admissions to negligence and causation "Hit List" items. The problem is that merely warning witnesses about these sophisticated tactics is grossly inadequate. Well-prepared witnesses have repeatedly failed at deposition because the preparation program did not include training to diagnose and repair the neurocognitive vulnerabilities where Edge attorneys attack. Proper training can not only protect witnesses from Edge attorneys' safety or danger rule attacks at deposition, but it can substantially decrease the economic value of the case.

REFERENCES

1 cf. Kanasky, W. F. (2014, April). Debunking and redefining the plaintiff Reptile theory. *For the Defense*, 76, 14-21.; Kanasky, W. F., & Loberg, M. (2017, January). Rehabilitating the defendant in the reptilian era: A neurocognitive approach. *For the Defense*, 59, 16-21.

2 See *Sean K. Claggett & Assocs. v. Keenan*, 2:21-cv-02237-GMN-DJA (D. Nev. Aug. 28, 2022)

3 see https://keenantrialinstitute.com

4 Labour, J. (Host). (2022, December 19). Why we lose or get less than we should with Brent Crumpton. [Audio podcast episode]. In *Fridays with Keenan's Cutting Edge*. Spotify. https://open.spotify.com/episode/1HQijk8Uw1txBwrXNd0t97?si=0782392af06146ed

5 Labour, J. (Host). (2022, March 14). Losses and lessons learned with Peter Levine, David Rash and Jeff Mueller. [Audio podcast episode]. In *Fridays with Keenan's Cutting Edge*. Spotify. https://open.spotify.com/episode/1fEZEfmU6ZWGr7q2NWGGRo?si=610babe74c524691

6 Ball, D. & Keenan, D. C. (2009). *Reptile: The 2009 manual of the plaintiff's revolution*. Balloon Press.

To learn more about how to use the
CSI Case Assessment Panel in your litigation or claim,
email info@courtroomsciences.com or call 800.514.5879.

CRISIS CONSULTING
RECORDS & DEPOSITIONS
WITNESS TRAINING
SETTLEMENT & TRIAL RESEARCH

CSI®

4950 North O'Connor Road, Suite 100
Irving, TX 75062-2778

Toll Free 800.514.5879
courtroomsciences.com