

2016



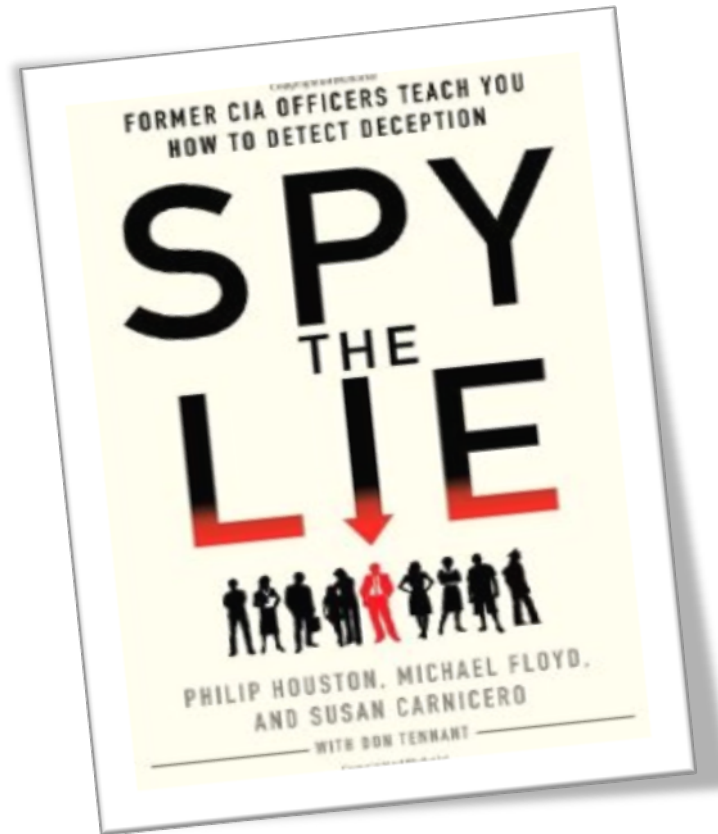
Spying the Lies

Presented by: Richard E. Ramsey, Esq. & E. Holland "Holly" Howanitz, Esq.

Friday, May 20, 2016 | 7:00AM – 5:00PM
Orlando World Center Marriott

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How to tell when your client (or the insured) may be lying



How tough is it to Spy the Lie and why?

We believe people won't lie to us!

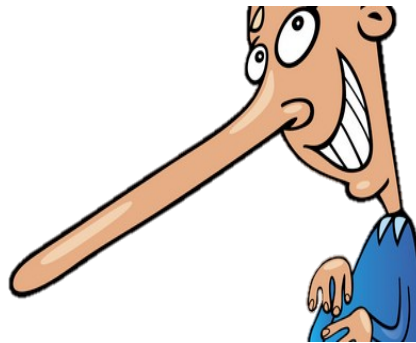
- Giving the benefit of the doubt
- Who wants to sit in judgment of someone else?
- “Innocent until proven guilty!”



How tough is it to Spy the Lie and why?

Some people are **DARN** good at it...

- How often does the average person lie during the day?
- Behavioral myths:
 - What do we see?
 - What do we hear?



How tough is it to Spy the Lie and why?

Our own biases and limitations

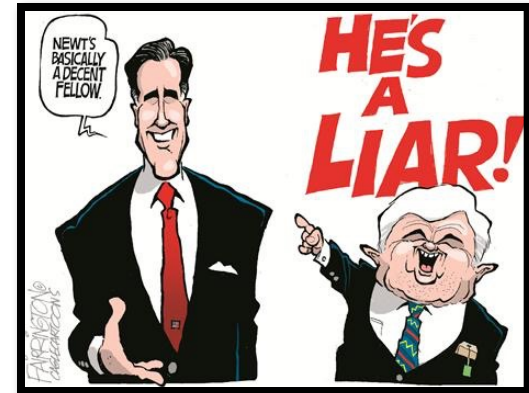
- How good of a listener are you?
- The subject matter . . . MATTERS.
- Learn to manage your biases
(i.e. sit with your arms crossed)



Where do you start?

Your active role to Spy the Lie.

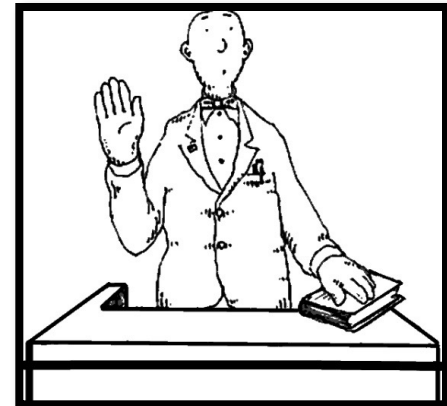
- Start with Presumptive Questions
- You must ignore (not process) truthful behavior
- Look for deceptive behaviors within 5 seconds of the questions
- Do you see a cluster of deceptive behavior?
 - Is one such behavior worthy for you to rely on?
 - Example: Ask your child: “Did you do your homework?”



What does deception sound like?

The “witness oath” covers all types: the truth; the whole truth; and nothing but the truth.

- *The truth:* Lies of Commission
- *The whole truth:* Lies of Omission
- *Nothing but the truth:* Lies of Influence



Verbal Behavior Designed to Mislead

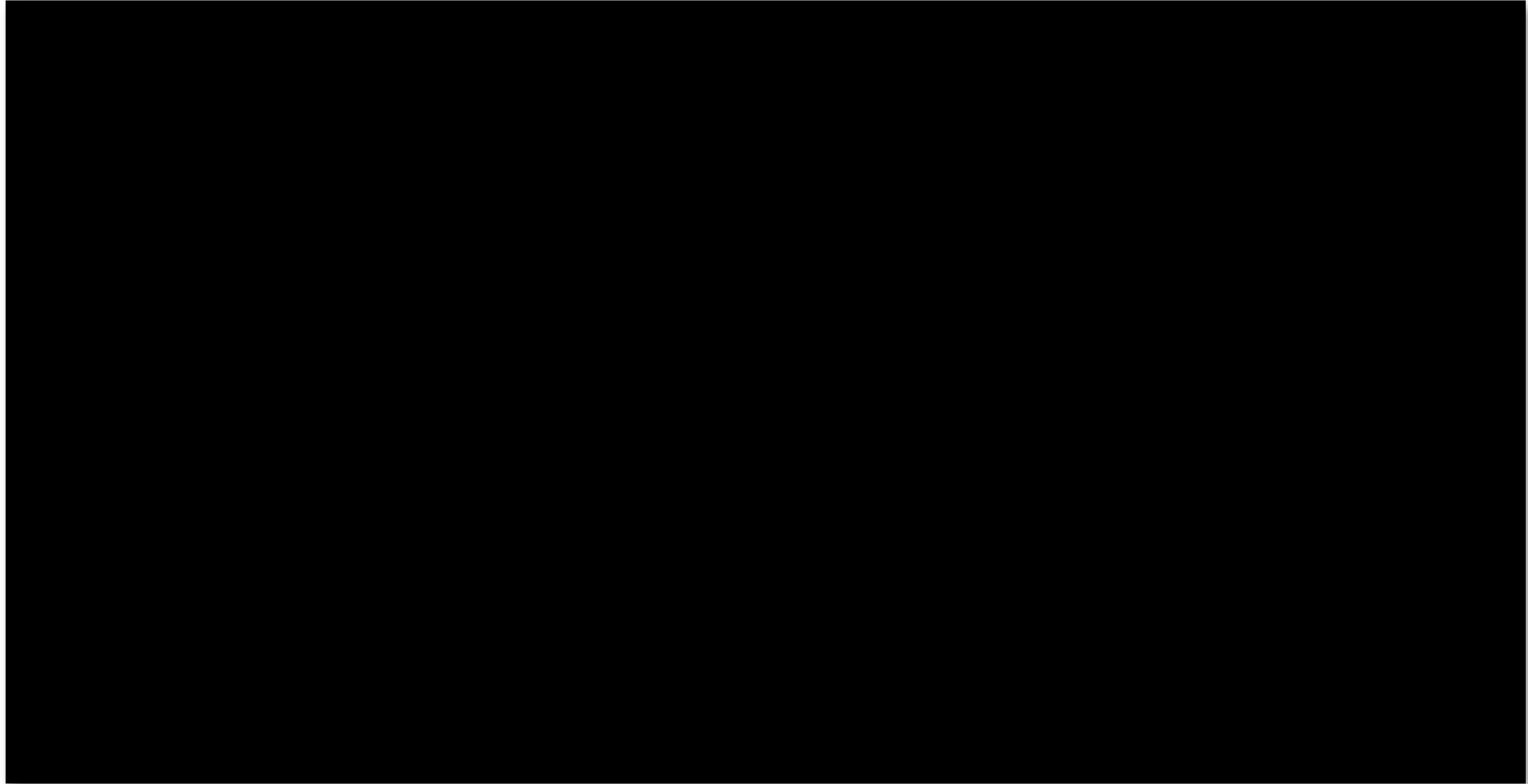


Verbal Behavior Designed to Mislead

Failure to answer

- Look for the cluster!
- Are they simply confused/not that bright?
- Is the denial buried within a long winded response?

Denial is Buried in a Long Winded Response



Verbal Behavior Designed to Mislead

Failure to answer

- Look for the cluster!
- Are they simply confused/not that bright?
- Is the denial buried within a long winded response?
- Is the denial nonspecific?
 - Example: “I didn’t see anything!” vs. “I didn’t see it.”
- Did they repeat the question? - “Cops!”

Repeating the Question



Verbal Behavior Designed to Mislead

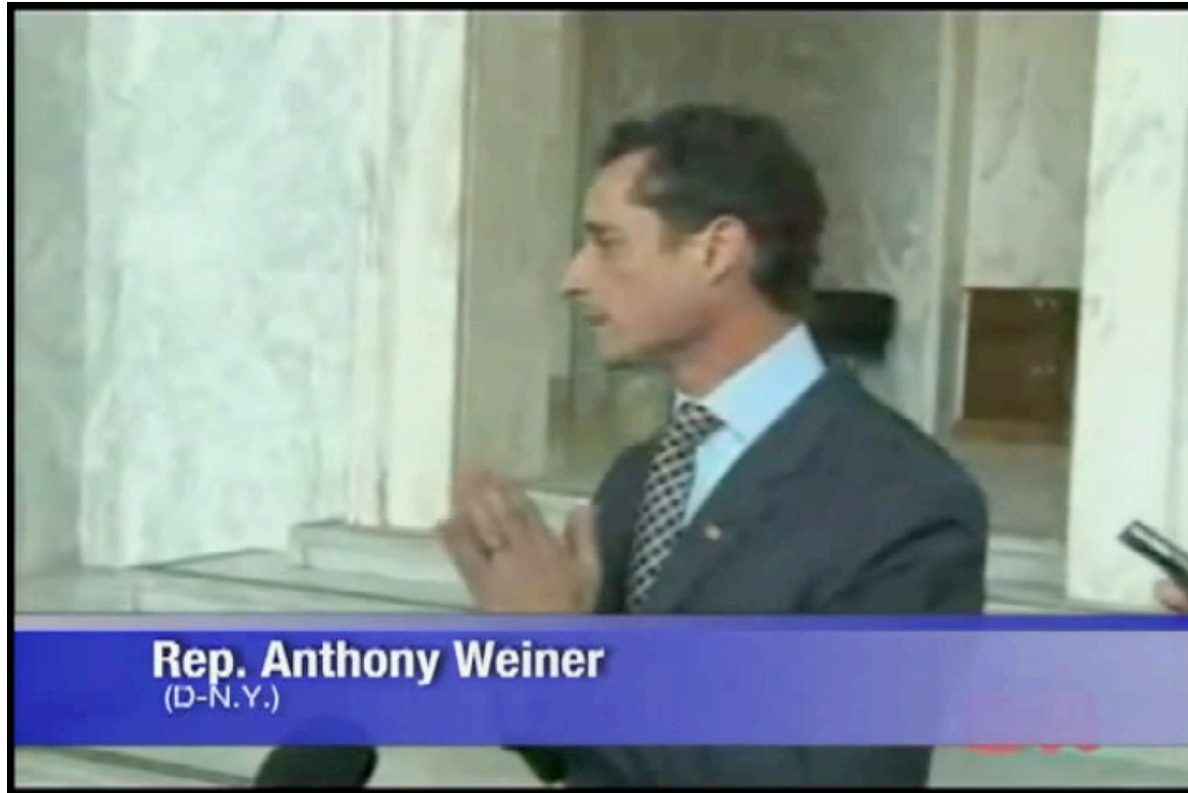
Failure to answer

- Look for the cluster!
- Are they simply confused/not that bright?
- Is the denial buried within a long winded response?
- Is the denial nonspecific?
 - Example: “I didn’t see anything!” vs. “I didn’t see it.”
- Did they repeat the question? - “Cops!”
- Did they “buy time?”
 - “That’s a good question.”;
 - “I’m glad you asked that.”;
 - “I knew you’d ask me that.”

Verbal Behavior Designed to Mislead (Cont.)

- Going into attack mode

Going Into Attack Mode



Verbal Behavior Designed to Mislead (Cont.)

- Going into attack mode
- Overly polite response
- Overly specific answers

Overly Specific Answers



Verbal Behavior Designed to Mislead (Cont.)

- Going into attack mode
- Overly polite response
- Overly specific answers
- Invoking religion
 - “I swear to God”; “I swear on a stack of Bibles”;
 - “As God as my witness...”

Invoking Religion



Verbal Behavior Designed to Mislead (Cont.)

- Going into attack mode
- Overly polite response
- Overly specific answers
- Invoking religion
 - “I swear to God”; “I swear on a stack of Bibles”;
 - “As God as my witness...”
- Convincing statements
 - “I have a great reputation.”; “I am an honest person.”;
 - “I’ve worked here for 20 years.”

Convincing Statements



Non Verbal Behaviors





Non Verbal Behaviors

- The DELAY
- Inappropriate level of concern
 - Why is this person smiling?

Inappropriate Level of Concern

(Why is this person smiling?)



Non Verbal Behaviors

- The DELAY
- Inappropriate level of concern
 - Why is this person smiling?
- Hiding mouth or eyes?
- Hand to the face
 - Biting or licking lips
 - Tug on ears

Ted Haggard



Non Verbal Behaviors

- The DELAY
- Inappropriate level of concern
 - Why is this person smiling?
- Hiding mouth or eyes?
- Hand to the face
 - Biting or licking lips
 - Tug on ears
- Anchor-point movements

Anchor Point Movements



Non Verbal Behaviors

- The DELAY
- Inappropriate level of concern
 - Why is this person smiling?
- Hiding mouth or eyes?
- Hand to the face
 - Biting or licking lips
 - Tug on ears
- Anchor-point movements
- Grooming gestures
- Don't rely on: Lack of eye contact; blushing; clenched hands.

The Questions you **NEED** to ask!

- The Punishment question



The Punishment Question





The Questions you NEED to ask!

- The Punishment question
- How OJ beat the rap?
 - The Presumptive Question
- Your tone: neutral; non-confrontational
- Rationalization:
 - “Everyone makes mistakes.”;
 - “When we don’t explain procedures, well, mistakes can happen.”



Look for Clusters

Your participation is crucial! Always remember...



Don't use this at HOME!



THANK YOU!

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Jurors Say the Darndest Things

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Psychological Science in the Litigation Process

- Magnus provides custom designed, case specific, jury research
- Magnus' Director of Research has conducted mock jury research since 1980
- There are always surprises: Jurors say the darndest things!





**“\$25--\$50--\$100
million = Bad
Defense Lawyer”**



**“If I hit a brick
wall, whose fault
is it?”**



**“Rat messing
with snakes”**



“They lied”



**“Courts require
facts”**



“Can’t lie”



**“Do I look in
pain?”**



“More land”



**“Who pays for
that?”**



**“You don’t do
time out”**



**“I take precautions;
why didn’t the
defendant?”**



“Lets Make a Deal”



“Increasing the Bottom Line”



“Yes, the mock jurors take their participation seriously!”



Research Options

- **Community Attitude Surveys**
- **Focus Group Research**
- **Case Strength Evaluation/Mock Trials**





Why the Research is Recommended

- **Assess Strength of Liability Arguments**
- **Test Various Arguments & Case Theories**
- **Determine Range of Damages**
- **Assess Effectiveness of Demonstrative Evidence**
- **Evaluate Attorney Presentation Style**
- **Evaluate Witness Credibility**
- **Familiarize Attorney With Venue**
- **Evaluate Settlement Posture**





Key Results

- **Themes**
- **Effective Strategies**
- **Variables Affecting Decision Making**
- **Liability**
- **Damages**
- **Juror Profiles**
- **Voir Dire Questions**
- **High Impact Demonstrative Evidence**
- **Attorney Evaluation**
- **Witness Evaluation**





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2016



Jury Selection and Other Trial Tactics What's #trending in the Plaintiffs' Bar?

Presented by: E. Holland "Holly" Howanitz, Esq. and Bill Kanasky, Jr. Ph.D.

**Friday, May 20, 2016 | 7:00AM – 5:00PM
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Then and Now

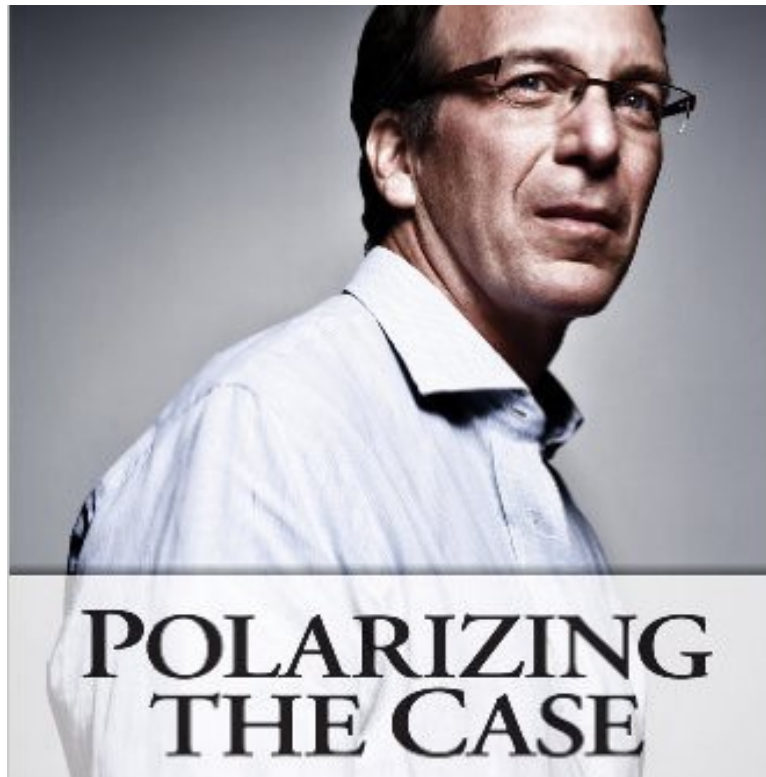
- Traditional Jury Selection and Trial Strategies
 - Appeal to sympathy
 - Ineffective and generic
- What's #trending now?
 - Reptile
 - The “bias list”



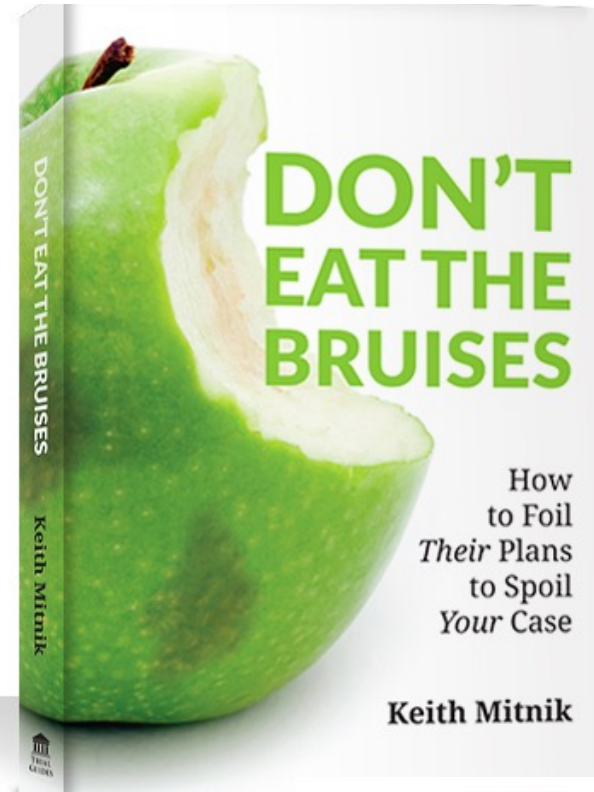
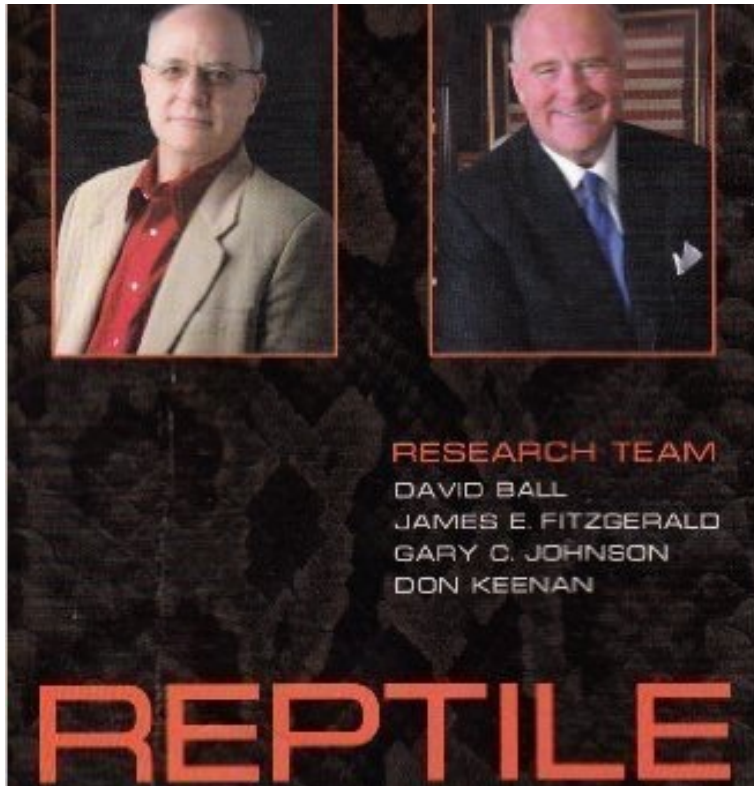
How Reptile changed the game...



Other Popular Trial Strategies



Other Popular Trial Strategies



What is the Reptile?

- The Reptile is nothing new but puts a spin on old, less widely used tactics.
- The Reptile is a plaintiff's trial advocacy approach which has become widely popular through Books, Dvd's, and Seminars.
- "The Reptile" refers to the reptilian part of the brain that contains human survival mechanism
- A case may be presented in a manner to reach the juror's "Reptile Brain" which should compel the juror to protect himself and the community. Leads the juror to side with plaintiff.

What is the Reptile?

- Jurors must be convinced that a verdict for the plaintiff will make the community safer because it will prevent the defendant or others similarly situated from harming the juror, his family, or someone close to him.
- To reach the Reptile, the authors suggest that Plaintiff’s counsel focus on community safety.
- More specifically, show the immediate danger of the kind of thing the defendant did – and how fair compensation can diminish that danger within the community.
- The tactic works but not for this reason.
- Method allows plaintiff’s attorney to individualize the harm to the juror while circumventing the “golden rule.”

Reptile Strategy – the basics



Reptile Strategy – the basics

- Safety Rules Tactics
- Duty and laws are described as safety rules which are in place to protect society including the juror and his loved ones.
- Plaintiffs utilize “safety rule” as opposed to “rules” because the former allows no exceptions.
- Rules are kept “short and sweet.”
- Rules are always aspirational and positive.
- Every safety rule’s purpose is to “prevent” and “protect.”

Reptile Strategy – the basics

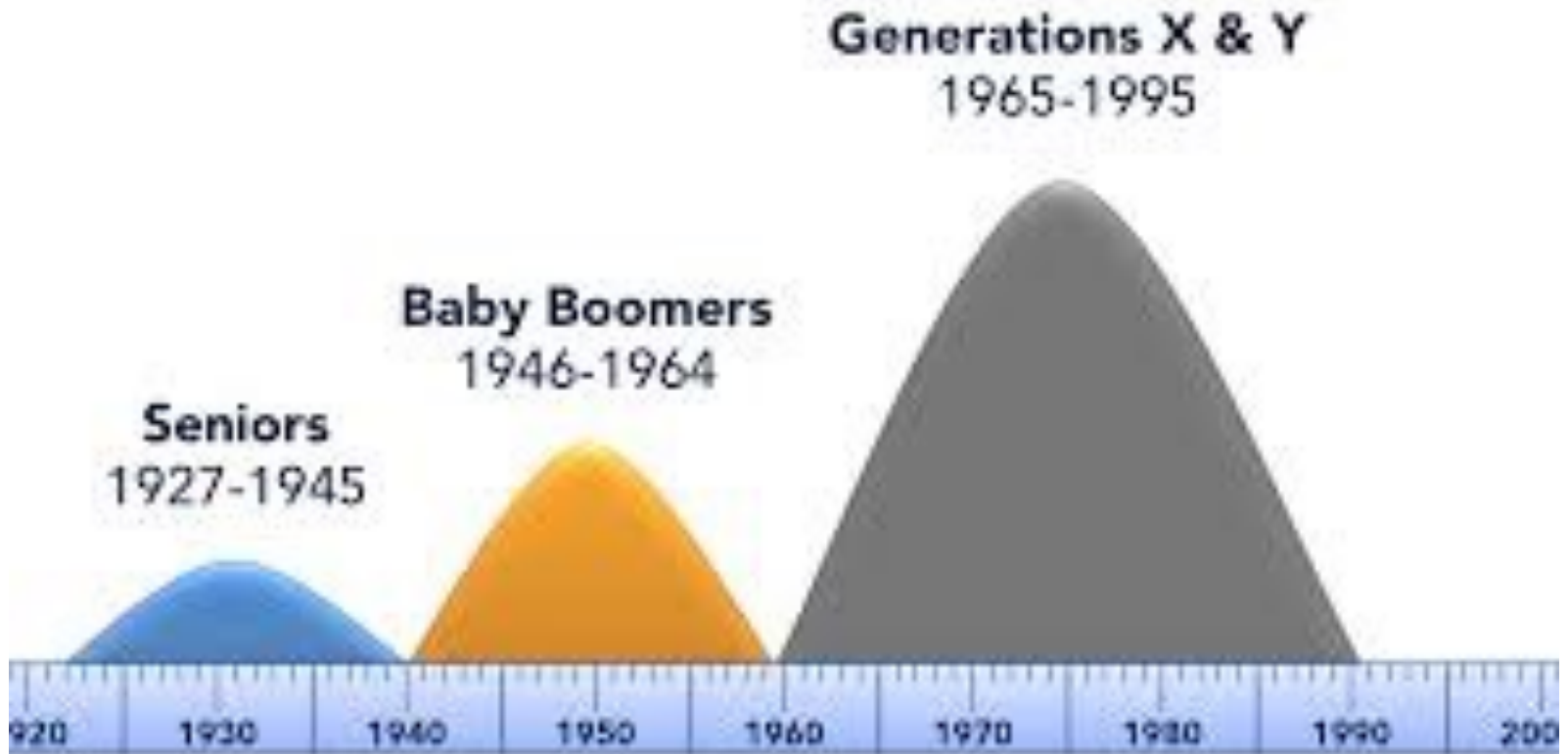
- The safety rule is then subtly broadened and extended to include and protect the juror from harm through choice language.
- “To protect the community”
- “To protect everyone”
- “To protect all those driving on the highway”
- “To protect all of us”



Recognizing the Reptile

- **Choice Language**
 - Plaintiffs will use choice language which is selected to stir emotion and ideals.
 - Words motivate, create accountability, and empower jury to create justice.
 - “Imagine”
 - “No excuses”
 - “If you remember one thing”
 - “Uncompromising integrity”
 - “The simple truth”
 - “Believe in better”
 - “Your decide”
 - “You deserve”

Today's jurors



Jury Selection – Art or Science?

- Art – the manner in which the attorney conducts *voir dire*.
 - Tone
 - Demeanor
 - Eye contact
 - Body language
- Science – tapping into the correct juror variables to expose bias and prejudice.
 - Psychological factors
 - Emotions
 - Experiences
- Goals of Jury Selection
- Evaluate (80%)
- Indoctrinate (20%)

Jury Selection Fallacies

- “Teachers and Social Workers always vote for the Plaintiff”
- “Accountants never award high damages”
- “Smarter people usually vote for the defense”
- “Minorities usually vote for the Plaintiff”

x Fallacy

x Fallacy

x Fallacy

x Fallacy

The Reptile in Voir Dire

- The Priming Process
 - Expose jurors of trigger words relating to safety
 - Examples
 - “would everyone agree that patient safety should be the hospital’s number one priority”?
 - “does everyone think that the community deserves a safe hospital.”
 - “Does everyone agree that if there is a defective product that injures someone, that person has a right to sue the company.”

Priming Language

- Some folks feel travel by car has become more **dangerous**. Who feels this way and why?
- Some folks feel that medical care has gotten worse over the past ten years or so. Do you think that can put the **community** in **danger**? How so?
- When you drive, what do you want truck drivers to do in terms of **safety**? Do you want them to reduce **risk** to you and your **family**?
- Do you feel that corporations have a duty to **protect** the environment? What **dangers** exist if they don't?
- Do you believe that it is a landlord/hotel owner's duty and obligation to promote and **ensure a safe environment** for their tenants?

The Reptile in Voir Dire

- The Defense Perspective
 - Give the jury some perspective:
 - Example: “does anyone think that just because the defendant is here in court he did something wrong?”
 - This will expose the jurors that already think the Defendant is guilty;
 - Allows counsel to suggest to the jury that the Plaintiff’s claimed injury may have been caused by something the Defendant didn’t do.
 - Diffuse the Plaintiff’s priming efforts by indoctrinating the jury into themes that are favorable to the Defendant.

Defense Priming – the Anti Reptile

- You will hear the term “standard of care;” and the words “reasonable” and “circumstances” are in the legal definition that the judge will instruct you on; but the words **safety and danger do NOT appear in the definition.** Do you all agree to follow the definition that the judge gives you?
- You will hear that there are “rules” that safety should always come first; you will also hear a different opinion, that **each situation has a risk/benefit trade off, depending on the circumstances.** Who here feels that employees are required to follow rules vs. using their **judgment** in each **unique situation?**

Defense Priming – the Anti Reptile

- Do physicians have a duty to completely eliminate all risks to a patient, or do you feel that physicians should measure the **risks-benefit ratio for each individual patient**? Why?
- Do you feel that there are rules in medicine, or that clinicians should use their best **judgment** in **each unique situation**?
- Do you have a **personal responsibility** to read warning labels on the products you use? Why is that?
- When making decisions in your job, do you have to use your **judgment** in each **individual situation** or do you just do the same thing every time?

Defense Priming – the Anti Reptile

- Do truck drivers have a duty to ensure your safety on the roadway, or do you feel that you have safety **responsibilities** as well?
- Do you have a **personal responsibility to** be careful when driving near tractor trailers on the highway? Why is that?
- Does everyone understand that this was an **accident**, not a deliberate safety violation that was intended to harm the plaintiff?

Misconceptions about Reptile

- Reptile Tactics are about survival instincts;
- The theory focuses on negative predispositions about companies and invokes the urge to “root for the underdog.”



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The “Bias List”

**SYSTEMATIC
DE-SELECTION
OF HIGH-RISK JURORS**

The “Bias List”

- Bias against money damages
- Bias against “not wearing a seatbelt”
- Bias against smoking or otherwise not taking care of yourself
- Bias against drinking and driving
- Bias against an injury with no objective evidence
- Bias against convicted felons
- *Through the bias list, the Plaintiffs’ attorneys attempt to create cause challenges for jurors with a normal amount of common sense.*

The “Bias List”

The Legal Pad: Cause Challenge Denied



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The “Defense Playbook”



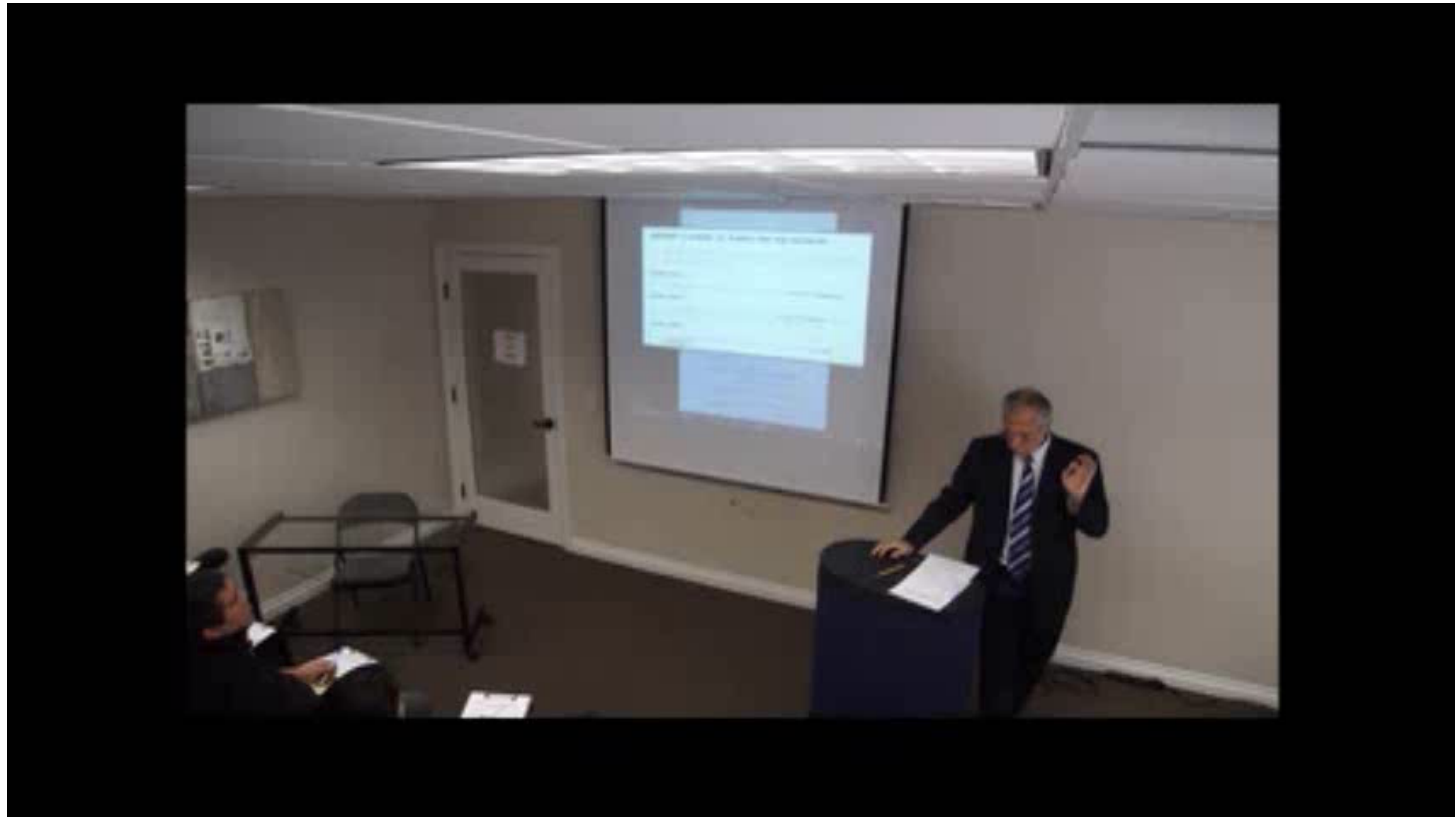
Reptile Tactics in Opening Statements



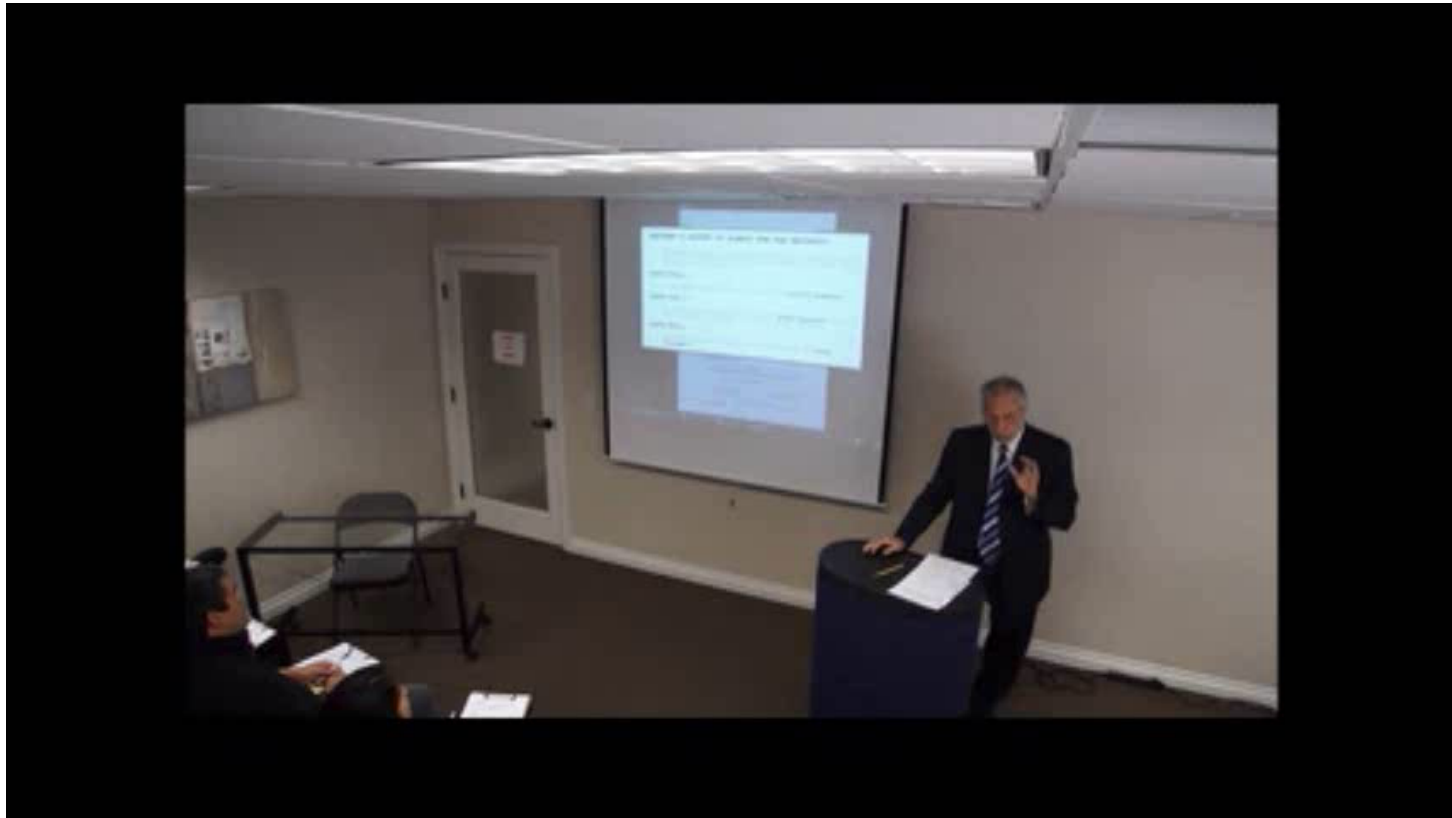
Effective Reptile Tactics: Targeting Defendant

- Avoid Sympathy
- Focus on Safety Rule
- Use of “Availability Bias”
 - Focus on Defendant 100%
- Use Persuasion, not FEAR

Plaintiff's Opening Statement



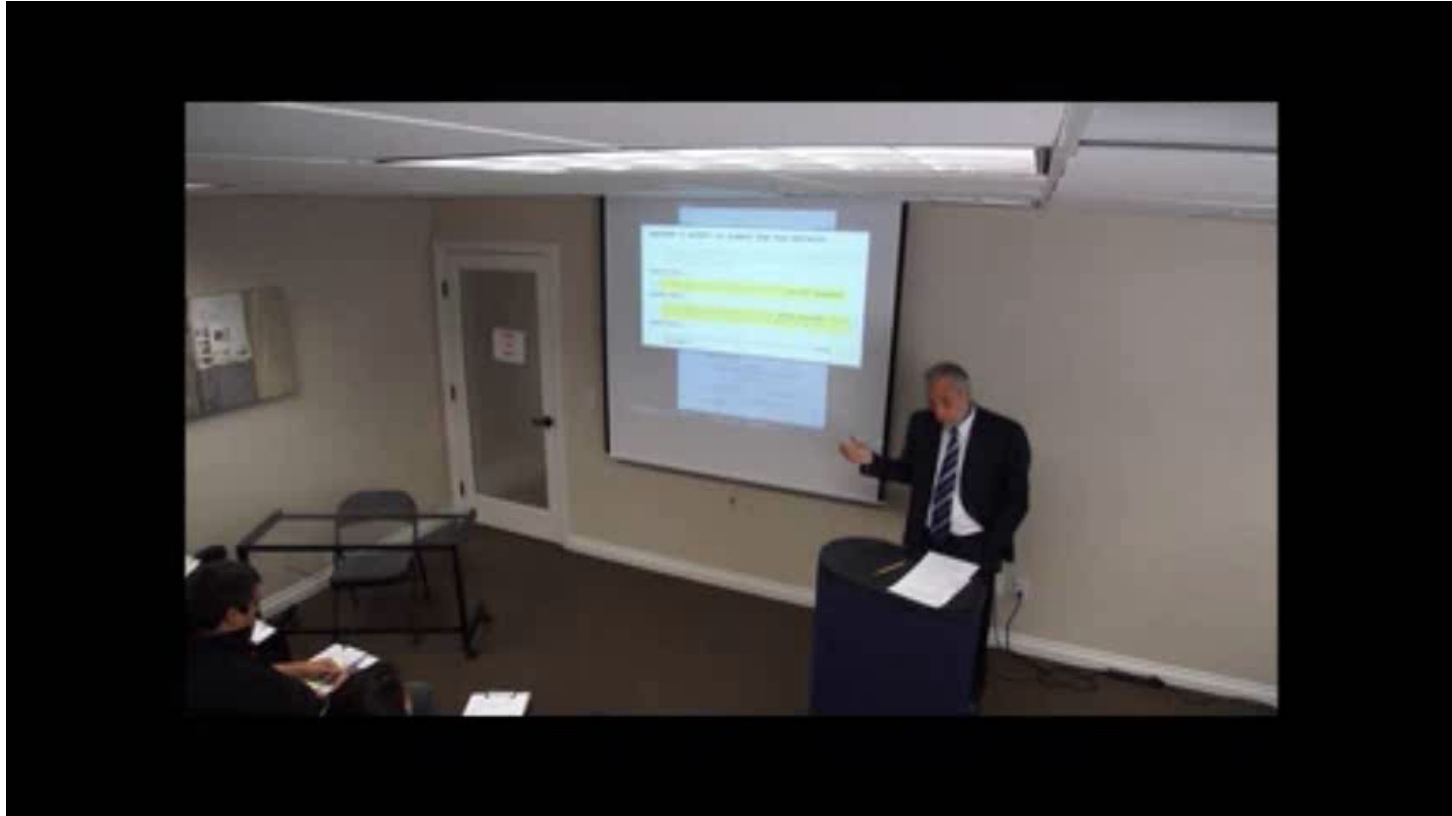
Plaintiff's Opening Statement



Plaintiff's Opening Statement



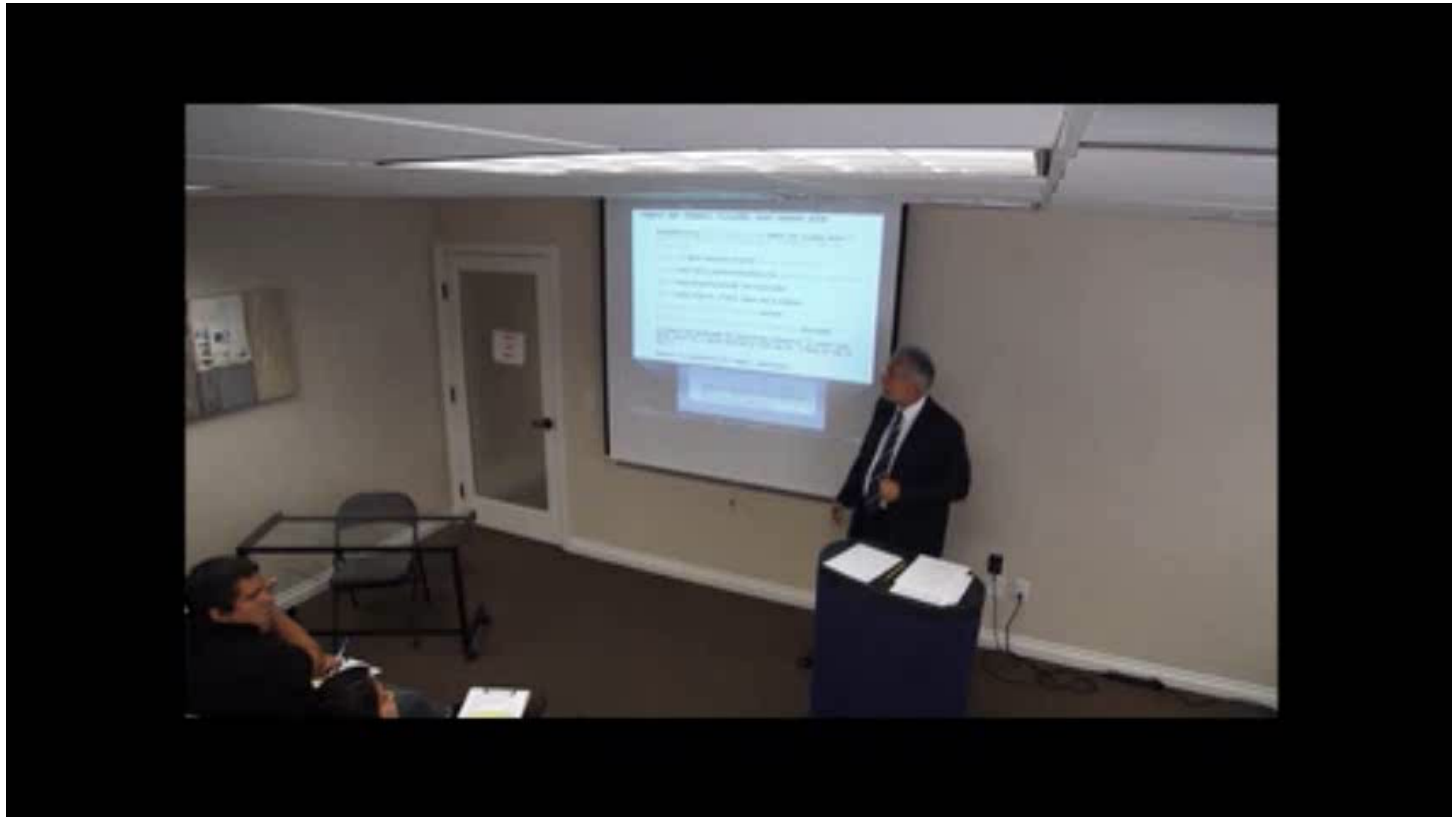
Plaintiff's Opening Statement



Plaintiff's Opening Statement



Plaintiff's Opening Statement



Defendant's Opening Statement

14 SO THERE'S NO DISPUTE, AS YOU HEARD FROM MR.
15 GOMEZ, THAT IN FACT THE CITY OF SAN DIEGO, THE SAN DIEGO
16 POLICE DEPARTMENT, CAUSED THE DEATH OF MR. MCCAFFREY. A
17 POLICE OFFICER, MICHAEL JUSTIN BRUCE, HE GOT IN AN
18 ACCIDENT WITH MR. MCCAFFREY'S MOTORCYCLE. THAT'S BEEN
19 AGREED UPON. YOU'VE ALL HEARD THAT MANY TIMES. YOU'VE
20 ALSO HEARD THAT THERE'S NO DEBATE ABOUT THE VALUE OF THE

18 THAT. THE CITY IS HERE BECAUSE THEY WANT TO PAY THIS
19 FAMILY A REASONABLE SUM OF DAMAGES FOR THEIR LOSS, BECAUSE
20 THE CITY IS RESPONSIBLE FOR THEIR LOSS, BECAUSE JUSTIN
21 BRUCE CAUSED THAT ACCIDENT. THAT'S -- THERE'S NO DEBATE
22 ABOUT THAT, RIGHT?

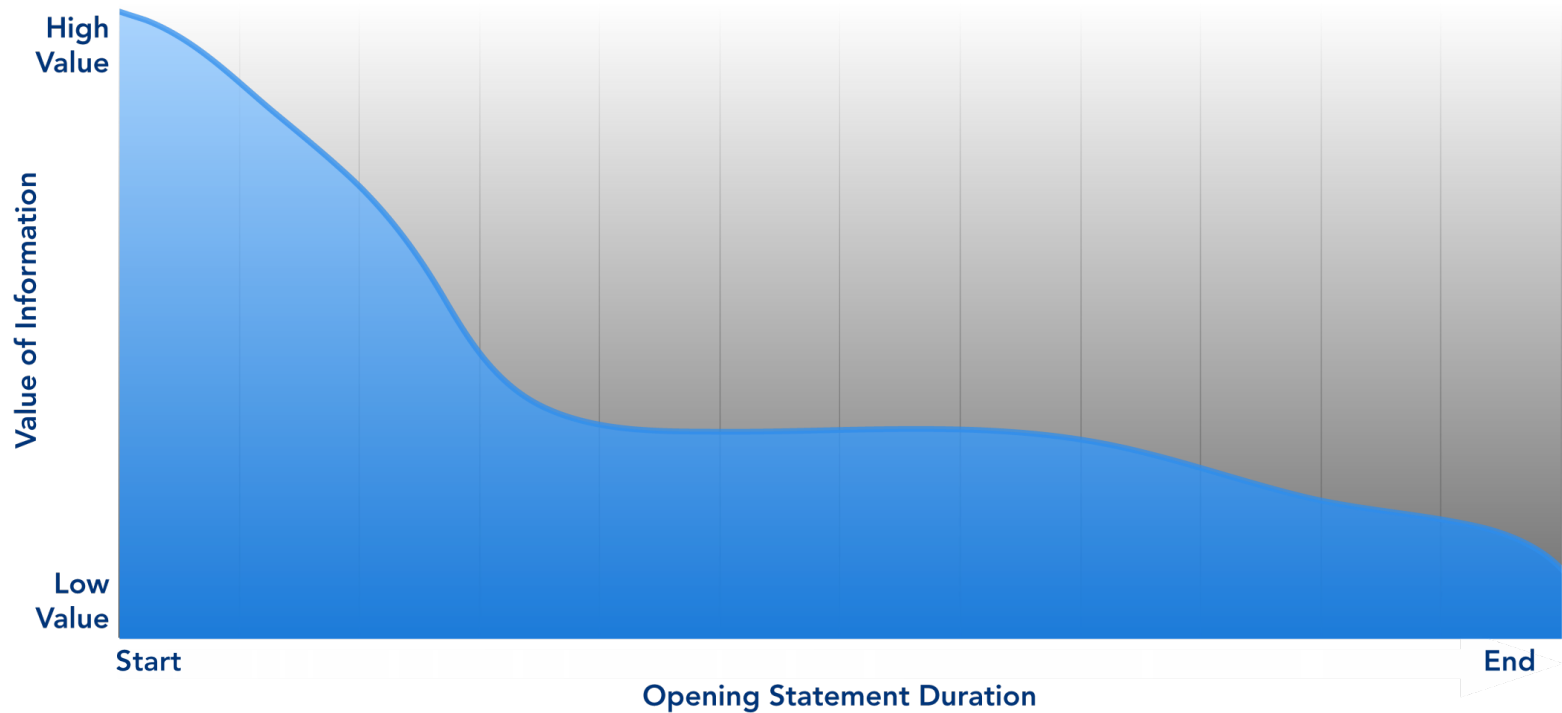
23 SO WHAT ARE -- WHAT ARE -- WHAT IS REASONABLE?
24 I DON'T KNOW. BUT YOU KNOW, AS A JURY, YOU HAVE A VERY
25 HEAVY RESPONSIBILITY. YOU HAVE A VERY HEAVY OBLIGATION,
26 BECAUSE THESE ARE REALLY HEAVY ISSUES. WE THINK -- WE
27 TALKED A LOT ABOUT THAT IN VOIR DIRE. YOU KNOW, THIS IS

Defendant's Opening Statement

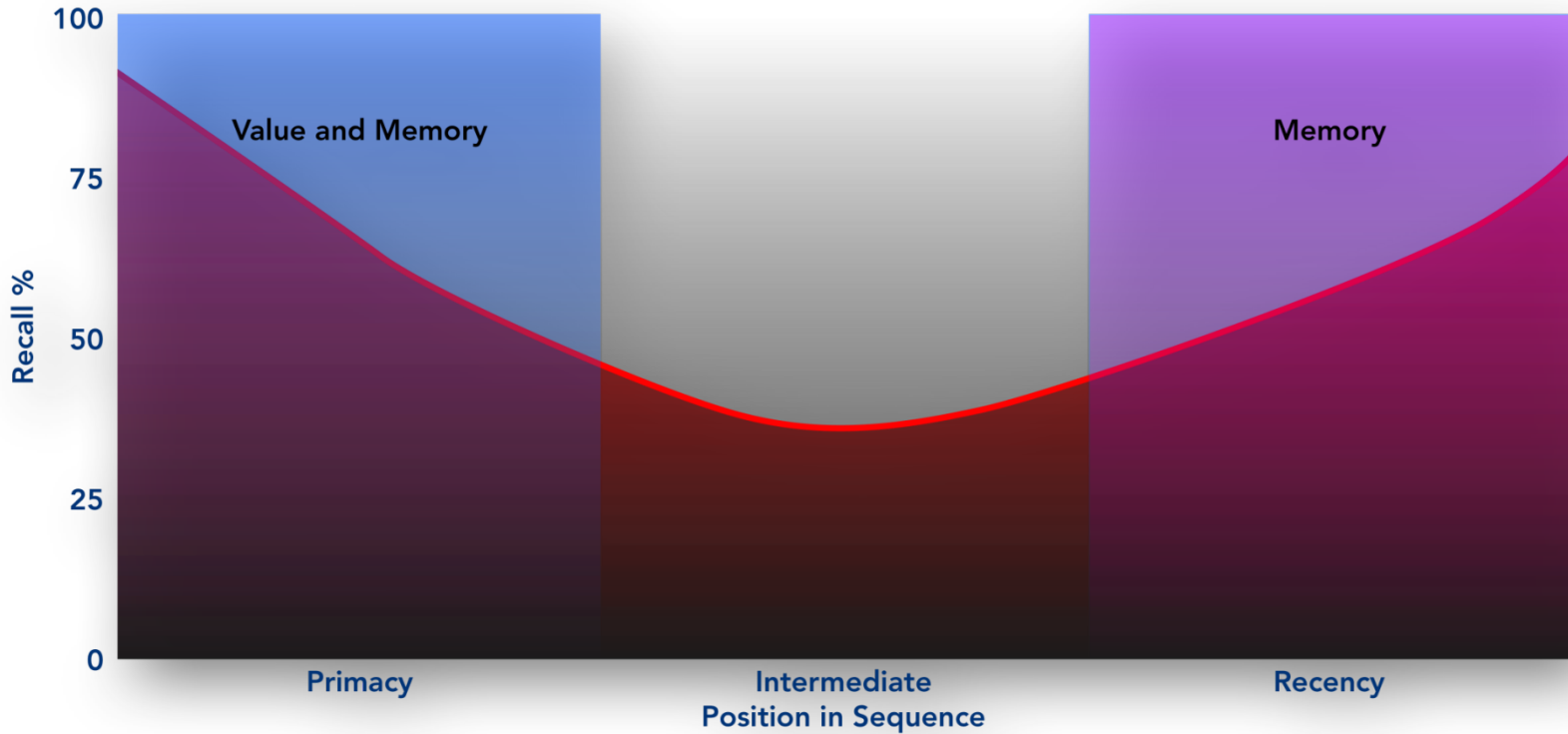
1 DUTY ISN'T TO DO JUST JUSTICE FOR THIS FAMILY. IT'S
2 EQUALLY IMPORTANT TO DO JUSTICE FOR THESE PEOPLE. FOR
3 LIEUTENANT BEASON, SAN DIEGO POLICE DEPARTMENT, THE CITY,
4 THE CITY IN WHICH WE LIVE.

5 NOW, WHAT DOES JUSTICE MEAN? JUSTICE MEANS
6 DOING YOUR BEST TO FOLLOW THE LAW AND THE EVIDENCE, BUT AT
7 THE SAME TIME, KEEPING YOUR HEAD AND UNDERSTANDING THAT
8 YOUR HEART WILL HURT, BUT YOU GOT TO KEEP YOUR HEAD. IT'S
9 BALANCING YOUR EMPATHY AND YOUR SYMPATHY WITH YOUR COMMON
10 SENSE AND YOUR REASONABLENESS. THAT'S THE GUIDE YOU HAVE,
11 AND IN ORDER TO DO JUSTICE IN THIS CASE, YOU HAVE TO DO
12 THAT.

True Primacy (Saliency) Effect



Ordering Information in Opening



Misconceptions about the Reptile Theory

- The theory is based on sound “science”
- The 2009 book by Kenan and Ball discusses “science” for 2.5 pages.



Effective Defense Theme – a classic

- Personal Responsibility
- *The Plaintiff's injuries/outcome is a product of his/her decision making*
 - Why it works



Summary

- The Plaintiff's bar is continually developing new theories and gimmicks for jury manipulation;
- It is important for the defense team to understand the theories, understand whether they work and why they work and formulate effective tactics to counter the efforts of the Plaintiff's counsel.



THANK YOU!

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