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## Reptile Dysfunction: An Appellate Court Disapproves of the Reptile Theory

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The Reptile Theory continues to spawn conferences across the county by plaintiffs' attorneys eager to learn what its originators have billed as a "revolution" and "the most powerful tool in the fight against tort reform." But a California Court of Appeal has called off the revolution. In what is believed to be the first appellate opinion addressing the Reptile Theory as such, in *Regalado v. Callaghan,* 207 Cal. Rptr. 3d 712 (Ct. App. 2016), the California Court of Appeal rejected the theory as improper argument.

**Reptile Basics**

The Reptile Theory has often been traced to ideas espoused by neuroscientist Paul MacLean. In the 1960s, Dr. MacLean theorized that the human brain evolved in stages. First came the reptilian complex, associated with the survival instinct. Next came the paleomammalian complex, associated with emotion and empathy. The final stage was the neomammalian complex, associated with logic, reason, creativity, and language. Although the theory briefly became popular and was even embraced by some psychiatrists, it has been rejected by most neuroscientists in this century. Nonetheless, it continues to be used by those seeking to simplify reasons for human behavior.

Relying on MacLean's theory about the reptile brain, plaintiffs' attorney Don Keenan and jury consultant David Ball published *Reptile: The 2009 Manual of the Plaintiff's Revolution*. They advocated appealing to the jurors' "reptile brain"—in other words, basic survival instinct. The idea is that, once triggered, the jurors' "reptile brains" will take over their higher-order thinking and compel them to reach a result that best protects the safety of their community.

The authors of the Reptile Manual explain that plaintiffs' counsel should couch the defendant's conduct in terms of the perceived threat to the community's safety. Thus, every case should be approached using an "umbrella rule" focusing on community safety. Under that theory, the defendant should not be allowed to needlessly endanger the public. Regardless of the *legal* standard of choosing reasonably among acceptable alternatives, the defendant must adopt the "safest available choice."

**The Legal Landscape**

Courts have long recognized that an "attorney's appeal in closing argument to the jurors' self-interest is improper." *Cassim v. Allstate Ins. Co.*, 94 P.3d 513, 521 (Cal. 2004). Such arguments constitute misconduct because they tend to undermine the jury's impartiality and violate the fundamental concept of an objective trial by an impartial jury.

At the most basic level, such arguments violate the defendant's constitutional rights. Litigants have a constitutional right to a trial of their claims before an *impartial* jury. *People v. Cissna*, 106 Cal. Rptr. 3d 54, 61 (Ct. App. 2010). For this right to have meaning, juries must decide cases based on the facts and law—not based on appeals to their own self-interest.

By focusing on community safety, the Reptile Theory improperly seeks to influence jury verdicts by appealing to the jurors' self-interest. The Reptile Theory distracts from the merits of the plaintiff's claim by appealing to the jurors' personal interest in their own safety and that of their community, with the plaintiff's claims being merely a placeholder for deep-seated, even subconscious, fears that jurors harbor about themselves and their families.

The Reptile Theory can also be seen as a new "Golden Rule" argument, which asks jurors to put themselves in the shoes of a party. Courts have held that a Golden Rule argument is an improper appeal to juror self-interest because it invites jurors to become partisan advocates for the party rather than impartial triers of fact. See *Loth v. Truck-A-Way Corp.*, 70 Cal. Rptr. 2d 571, 576 (Ct. App. 1998). Courts have deplored such arguments as tending to "denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence." *Id*. Similarly, "want ad" arguments—which ask a juror how much they would need to be paid to respond to an ad in the newspaper that they be harmed like the plaintiff—are also improper. *See, e.g., Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d 36, 38-39 (Fla. Ct. App. 2015).

Courts have rejected similar arguments when made by defendants. For example, it can be highly improper for a public entity to appeal to the jurors' fear of diminished government services and higher taxes should they return a verdict for the plaintiff. *Martinez v. State*, 189 Cal. Rptr. 3d 325, 331 (Ct. App. 2015). For the same reasons, it is highly improper for the plaintiff to argue that jurors have a personal stake in the outcome of the action.

**Regalado v. Callaghan**

Division One of the Fourth District of the California Court of Appeal rejected the use of the Reptile Theory in *Regalado*. The plaintiff's attorney in that case stated during closing argument, "You are the conscience of this community." *Regalado*, 207 Cal. Rptr. 3d at 725. The attorney went on to tell the jurors that they make a decision about "what is safe, and what is not safe" and that their function was as "a matter of public policy, public safety . . . about keeping the community safe." *Id.* The defense attorney objected on the basis that this was a "reptile argument" and the Court of Appeal agreed that the argument was "improper." *Id.* at 725-26. "[I]n our view the remarks from [plaintiff's] counsel telling the jury that its verdict had an impact on the community and that it was acting to keep the community safe were *improper* . . . ." *Id.* at 726 (emphasis added). However, the *Regalado* court concluded that the defendant had waived the issue by failing to timely object to the remarks and to request a curative admonition.

In rejecting Reptile Theory arguments, the *Regalado* court cited to the basic rule that an attorney cannot " 'pander to the prejudice, passion or sympathy of the jury.' " *Id*. at 725 (quoting *Martinez*, 189 Cal. Rptr. 3d at 331). It also emphasized that an appeal to "jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality." *Id.* at 725-26. The *Regaldo* court's holding is consistent with the rule that counsel must not suggest that a jury is obligated to "send a message" with its verdict. *See Collins v. Union Pac. R. Co.*, 143 Cal. Rptr. 3d 849, 861 (Ct. App. 2012). Such arguments tend to deflect the jurors from their task, which is to render a verdict based solely on the evidence admitted at trial. As the *Regalado* court colorfully explained, "The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Regalado*, 207 Cal. Rptr. 3d at 725 (quoting *Martinez*, 189 Cal. Rptr. 3d at 331).

The plaintiffs' bar is well aware of the threat that *Regalado* poses to the reptile "revolution." After the *Regalado* Court of Appeal filed its opinion, the Consumer Attorneys of California requested that the California Supreme Court order the opinion depublished. Ironically, the Consumer Attorneys did so in a lengthy request that never acknowledged the existence of the Reptile Theory or even use the word "reptile." (This is surprising given that the same organization sponsors seminars instructing plaintiff attorneys how to use the Reptile Theory in their cases.) The California Supreme Court summarily denied the request. The *Regalado* opinion will thus remain on the books, and can be cited as authority to exclude reptile arguments from the courtroom.

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