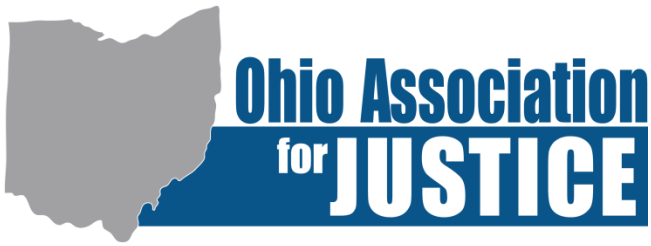
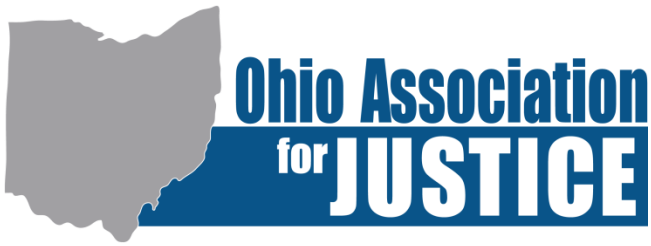


Plenary Session

2011 Annual Convention

Thursday, May 12, 2011

Hilton at Easton, Columbus, Ohio



Introduction to Reptilian Trial Advocacy

David Ball. Ph.D.
Miller Malekpour & Ball
Durham, North Carolina

PUBLIC RESPECT AND TRUST

How to Restore and Deserve It

David Ball, Ph.D.
Miller Malekpour & Ball, Durham
ball@nc.rr.com

David Ball, Ph.D., one of America's most-respected trial consultants, is a four-time best-selling trial advocacy author and jury researcher. His book *David Ball on Damages* changed the face of American trial advocacy, and Reptile, which he co-wrote with Don Keenan, has continued the tradition. Dr. Ball is the country's most in-demand CLE lecturer. In 2002 he received NCATL's Charles Becton Excellence in Teaching Trial Advocacy award. With partners Debra Miller and Artemis Malekpour he consults on civil and criminal cases throughout the US and Canada.

Talk doesn't cook rice.
– Chinese proverb

***Deeds*, not Words**
– Max Roach (American jazz musician and composer)

You know I've heard every line
No baby, not this time
If you want me like you say you want me
Well then, you gotta *show* me . . . .
I see you there talking loud
But *you got to show me.*
–Janet Jackson

Please don't explain. *Show me!*
– My Fair Lady

Nay, Everyman, I will bide with thee,
I will not forsake thee indeed;
Thou shalt find Good *Deeds* a good friend at need.
– The character Good Deeds in *Everyman,* a medieval drama

The Lord is a God who knows, and by Him *deeds* are weighed.
– 1 Samuel 2:3

Just *do* it!
– Nike

Words are no *deeds.*
– Shakespeare (*Henry VIII*, III,2)

Words to the heat of *deeds* too cold breath gives.
– Shakespeare, (*Macbeth, II,1)*

Talk is gibber-jabber. Action is truth.
– Catherine Walsh, 3rd grade teacher

There is no effective weapon against the persuasive power of good works.
– David Ball

THE PROBLEM

A third of jury-eligible Americans hate and fear trial lawyers. This is because of what they think you *do*. That third "knows" you endanger their well being: their jobs, their health care, their families, their religion. They "know" you make your exorbitant living though trickery and sham cases. They "know" you profit from the misery of others.

A decades-long campaign against you has brought them to this point. That campaign – carefully planned and executed – was unchallenged until a few years ago. By then it was too late to talk our way out of it. The decades-long, one-sided case had convinced a third of Americans that trial lawyers are a serious public menace.

As with all big-lie campaigns, the tort-"reform" campaign has been based on grains of truth in order to make it credible. Some greedy trial lawyers do misuse their power. Some verdicts are or seem outlandish and harmful. Many trial lawyers and their organizations support liberal politicians and judges who threaten the core values of many people. Medical liability insurance, products, services, and personal insurance have indeed gotten more expensive. And a few years ago there was indeed a shortage of flu vaccine. The propagators of tort-"reform" brilliantly and without opposition spun and distorted such truths into a full-blown, nightmarish mix that turned trial lawyers and judges into terrorists – at least in the minds of a third of the public, and that third is growing

Tort-"reform" beliefs are now so firmly embedded – and so firmly supported by a third of every community – that they cannot be changed by anything our side says, no matter how we say it or how often. **It's too late for words. When a trial lawyer or a trial lawyer's organization uses only words, things get worse.**

When a politician you fear and hate talks about justice, decency, and fairness, you hate that politician even more for what you perceive as his or her hypocrisy. That's what the poisoned third does when they hear us talk about justice or any of our other values. In their eyes, we are a poisoned source –-and no one trusts the words of a poisoned source. Not ever.

For example, try arguing with an extreme believer on the other side of your political fence. As you argue, he will erect a higher fence. If you think you or your organization has ever changed a tort-"reformed" juror's mind with just words, the only fool in that interchange was likely you.

Worst is when trial lawyers and their organizations rely on shallow platitudes. For example: *"We're here for the little guy."* Tort-"reformed" citizen response? "Yeah, you love it when a little guy gets hurt because you make lots of money."

Or, *"We're here to protect families."* Tort-"reformed" translation: "Yeah. *Your* families. Not ours. You're taking away our health care, our jobs, and our financial well-being."

Or, *"We're here for rights and justice."* Tort-"reformed" translation: "You love rights and justice because you make a fortune from them.

You can even lose your case simply by starting your opening with, "Ladies and gentlemen, the truck driver's carelessness hurt my client and *we are here for justice."* Tort-"reformed" translation? "Here's one of those greedy lawyers we've been warned about."

When it comes to public opinion, not even facts help us. In every state, a third of the public believes that trial lawyers are driving down the number of physicians in the state. The fact is quite the opposite: the increase in the number of doctors in every state but one is unprecedented. But when we say that, no one believes us, because we are a poisoned source. "When a trial lawyer uses a fact or statistic, it is a lie."

In our younger years, most of us believed this: "If I just had the chance to sit down and *explain* to the other side what is wrong with their point of view, they would see the truth in what I say." Remember when you thought that? Long, long before your first trial, I bet.

Not even Gandhi, Jesus, or Martin Luther King, Jr. – extraordinary deployers of words – could rely on words alone. They needed acts and even miracles to persuade. Fortunately, we don't need miracles. We need just some deeds. Good deeds. Deeds *first.* Then, and only then, if still necessary, should we use words, messages, communications. Use the reverse order at your peril. **That is the single most fundamental and universally accepted principle of persuasion.**

THE SOLUTION

So what do you do? What should your organizations do? What can open the minds of the poisoned third of the public enough to grant admission to our good words, arguments, and facts? How do we regain the ground lost to the decades-long campaign about our supposed evil deeds?

Simple. **We just need to *do things* that help others *in ways that do not simultaneously help ourselves.* We need to regularly, publically, and selflessly commit altruism.**

In playwriting and screen writing, this foolproof method is called "Save the Cat."[1] The principle: You will easily persuade an audience that a character is good by showing the character doing something selfless or even disadvantageous to himself. It works in real life even better than in the movies. (It's the opposite of kicking the puppy.)

How do we know it's foolproof? From Shakespeare. From marketing experts. From psychologists. From history. From everyday observation. And from those individual attorneys who have already been doing it. Selfless good works is even the prime ingredient of classical oratory, where the focus is always on deeds, never on words – no matter how oratorically soaring the words may be.

Re-read Mark Antony's "oration" – how he turned the angry Roman crowd that had been cheering Caesar's assassination. Mark Antony's brilliance lay not in his words. The crowd did not turn his way until he pointed out what Julius Caesar had *done.*

When WalMart's reputation was sinking to the point where it affected sales, rather than mounting more sales campaigns, WalMart started *doing good things*, such as improving employee health benefits. And who was first to show up after Hurricane Katrina? WalMart! With three huge 18-wheelers loaded with fresh water. And the same heartless corporation that forced its employees to go to government programs rather than provide health care benefits has now mended its bad reputation by giving out four-dollar prescriptions.

When mid-east terrorists found that their violence was alienating their own supporters, the terrorists started programs of medical help, schools, and other social services for the populace. The terrorists knew better than to rely on words.

All good persuasion uses effective framing, well-chosen words, and active themes. But without a focus on *deeds,* all the framing and words and themes – and even facts – in the world are useless. Just as you can't win a case by stamping your foot and saying, "My client is right so give us money!" neither can you change the minds of tort-"reformed" jurors by stamping your foot and saying "Trial lawyers are good, so trust us!"

I think I hold the world's record for the number of tort-"reformed" jurors interviewed in depth. I know every reason for which they fear and loathe you. I know their ugly reactions when they hear our words about how good we are, and about how mistaken their conceptions about us are. They carry their reactions right into trial. Every tine.

This kind of information never surfaces in the kind of polling or focus groups our organizations do or sponsor. Such studies are for different – and necessary – purposes. But they illuminate nothing about how citizens influenced by tort-"reform" think and decide when they become jurors. So we had to do our own jury research. As a result, we know what can change the hearts and minds of the public about trial lawyers. We have tried it with the worst of those jurors, and it works. Here's what we have found out:

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[1]See Blake Snyder, *Save the Cat.*

THE BIG THREE
Trial lawyers need to do three things.

First, and right now, trial lawyers need to learn how to conduct trials so as to persuade the poisoned jurors to side with the plaintiff. This can seem impossible but the most recent research has shown us how to do it.[2] If you have a trial coming up, you cannot delay learning this new material.

Second, trial lawyers need more than ever to financially support the legislative efforts of groups such as AAJ and the state trial lawyers organizations to fight anti-litigation legislation. Trial lawyers who do not – yet reap the benefits of those fights – are leeches.

Third, trial lawyers and their organizations must use *effective* methods of changing the minds of the poisoned third of the jury pool. This does not means words. It means good works. No words or messages – unless accompanied by an equal or greater dose of good works.

We have no need to match the increasing tens of millions the insurance companies, chambers of commerce, and national and international corporations continue spending to wipe out trial lawyers. Unlike any campaign of words, our good works will outweigh every last cent the other side can spend. **There is no effective weapon against the power of selfless good works.**

DOES IT WORK?
Come back with me to the early 1990s. An Atlanta attorney – Don Keenan –is doing some playground injury cases: kids who got mangled or killed because half-ton dead branches will eventually fall, or because jagged pieces of metal fence will poke out young eyes, or because of any other of a number of other common and commonly ignored playground dangers.

Keenan wins the cases he tries, so he's doing right by these kids. But in the dark of night, Keenan finds himself thinking, "Do I really want to lie on my death bed some day thinking that all I've been in my life is the guy who comes around afterwards to clean up? Just the garbage man?" Keenan decided it was not enough. So, he thought, *Why not keep kids from getting hurt in the first place?*

Now there's an act against a trial lawyer's self-interest! Prevent the very kind of harm that provides his cases!

So Keenan printed up a playground safety check-list. He distributed copies all over the place – so parents could take the list to their kid's playground and check off every safety-required item.

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[2] If you are a member of the North Carolina Advocates for Justice (formerly NCATL), you can access its 9/30/08 Med Mal seminar (med mal attorneys only) and its 11/7/08 *David Ball on Damages* seminar. Both explain the new methods that have tilted the playing field in our favor. If you are not an NCATL member, you can purchase DVDs of my AAJ Damages Seminars. Or come to *damagesforum.net* for other options NB: ***Do not use a source more than six months old, since the research is rapidly creating new developments..***

No dead overhanging branches. Check!

No missing rubber safety tips.

No jagged fences.

No broken pavement.

Etc.

Any item on the list that a parent could not check off was to be reported to the principal, then the school superintendent, then – if still necessary – the news media.

In this easy way, Keenan protected innumerable kids. And he showed that he was a caring person. He never stood around proclaiming such counter-productive words as, "I care! I care! Watch me feel how I care!" Instead, he *acted* – and to this day continues to act – to help more and more – in ways *that do not simultaneously enrich himself.*

Because , as everyone knows, saving the cat does not help you when you're paid to save the cat.

Aside from protecting innumerable kids, Keenan's good works also gave him a foot in the door of the tort-"reformed" jurors.

Over the years, Keenan did more. His Keenan Kids' Foundation is a major public force in protecting children in every way they need protecting. And his recent book – *365 Ways To Keep Kids Safe* – carries his work even farther.

Did Keenan's good deeds help? Well, when he sets foot in trial, there is no tort-"reform." Jurors know– or quickly find out when they check him out on line, as some on every jury, including yours, do regardless of admonitions from the bench – that Keenan is the guy who protects kids. So when they see him here protecting the child in this particular case, the jurors know he's doing what he always does: protecting kids who really need protecting.

Not every trial lawyer can start a public service foundation as Keenan did – though you can band together with other lawyers and do it easily. Not everyone can write child safety books that Oprah orders her audience to read, though you can fill your web site with useful safety tips. But every trial attorney can find good and selfless works to do. And even without Oprah's help, trial lawyers can easily – and inexpensively – let their communities know about their good works. In fact, letting the community know means that others in the community will likely to step forward to help.

THE SPECIFICS

Last year I was explaining the "good works" principle a Los Angeles CLE seminar. "Go do good works!" I pleaded, as I am pleading now. A lawyer raised his hand and asked, "What

good is there we can do?" He was not kidding. The guy lives in the middle of L.A. and could not think of any good that needed doing. The poor guy. Well, in case he's reading this:

To paraphrase the great 17th-century English poet John Dryden, *"Simply go do the good thing nearest you!"*[3] Keenan was doing playground cases. He does kid's cases. So he did the nearest thing by helping protect playground kids before they got hurt. And now he protects all kinds of kids from all kinds of danger – before they get hurt.

It's an easy club to join: Do what's nearest you:. What's in your world that you can help make safer, or better, or easier for other people – and that does not simultaneously profit you?

Here's a sampling of what trial lawyers have already done, and what their organizations have done:

2006. Oklahoma. Dangerous heat wave. A trial lawyer is out buying a window air conditioner. Decides to buy two. Goes home, calls a social agency to get the name of someone in danger of dying from the heat. That evening the news on TV features the lawyer installing the air conditioner. Cut to an elderly man inside saying, "I have heard of this kind of thing happening to other people. I never thought it would happen to me." He goes on to explain how the heat nearly killed him the night before, but that now ... and he begins to cry. One of the more powerful TV moments anyone has ever seen.

That was Saturday.

Monday: Members of the trial lawyers academy in Oklahoma chip in enough to buy dozens of air conditioners. They install them where needed all over the state. Result: lives saved. And great news headlines extolling trial lawyers. Now in Oklahoma, the term "Trial Lawyer" has some new respect – because they called the air-conditioner program "*Trial Lawyers* Are Cool."

2006: A Connecticut Trial Lawyers Association press release announces that a dozen trial lawyers standing by to provide *free* legal assistance to veterans having difficulty with government agencies. This becomes a leading news story in New York and throughout New England for days. And lots of veterans are being helped.

Years ago: A Midwestern town runs out of money for Fourth of July fireworks. A trial lawyer steps in. To this day he pays the few thousand a year for the fireworks. He dresses up as Uncle Sam and gives the Fourth of July speech. Everyone loves it. He's become a town hero and institution. Do you think tort-"reform" hurts him when he goes to trial? Nope.

WEB SITES. Smart trial lawyers turn their web sites to good-works use. Rather than the usual transparent-greed sites such as the "We-*are-such-good-lawyers-and-we-will-win-your-case"* site, or the *"Look-at-my- picture-don't-I-look-professional!"* site, or the "*Here's me in my library of books I haven't opened in a decade*" site, or the *"Here's my great victories where I got*

[3] "Do the duty which lieth nearest to thee! Thy second duty will already have become clearer."

juries to give wads of money that other lawyers wouldn't have gotten," site, lawyers are now transforming their web sites into help centers.

If you do the same, then when jurors look you up – as they will – they'll see you are about caring and good works, not about marketing and greed. So fill your web site with lists of on-line and local injury support groups, books to help victims cope[4], and other help resources. Facts they need to know about. Your legal wares should be a page they reach by a secondary link. Don't worry; if they need you'll they'll find it. And jurors looking you up will see your attention to good works.

A caring trial lawyer in Wisconsin – Gordon S. Johnson, Jr. – has a good-works web site called *waiting.com*. It is for people who have loved ones in comas. The site comes up on the first or second page of a Google search. It is not the usual greedy, pathetic, and harmful attempt to cram legal services down some poor family's throat. Instead, it is an attempt to ease them, inform them, comfort them, and introduce them to a community of others in their same situation and to experts about comas. It includes Johnson's legal services, but almost as an afterthought.

And yes, he does get cases from it. But he serves the greater good by actually helping people, most of whom are obviously not potential clients.

Another good-works web site: icanmakeadifference.com. It's run by the Gary Martin Hayes law firm in Atlanta. And in association with Mothers Against Drunk Driving, Gary Martin Hayes runs public service ads against drunk driving. Hayes is even on the board of MADD. This *shows* (not tells) that he's about safety, not greed. That pays off in every trial. And it helps innumerable people.

A POTPOURRI OF GOOD WORKS

Now, you don't need the list that follows. On your own, you can figure out plenty of good works you can do. But to get your thinking juices flowing:

A number of firms give out bicycle safety helmets.

A rural western firm supplies a staff person every afternoon to serve as school crossing guide.

Your firm can provide free legal services for local social-help agencies or start-up schools. Or serve on the school's or agency's board and publicly seek support for it.

Run an "emergency assistance" hotline on your web site – where people in need can post their needs and people interested in helping can review the site often to see how they can help.

Look into what you can do in your community to help senior citizens, or the homeless, or areas that need neighborhood security programs, or food banks, or ... ad infinitum.

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[4] Such as *Fighting Back, the Rocky Bleier Story* – which has helped countless badly injured folks deal with their agony.

Run a December holidays booth or table at a local mall to collect presents or cash for local underprivileged kids.

Protect the public by providing taxi tokens to intoxicated patrons for a free cab home.

Team with other lawyers to do safety checks of public and business facilities. Report the results on your web site or in a newspaper column.

Become an actively involved supporter and fund-raiser for a worthwhile local charity. (Avoid anything controversial.)

Teach English to immigrants – free. Advertise to attract attendees. (Learn how to teach by Googling TEFL ("Teaching English as a Foreign Language"). You can become an expert in just a few hours.

Teach adult literacy classes.

Tutor kids or any other group that needs tutoring.

Provide continuing help to kids with illnesses, disabilities, or permanent injuries. (For an inspiring example, see the Epilogue to this article.) Team up with a local hospital. Provide help for social workers who deal with these problems. Underwrite in-hospital entertainment for the kids (or do it yourself, if you are entertaining enough to entertain kids). Sponsor in-hospital pet-visitation programs or rehab horse programs (for people, not horses). Help raise money for Sponsor or coach a local Special Olympics team. Provide free tickets to local cultural and sports activities for familes that can't afford them. Become a visible advocate for social agencies – MDDD, YM/WCA, shelters, etc.

Post on your web site the fact that hundreds of people needlessly die every day in American hospitals due to safety rule violations. Provide a list of ways people can protect themselves and their loved ones while in the hospital. Or choose any area of public danger. Explain the danger, and give advice in staying safe. For example, you can post safety tips on cars – new and used – for such things as child safety in the back seat. (Some cars are more dangerous than others for kids.)

Post a list of the dangerous streets in your community for bicycles.

Be openly available for free legal help when disaster -- flood, hurricane, etc. – strikes. Organize 25 lawyers across the state who will show up as first responders at the disaster site with the Red Cross or other state disaster relief officials. One state's trial lawyer's academy has already launched this program. The purpose is to help folks with their insurance companies and other legal matters that emerge from the disaster. Free, of course. Just showing people you are there to help soothes one of their greatest worries in such situations.

Get involved with the Bob Woodruff Family Foundation to provide needed support to the overwhelming number of returning brain-injured veterans.

Team up with two or three other trial attorneys to write a regular legal-advice column in a local minority-reader newspaper. (Great for marketing, and you'll provide an essential service.)

Team up with two or three other attorneys to do a weekly drive-time radio show for a local station. Cover topics such as interesting local trials and verdicts, guidance on how to stay safe in various situations (e.g. in hospital), legislative matters that can affect individuals, legal advice people need to know, etc.

Adopt a highway. Keep it spotless.

Help your local children's Guardian ad Litem program, or Friends of the G.A.L. They need and deserve help, your help will change young lives, and you will go to heaven.

If you advertise, 25% of your ads should be helpful, not just marketing pleas. For example, "We do not want to see you as a defendant in court, so please: *Don't text message while driving."* Or, "If you speed in a school zone we will come get you in trial. So slow down."

If you buy the back page of the phone book, a third of your ad should be a list of emergency numbers or some other useful service..

For a small ad inside the phone book, include a line or two that supports a local cause or delivers a selfless message: "Support Mothers Against Drunk Driving." Or, "Make trial lawyers obsolete: Do everything safely." Or, "Safety First. We already have enough business."

REJECTING CASES: There's a right way and a wrong way to reject cases. The wrong way is how it's almost always done. Debra Miller, one of my partners at Miller Malekpour & Ball, has a better way. It requires more than just saying "no." It requires sending folks away with hope and some real help.

For example, when rejecting someone, provide contact information and descriptive information about no-cost and low-cost support and assistance groups for folks with his or her kinds of injuries. Include area and on-line social and community services, and national resources (e.g., the Anxiety Disorder Association of America or the American Geriatrics Society Foundation for Health in Aging, etc.).

Ask your clients and past clients for other ideas: What has helped them? Relay those ideas to folks you cannot take as clients.

Ask your experts – doctors, psychologists and grief counselors – for ideas. Collect pamphlets, reading recommendations, and other resources. Describe available videos at the local library. Have your staff person compile all this. Have your most empathetic person unhurriedly review it all with the person you have to reject as a client.

Every would-be client comes to you for help. So even when you can't take the case, you still need to help. You have no moral right to waste their time and give nothing in return. You need to stop making people who are in fear and pain audition for you – unless you are prepared to give them something in return more than a chance you'll accept them. Stop the ghastly practice of turning people out without helping them – as if their fear, pain, anger, and loss are beneath your notice except when they can profit you. **When you turn away suppolicants without helping in some way, you have made them fruitlessly grovel.** Not a religion in the world allows this.

And obviously, it is not what you intend. But that is exactly how the rejected person and everyone they know perceive it. Result? For each rejectee, you create a small and vocal cadre in *your own community* who now "know" you are made of nothing but greed.

Think about how many such cadres have you created so far.

This means that most trial attorneys — *each one on his or her own* – have turned hundreds and even thousands of folks who were not initially tort-"reformed" into some of the most virulent tort-"reform" jurors. Maybe even on your jury. By the time they get there, you'll have forgotten them. They will never forget you.

So when you reject in the wrong way, you help the insurance companies, the chambers of commerce, and the corporations in the most effective possible way. Because as powerful as your good works can be, *bad works are even more powerful.*

And turning folks away in the wrong way is a profound, inexcusable, and public bad work. Very bad. So please, reject in the right way. Once most firms do that, we'll grow an army of grateful (and surprised) folks in every community – folks who, in return, will help our cause.

More importantly, you'll have done the right thing in the right away.

ORGANIZATIONS. Urge *and help* your state trial lawyers organizations and AAJ to do good works – or at least facilitate individual law firms to do them . The organizations either must make this as major a part of their activities as lobbying, or they will eventually perish along with the profession as we lose state after state and then the nation overwhelmed by draconian "reform" laws that render our profession a relic of the past. Organizations whine that they have neither the money nor the time – but that's an excuse. Facilitating and encouraging and even doing good works is neither expensive nor time consuming.

I have gone so far as to tell lawyers to resign from their Trial lawyer organizations if the organizations insist on focusing only on lobbying and lawyer education. ***Without a good works approach, that is a doomed approach.*** **Do all you can to make them add good works.** I have retracted my "resign" recommendation, because lobbying is become more and more important – even though it is a desperation activity that can only slow our demise, and that would be unnecessary by now if we'd been doing good works for the past ten years. If the public were on our side there would be minimal legislative tort-"reform. When corporations and

legislators tried to pass tort-"reform" legislation in Pennsylvania at the start of the last century, public reaction was so hostile that the legislators instead amended the state constitution to preclude any tort-"reform" laws.

SHOW THE WORLD. An outstanding attorney in one of America's great law firms heard me teach all of the above. "No!" she said. "My firm has done good works for years – and we still can't win a case!" She gave me an annual report of all their good works. Problem was, the public knew nothing about them. Among Jesus's first recorded words are these: "Neither do men light a candle and put it under a bushel, but on a candlestick; and it giveth light unto all that are in the house." Your good works are your candle, and we have a huge house to light.

Today, that firm lists its good works on its web site. It should be the site's main page, with everything else on sub-pages. But it's a start.

ON LINE: Speaking of web sites: Every political donation you make is easily found on line. Jurors often research this kind of information. No matter what candidate you donate to, it will offend some jurors, leaving them less willing to trust you or want to help you. So make your political donations in your kid's name, or some other name. Your political views are none of a juror's business.

Here's what is their business: Your visible, selfless, good works. They are the only tool that can regain the lost ground of almost 40 years of effective, powerful, well-financed, unanswered tort-"reform" attacks.

We can regain the field, but we'll have to deserve it. So as Nike says, Just do it.

EPILOGUE

Last year a lawyer[5] cornered me at a conference. "Ball!" He yelled. "You ruined my life!" I felt I needed no more of this conversation and started away. But he grabbed me and continued. He said, "Dammit, Ball, you told us to do good works. Near-at-hand works."

I looked around for accessible escape routes.

He continued: "I do cases for kids who are serious burn victims. I know that the hardest thing – beyond even the pain – is the disfigurement. It's awful for a kid to grow up with. So I started a summer camp for these kids. They get to spend close time with others in the same boat. They gain confidence. They learn how others handle it. The damn idea grew like kudzu. Now I got five burn camps. Takes half my time! I don't earn a cent from it! What the hell?!?"

Was he gonna punch me out?

Then he – New Jersey attorney Sam Davis – says, "*And I have never been happier in my life."*

[5] See http://burnadvocatesnetwork.org/. New Jersey's Sam Davis is the attorney. Send him money to help support the burn camps.

That gives us the gold standard. If enough trial lawyers get to that level, tort-"reform" in juries and in the legislature will devolve to a barely believable historical oddity. Result: fair settlements. Fair verdicts.

The alternative: If we rely on just the blather of words to try to persuade, or think that lobbying efforts do any more than – at best – slow the inevitable death of the profession, we are allowing our own demise. In the near future there won't be trial lawyers. Because once the poisoned third grows to half (eight or nine years away at the current rate) your work will be all but outlawed. If you think I'm crying that the sky is falling, keep a hard hat handy.

So get busy. Either that or get a book on how to do some other field of law. I assure you, I will not have written it.

Damages and the Reptilian Brain
(Introduction to the New Advocacy)

Ed – Breakout quote – please do not use at the beginning of the article. It does not make sense until later.

When the Reptile detects a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community. When there is more than one survival danger, the Reptile focuses on the most immediate.

By David Ball, Ph.D.

Background.
For nearly four years, three attorneys – Don C. Keenan (Atlanta, GA), James E. Fitzgerald (Cheyenne, WY), and Gary C. Johnson (Pikeville, KY) – and I have been investigating a part of the brain neuroscientists call the R-Complex, or "Reptilian" brain, and how it affects the kinds of decisions jurors are called upon to make.

Our impetus came from a southern beach where Don Keenan has a home. Soon after moving in, Don discovered that his next door neighbor is Karl Rove, one of the plaintiff's bar's arch-enemies. During what Rove probably thought was casual conversation, Keenan got him talking about persuasion. Rove particularly praised the work of marketing guru Clotaire Rapaille.[1]

Hearing about Rapaille, Keenan soon propelled us into the adventure of our lives. It took us through evolutionary science,

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[1] See, for example, Rapaille's book *The Culture Code*.

neuroscience, and an extensive series of participant-centered research projects across the country.

We began, as good research demands, with deep skepticism. And we had reason for skepticism: Though Rapaille and other marketers had long demonstrated that enlisting the Reptilian brain is marketing's most persuasive tool, and though Karl Rove & Co. are only the latest in a line of persuaders who have empirically proven the principle for thousands of years, marketers need to persuade only a few per cent of the population. And political persuaders such as Rove need only a bare majority. But trial lawyers need 75 to 100%. It seemed unlikely that the Reptilian brain could get us that high. But the mere possibility seemed worth the effort of finding out.

Rapaille's techniques provided our starting point. His techniques derive from the work of National Institute of Mental Health neuroscientist Paul D. MacLean, who developed the concept of the three-part ('triune') brain in humans. MacLean called the most primitive part 'Reptilian' because it is identical to the full brain of modern reptiles.[2]

The Reptilian Brain and Gene Survival.
The Reptilian part of the brain – which by now we simply and affectionately call 'the Reptile' – runs our autonomic life-functions. She (an arbitrarily chosen pronoun) creates, directs, and motivates our survival drives such as hunger, sex, and danger avoidance. She has no emotion, thought, or memory, but enlists those services from other parts of the brain to fight for your survival chances and the survival chances of your genes.

Whenever anything can potentially affect – even a little – those chances of survival, this most primitive thing in your head grabs full control of the entire brain. This includes control of your logical, emotional, and other decision-making resources. As soon as a survival danger crops up, the Reptile rearranges the brain's priorities, placing the Reptile's only concern – survival – on top.

Lineages in which survival concerns took a lower priority could not have survived the unforgiving macro-forces and micro-forces

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[2] *The Triune Brain in Evolution: Role in Paleocerebral Functions.* MacLean, Paul D. Springer, 1990.

of evolution.[3]

Survival traits.
Lions: claws. Cheetahs: speed. Skunks: big stink. Humans: the ability to make decisions using complex input and abstract analysis. This is how we survived eons of precipitously changing environments and hungry creatures stronger and faster than us.

The human brain can perceive, store, gather, weigh, and analyze information. Those sophisticated IT services enable the Reptile to select the safest available decision, which she'll then force us into.

Logic.
We like to believe we base our decisions on rationality and logic. Sorry. Logic is but a fragment of our brains. It controls little. When it comes to survival, logic is subservient to the Reptile. When the two conflict, logic either changes or is ignored. In other words, when people make survival-related decisions, they obey the Reptile, not logic, emotion, intuition, or abstract criteria such as 'justice.'

And the Reptile's imperative is that *safer – even a <u>little</u> safer – is the only acceptable choice.*

Enlisting the Reptile.
Not only rock-solid logic but facts, stories, bias-battling, and pleas for justice, emotion, and speaking eloquence are all easily defeated unless you get the Reptile on your side. To do that, you need to show two things: 1) *danger(s)* to the Reptile – dangers which are represented by what the defendant did – that connect to the juror and his family, dangers which 2) a full and fair damages verdict will *diminish* for the juror and his family. Result: the Reptile sees a proper damages verdict as her best available choice for survival – *even if it affects her survival only by a very small amount.* So the Reptile helps us in 'small' cases as much as she does in large ones.

Research Results:

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[3] See Williams, George C., *Adaptation and Natural Selection*; and Dawkins, Richard. *The Selfish Gene*. If you prefer, instead of evolution you can think in terms of 'Intelligent Design,' as long as you understand my explanation of the nature of the design.

Our research has shown the following:

1. The source of anti-plaintiff attitudes and biases, and how to remove them from the decision-making process.

2. How to develop new and effective litigation and advocacy techniques the defense cannot fight.

3. Why Reptilian trial advocacy throws out very little of what you already do. Instead it focuses and redirects you, like adding a telescopic laser-sight to a rifle.

For just one example – and you must use this in your next case – the research showed that physical pain as an element of damages is nowhere near as effective as showing how the injury has 1) interfered with *mobility* and 2) resulted in *loneliness* and *isolation.* This is because over the course of evolution, pain actually helps us survive, while lack of mobility and being alone are among the leading causes of death.

We usually just feel sorry for another's physical pain, but we never actually feel their pain. In contrast, we often *share the specific feeling* of another's impaired mobility (can't get home, can't escape danger, etc.) or loneliness (a lover leaves or dies, the good guy becomes a social outcast, someone faces the rest of his life alone, etc.) Shared feeling is immeasurably stronger than feeling sorry, and the two derive from very different parts of the brain.

Remember this when you're researching and framing your next case. This principle is basic to plays and movies (few center on physical pain), and should be to trials as well.

Tort-'reform.'

Reptilian techniques – dishonestly and cynically deployed – are almost alone responsible for the sickening success of tort-'reform' in trial and in the legislatures. The tort-'reform' campaign has persuaded a third of the public – and the proportion is growing – that lawsuits and trial lawyers endanger every family's medical care, jobs, and safety. These are survival dangers! So until you get the Reptile on your side, she will implacably drive the juror to fight you.

Years ago the work of David Wenner (Phoenix, AZ) and Greg

Cusimano (Gadsden, AL) confirmed that a number of common biases hurt our cases. For example, many jurors blame our clients for failing in their personal responsibility, as in "She should have gotten a second opinion." We have found ways to partly offset this bias – such as by saying, "Talk about *corporate accountability* instead." But even when this works, the tort-'reformed' Reptile simply substitutes a different bias or some other equally effective motivating force to control the juror's decision. As Rapaille says, the Reptile never loses. She will instantly deploy five other biases, attitudes, misperceptions, and fears for each one you counter.

Real reform.
Fortunately, the Reptile deploys those weapons against you *only when she considers a verdict for your side to be a threat to her.* As soon as she perceives that a defense-favoring verdict would cause a greater or more immediate threat, she deactivates those weapons.

This is true even about experience-based and situation-based attitudes, the deepest of feelings, and 'core values.' The Reptile deploys such things only when they help her. She abandons them when they don't. They are not continual conditions such as hunger.

After all, the Reptile did not survive evolution by allowing attitudes, biases, and 'core values' to interfere with her survival. To the Reptile, the *only* core value is survival, and it trumps everything else.

This is why tort-'reformed' jurors can love *Erin Brockovich*. It's why a White supremacist forgets his racism when he and a Black man need each other to get themselves out of danger (as dramatized in *The Defiant Ones*). The racism is not cured; it is merely suspended when it interferes with survival.

Understand this clearly: an attitude, bias, or 'core value' (and even the drive for justice) exists solely as a defense mechanism. When it can interfere with survival, the Reptile drops it like a hot potato. We saw this surprising phenomenon in session after session of our research, and have now been seeing it in trial after trial.

Fear.

At the heart of all this lies *fear*. Without tort-"reform" having profoundly scared a third of the jury pool about their own survival issues, the second-rate defense 'experts' and defense lawyers with bogus cases would not so easily outdo excellent plaintiff's lawyers with good cases and experts. Dollar verdicts would be full and fair, not tokens.

But unlike the purveyors of tort-'reform,' we have truth on our side. For example, here's one of an endless number of truths we can make effective Reptilian use of: The national death rate from medical "error" is 15 times higher than the national murder rate, vastly outweighing the supposed survival dangers the tort-"reform" movement has fabricated.[4] Obviously, knowledge of this fact would have a lot to do with what the Reptile will do in a med mal case.

Without violating the Golden Rule stricture, Reptilian advocacy shows that the kind of violation that hurt your client is an immediate and ongoing danger to the juror, a danger that can be diminished by a full and fair money verdict. The plaintiff's use of the Reptile in this way is exclusive, because the defense has no way to offer refuge from immediate or ongoing danger. In every case, we – and only we – can. And to the Reptile, immediate dangers always trump mid-term and long-term dangers, which includes all the dangers fabricated by tort-'reform.'

Once you have enlisted the Reptile to your side, the defense has only one practical tactic: attempting to make the judge prevent you from using Reptilian methods. For example, some venues such as parts of Florida bar community-safety arguments. In such circumstances, you can simply refrain from being explicit, or you can shift to other equally effective Reptilian techniques.

'Rules of the Road'

One focus of our ongoing research is to expand the arsenal of admissible Reptilian techniques. So, for example, our adaptations of Rick Friedman's and Pat Malone's landmark *Rules of the Road*[5]

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[4] http://www.fbi.gov/ucr/ucr.htm and *Fourth Annual Patient Safety in American Hospitals Study*. HealthGrades, Inc. 2007.

[5] TrialGuides. *Rules of the Road* is required reading for every plaintiff's attorney, including business, intellectual properties, and every other kind. Also see our extension of it:

provides the basis of one approach – even in stipulated negligence cases – to use the Reptile without transgressing local limitations. Properly used, the 'Rules' implicitly and easily elevate defendant error/mistake to rule violation that endangers the community.

Tentacles of Danger.
We call one primary technique 'spreading the Tentacles of Danger.' This technique intensely connects the defendant's dangerous conduct to each juror. It keeps the juror from seeing the danger as relevant only to other people. Your client's injuries become the concrete manifestation of the community danger of the defendant's violation. The injuries show the jury that such a danger is among us.

Here are some ways to spread the Tentacles of Danger:

> Q: Dr. Myexpert, not everyone has experience with childbirth. Please explain how violating the rule that the defendant violated in the delivery room is a dangerous way to practice medicine.
>
> A: Let me explain by using the example of an older person reporting chest pains to the emergency room .... [*and then have the expert provide examples of how the rule works in additional branches of medicine. This make the danger a community danger, rather than just a danger to babies and mothers during childbirth.]*[6]

Or,

> Q: Mr. Driver's Ed Teacher, the defense told the jury that a low-speed accident can't cause serious harm. What do you teach your students about that?
>
> A: I show them the state's statistics of how many people in cars are permanently injured every year by collision speeds under 12 mph. And I explain that the same impact could

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Reptile (Ball and Keenan), Chapter Six: "Safety Rules and the Reptile."

[6]You need not make an overt community safety argument for this to work. You are simply educating the jury about how the danger works by analogy to situations they are more familiar with. Analogy is always an acceptable means of explaining concepts.

> easily maim or kill pedestrians, and does all the time.

This helps show 1) that low-speed injuries cause harm to people in cars and 2) that everyone is at lethal risk from low-speed impact. So violating the rule requiring drivers to see what is there to be seen is a community menace. This impels the Reptile to use fair compensation to protect herself – even when you are not allowed to make that explicit argument.

Examples for closing:

> It's up to you to decide how far someone has to go in breaking the community's safety rules before you – as the community's representatives – decide he must pay full and fair compensation for the harm he's done.

Or (where allowed):

> If you give this defendant a pass for what he did, what do you think will happen next? What will others do in this community when they see what this defendant got away with?

Ordinary Care and Standard of Care.
Raleigh attorney and Duke law professor Donald H. Beskind points out that almost every venue has a case specifying that public policy tort law expresses, at least in part, the social need for community safety. This is precisely why the Reptile is our ally.

And here is how the Reptile and the law are in total agreement: **No one exercising ordinary care *needlessly endangers* anyone. It is not 'prudent' to needlessly endanger. For the same reason, there is no such thing as a standard of care that *needlessly endangers.***

Even the defense has to agree to this.

So to both the law and the Reptile, *the only acceptable choice for any particular goal is the available choice that carries the least unnecessary danger.* The second-safest choice, no matter how safe, is negligent – because it carries more danger than the safest. When there's a safer way, that danger is needless.

That is the imperative by which our species (and our laws)

evolved and survived.

So when a defendant claims his second-safest choice was "safe enough," your proper use of the law in this uniquely accurate way should give you a strong negligence win, along with the impetus for a full-dollar verdict.

This is just one of the many Reptilian techniques that totally alter the playing field.

You and the Reptile.

Once you have mastered Reptilian advocacy, every case – even the "smallest" – becomes important to the Reptile, whose only priority is survival safety. You will leave the Reptile with no survival reason to buy into any more bogus IME testimony or to deploy an anti-plaintiff bias or attitude or to do anything else that has been blocking your path to full justice. The usual shaky defense hat-pegs that have been killing us no longer hold hats, because those pegs no longer offer safety.

Instead, safety will lie solely in a full and fair damages verdict.

How Do You Learn?

Start by reading *Reptile.*[7] Then attend a seminar – some of which will be offered by AJA. And please join us at ResearchExchangePartners.com, where you will be the first to learn of new developments without having to wait for books and seminars.

The substantial repertoire of Reptilian methods is expanding almost daily both from our continuing research and from new ideas being sent in by lawyers already on board.

Once you're on board, you too must keep us up-to-date on your work and any new Reptilian approaches you come up with.

We've all been through the long night of tort-"reform" together. Now, working together, we are speaking truth to power in ways that power cannot survive. In a democracy, that is the very

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[7] *Reptile, the 2009 Manual of the Plaintiff's Revolution.* David Ball and Don Keenan. Balloon Press, 2009. Find seminar and workshops schedules at ReptileKeenanBall.com.

definition of justice.

– David Ball (Miller Malekpour Ball; Durham, N.C.) is a jury researcher and trial consultant, and America's best-selling trial-advocacy author. His *David Ball on Damages* will soon be in its third edition, and he has just released *Reptile*, co-authored with Don Keenan. Dr. Ball's background includes engineering, research methodology, physics, and a long career as a professional theater director and writer. In two decades of trial consulting he has taught and worked on criminal and civil cases in almost every state and in Canada, received the North Carolina Advocates for Justice Charles Becton Award for Teaching Trial Advocacy, and gained wide recognition for reshaping the course of plaintiff's advocacy. *Editor – if the bio is too long please give me the desired word count and I'll trim it.)*