Rules of the Road™

A Plaintiff Lawyer's Guide to Proving Liability

Second Edition
Revised and Expanded

Also by Rick Friedman

Polarizing the Case: Exposing and Defeating the Malingering Myth (Trial Guides, 2007)

Rick Friedman on Becoming a Trial Lawyer (Trial Guides, 2008)

Also by Patrick Malone

The Life You Save: Nine Steps to Finding the Best Medical Care—and Avoiding the Worst (Da Capo Lifelong, 2009)

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By
Rick Friedman
and
Patrick Malone

Trial Guides, LLC

Trial Guides, LLC, Portland, OR 97205

Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability
Second Edition—Revised and Expanded

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Printed in the United States of America.

ISBN: 978-1-934833-17-9

Library of Congress Control Number: 2010927680

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Jacket design by Theodore Marshall

Interior design by Laura Lind Design

This book is printed on acid-free paper.

Acknowledgments and Dedications

I am indebted to many people who generously contributed their time to help with this book: Kim Dvorak, Jeff Feldman, Gary Fye, Katie Kalahar, Jeff Rubin, Paul Scoptur, Jackie Shepherd, Trina Tinglum. It is as good as it is because of their help. It undoubtedly would be better if I had accepted more of their suggestions.

I must also thank Janet Crook, who is always watching my back, above and beyond the call of duty.

Finally, this book would not have been written but for my wife, Kirsten, who kept insisting I had something to say that someone would want to read.

I dedicate this book to the best trial partners anyone could ever want: Jeff Rubin and Dee Taylor.

—Rick Friedman

So many friends and colleagues in the plaintiff's bar have generously helped me to grow in this profession that I cannot count all of them, let alone list them here. I feel blessed and thank them all. Some nonlawyer special people (you know who you are) also have helped me a lot. My wife, Vicki, deserves the rest of the credit.

Dedication goes to our sons: Ian, Chris, and Brendan.

May 2010

—Patrick Malone

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This book is intended for practicing attorneys. It does not offer legal advice or take the place of consultation with an attorney who has appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment. Readers should also consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book), and make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

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Names of some defendants and witnesses have been fictionalized.

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Preface to the Second Edition

We've learned a lot in the five years since the first edition of this book was published. We've continued to try cases using the Rules of the Road, of course, and those experiences inform this edition. We've also taught seminars on Rules of the Road, which have allowed us to see where problems arise for lawyers using these methods for the first time.

More important, we've been the beneficiaries of hundreds of comments and suggestions from lawyers around the country, generously sharing their experiences with us, for which we are grateful. Many of their ideas show up in this edition.

Like those of countless other plaintiff's lawyers, our ideas have been picked up, polished, and refined by one of the great legal tacticians of our age, David Ball. Ball picked up an early copy of *Rules of the Road* and ran so fast we often lost sight of him. He immediately understood the power of this approach and brought his own energy and creativity to improving it. He saw things we did not and knew how to teach things we had trouble articulating.

In chapter 3, we have clarified the definition of an effective "Rule of the Road," and have explained the key distinction between Rules and principles. We also have new chapters:

- Chapter 5, "Why Rules and Principles Need to Be Kept Distinct" expands this discussion of why rules and principles need to be kept separate.
- Chapter 9, "Troubleshooting Your Rules" is intended to help both beginners and advanced students of the Rules system hone their case rules down to the most powerful set.
- Chapter 10, "Fitting the Rules into Your Case Story" talks about the interplay between case themes and rules, and how an effective set of rules can enhance a case theme.

- Chapter 11, "A Special Problem: Rules of the Road in Automobile Cases" explains the role of Rules in automobile cases, where the use of the Rules system can backfire if not used adroitly.
- Chapter 14, "Motions *In Limine* About the Rules" and appendix L, "Response to Motion *In Limine*" discuss motions *in limine* about the rules themselves.
- Chapter 15, "*Voir Dire*" discusses using the rules in *voir dire*.
- Appendix M, "Samples of Rules in Different Types of Cases" will hopefully stimulate the creative process in our readers.

Throughout the book, we offer new examples that we hope will make points clearer and show the varieties of settings where our approach can be used.

We continue to believe what we said in the first edition: If properly executed—and if you have a meritorious case—there is no defense to the Rules of the Road approach. We hope this second edition helps you win the cases that deserve to be won.

Introduction

Has this ever happened to you? You are an attorney for the underdog, representing someone hurt by the indifference, carelessness, or greed of a large institution. You are on the right side of the case. Morally and legally, you deserve to win. You believe you are scoring points with the judge and jury. The other side's arguments are weak and disorganized.

And then you lose.

How did that happen?

We think we have some answers, and some ways to keep it from happening again.

The defense wields three weapons to defeat plaintiffs' cases that should be won:

- Complexity
- Confusion
- Ambiguity

Complexity, confusion, and ambiguity are insidious enemies. They creep up when you are not looking. They rarely attack head-on. They are particularly abundant and pernicious in complex cases such as insurance bad faith or medical malpractice. This is because both the facts and the jury instructions in these cases

are often complex, confusing, and ambiguous. But these enemies appear in simple cases too.

Sometimes, complexity, confusion, and ambiguity are inherent in the case; other times, they proliferate due to a conscious defense strategy of confounding the jury and judge with endless, immaterial detail. In either event, you must defeat complexity, confusion, and ambiguity, or they will defeat you.

In this book, we set out a technique to neutralize these three defense allies and bring clarity and focus to any case. It has helped us win worthy cases that otherwise might have been lost.

We wrote this book for our fellow attorneys who represent consumers, patients, and other real people in lawsuits brought to redress injustice and injury. Between us, we have more than four decades of experience preparing and trying cases. We have tasted the ashes of unfair defeat. We have also enjoyed great successes. We love our profession, and we chafe at the untruths peddled regularly these days by the rich and the powerful who don't like it when we hold them accountable in a court of law. Every time our side loses, the other side harrumphs that another frivolous lawsuit has flamed out. Most of the time, we think the opposite is true: frivolous defenses have triumphed because of complexity, confusion, and ambiguity.

Here is a road map for this book.

- Chapter 1, "Defining the Problem," defines the problem of complexity, confusion, and ambiguity in some detail. The core problem stems from ambiguous liability standards that permeate jury instructions. Remember the "reasonable person"? What does it mean?

- Chapter 2, "Solving the Problem," introduces our solution: the Rules of the Road. These are the specific, concrete liability standards that you must discover—and then articulate—from the first interview with a prospective client through to the posttrial motions and appeal.

- Chapter 3, "Identifying the Rules of the Road," focuses on finding and defining the Rules of the Road for any case.

The hunt for good Rules of the Road must range far and wide: from the defendant's files to the public library to statute books and regulatory pamphlets.

- Chapters 4–13 show how to develop the Rules. We cover the initial case investigation, writing the complaint, and working with experts; then we move through discovery, pretrial motions, and the trial. Along the way, we cover expert preparation, depositions of corporate spokespersons, and the construction of an opening statement. You will find nuggets on the killer interrogatory, how to cross-examine an opposing expert with a learned treatise, and the best preventative to jury nullification.

- Chapters 14–19 show how to apply the Rules from *voir dire* and opening statement, through direct and cross-examinations and closing arguments. We add some final thoughts in chapter 20, which includes a list of other essential reading for plaintiff's lawyers.

Ultimately, this book is about how to breathe life into ambiguous legal standards and create an indisputable standard for everyone—judges, juries, and defendants—to see. The standard must be as clear as a double yellow line on a highway.

The Rules of the Road techniques can help you focus your own thoughts and efforts and thus focus the reasoning and decision making of the judge and jury. It can *help* you work more productively and effectively—but you still have to do the hard work.

A few disclaimers and explanations are in order:

- Our examples come from actual briefs, depositions, and trial transcripts. The examples illustrate how a Rule or principle works, leaving you to adapt the concept for your own cases.

- Because most of the examples are from actual litigation materials, we elected to present them unvarnished and uncorrected, as they appear in the official court records. The impression some trial educators give—that everything must be executed with perfection in the courtroom—is not

only misleading, but inhibiting and harmful. This is a messy business we are in. If we think we must be perfect, we may be unwilling to take the risk of looking messy—a risk we must often take if we want to win. So you will see bad grammar, awkward questions, and a fair amount of fumbling.

- This book presumes you either know the basics of trial practice or are learning the basics from other sources.
- Names of defendants and witnesses have been changed to let the publisher sleep better at night.
- We have tried to communicate what we think you need to know about the Rules of the Road as directly and efficiently as possible—with a minimum of anecdotes.

However one war story is worth repeating, because it really started this book. Rick Friedman tells it now:

> It was 1996. I was trying an insurance bad faith case. It was going well. Our expert witness explained to the jury how and why the claims handling was improper. In cross-examination, the claims handlers were evasive.
>
> But I was uneasy. I had tried many cases by this point in my career, but this was only my second bad faith case. I had been uncomfortable in the first one too. In both, I felt like I was punching a paper bag or trying to climb a smooth greased pole. Did the jury understand what we were proving, how bad this conduct was? It didn't seem to.
>
> Before closing argument, I had a three-day weekend to think about this problem. I was frustrated. I thought and thought and thought. What was different about bad faith cases that made me so uncomfortable? And then it came to me.
>
> When trying other types of cases, I had always been able to hold the facts up alongside a standard and show the jury that the standard was or was not

> violated. In criminal cases, the standards are clear: "criminal intent" is defined; "deadly weapon" is defined. In employment cases the standard is found in specific contract or statutory provisions. In traffic cases the negligence standard is vague—what a reasonable person would do—but everyone knows—or thinks he knows—what a reasonable person would or would not do while driving a car. In bad faith cases, the standard is also vague—was there a reasonable basis for the company's actions? Jurors (and most judges) lack much knowledge of what a reasonable company would do in adjusting a claim. I was faced with the three horsemen of defeat: complexity, confusion, and ambiguity.
>
> The answer I supplied to the jurors was what they understood and brought with them into the courtroom in any traffic case—the Rules of the Road. I defined "reasonable basis" for the jury in a way that the defense could not dispute or avoid.
>
> When judges and juries learn the Rules of the Road of insurance claims handling, there is no ambiguity or confusion about the wrongfulness of the defendant's conduct.
>
> That weekend, I took the uncontested statements of my expert and the admissions of the defendant's experts and claims adjusters and constructed my first Rules of the Road chart for the jury.[1] The result was a substantial verdict for the plaintiff,[2] and the beginning, for me, of a new approach to trying cases.

A final word: some have asked why write a book and possibly reveal these secrets to the defense bar. We believe there is no effective defense to this technique. It cuts through subterfuge and evasion; that means it will always help plaintiffs with worthy cases and can never be used to hurt them.

---

1. See appendix B, "Sample Insurance Bad Faith Rules of the Road."
2. *Ace v. Aetna*, 139 F.3d 1241 (9th Cir. 1998).

1

Defining the Problem

The word "reasonable" turns up so often in civil jury instructions on liability that it can become invisible to the plaintiff's lawyer. This is where the problem takes root.

Consider the following:

- In medical malpractice cases, the key instruction asks the jury to measure the defendant's conduct in comparison to what a "reasonably prudent" or "reasonably competent practitioner" in the same field would have done.
- In product liability cases, the jury is asked to determine if the product was "unreasonably dangerous" or if the manufacturer failed to act in a "reasonably prudent" way.
- In most states, the first-party insurance bad faith jury instruction will be similar to Arizona's pattern instruction as follows:[1]

1. Arizona bad faith law is among the most supportive in enforcing policyholder rights. The problems illustrated by the Arizona bad faith instructions are even worse in many other states.

> There is an implied duty of good faith and fair dealing in every insurance policy. The plaintiff claims that the defendant breached this duty.
>
> To prove that the defendant breached the duty of good faith and fair dealing, the plaintiff must prove:
>
> 1. The defendant intentionally [denied the claim] [failed to pay the claim] [delayed payment of the claim] *without a reasonable basis* for such action; and
>
> 2. The defendant knew that it acted *without a reasonable basis,* or the defendant failed to perform an investigation or evaluation adequate to determine whether its action was supported by a *reasonable basis.*[2]

So what does it mean, "reasonable"? Look it up in the dictionary,[3] and you will find a wide range of meanings:

- Showing sound judgment
- Rational
- Moderate (as in a "reasonably priced house")
- Conforming with established standards or rules[4]

There's the one we want: "conforming with established standards or rules."

So we have two imperatives that require us to focus carefully on this ubiquitous word "reasonable." First, we need to show the jury that in the legal context, reasonable refers to "established

2. RAJI (Civil) 3d Bad Faith 1, emphasis added.

3. By the way, we've all heard about juries who used, or at least asked for, a dictionary in their deliberations. How often does this happen because the lawyers have left the jury at sea without good definitions of the critical words they are asked to apply?

4. This one can be found in a list of thesaurus equivalents for "reasonable" at http://www.thefreedictionary.com.

standards or rules." Second, we need to pour content into those rules. If we fail to meet both imperatives, the complexity, confusion, and ambiguity of the case threaten to overwhelm us.

Let's see how this can happen in insurance bad faith cases. The reasonable-basis instructions allow defense arguments like these.

Disability Case

It is true that both of the plaintiff's treating doctors sent letters stating she was disabled. But the question for you to decide is not whether or not we made the right decision; the question is whether we acted in bad faith. The judge will tell you in his instructions that we are only guilty of bad faith if we acted with *no reasonable basis.*

It is true there are 1,000 pages of medical records, spanning four years that support the proposition that the plaintiff was disabled, but remember Dr. Smith's 9/25/04 note: "Unclear why she hasn't improved by now." That gave us a *reasonable basis* to [delay payment and investigate further] [ask for an IME] [deny the claim]. Maybe, with 20/20 hindsight, you can say we were wrong, maybe the claims people here—who are human beings, like you and me—used *bad judgment,* but we are not guilty of acting without a *reasonable basis*.

Uninsured-Motorist Case

The plaintiff claims that her injuries were caused by the accident. But in none of these thousand pages of medical records is there a single entry that says this accident caused her herniated disc. It was *reasonable* for us to question this.

Property Case

> When the plaintiff signed her proof-of-loss form under oath and stated that her couch, which we know was worth only $900, was worth $1,000, we were on notice that this might not be an honest claim. We had a *reasonable basis* to be skeptical. We had a *reasonable basis* to request more supporting documentation on her claim. We had a *reasonable basis* to take seven years to adjust a $10,000 claim.

In a third-party bad faith case, the Arizona jury instruction has a "prudent insurer" standard. This is even worse than "reasonable basis." Can't you hear the defense arguments? "We can't be throwing our money away. We were just being prudent."

You get the idea. Even the slowest defense lawyer can recognize that these concepts of "reasonable basis" and "prudent insurer" provide safe harbors for egregious insurance-company conduct. Why? Because "reasonable basis" and "prudent insurer" are *ambiguous* standards. So are the concepts of a "reasonably prudent" doctor or an "unreasonably dangerous" product.

Two things can happen when the jury is asked to apply an ambiguous standard. First, the jury may be confused. Faced with a confusing situation, most of us prefer not to act—to wait. Jurors are no different. To render a verdict for the plaintiff, the jury needs to be confident, willing to act. A confused jury is rarely a plaintiff's jury.

Second, the jurors are free to invent their own definition for the standard—in this instance, reasonable basis. There may have been a time—before corporate America bombarded us with antiplaintiff propaganda—when jurors were inclined to define an ambiguous standard in a way favorable to plaintiffs. Those times are gone and are unlikely to return in our lifetime. Now an ambiguous standard is like a magnet, attracting antiplaintiff slogans, beliefs, and stereotypes. Even those jurors who would like to rule in your favor will have a hard time resisting reasonable basis arguments like those illustrated above.

As already noted, this same problem often arises in personal injury cases. Most jury instructions in negligence cases say something like: "Negligence is the failure to do something a reasonable person would do under the circumstances, or doing something a reasonable person would not do under the circumstances." Again, we are back to the problem of reasonableness.

This may not be a problem in automobile accident cases because most jurors think they know what a reasonable driver would do in specific circumstances. (This is why the Rules approach can be problematic in automobile cases; see chapter 11.) But you don't have to stray very far from typical auto cases to have the concept of reasonableness create ambiguity problems.

Here's an example from a case Rick handled a few years ago. This fact pattern will be used as an example throughout the book to illustrate various points.[5]

An eight-year-old girl lived with her family on a rural two-lane road in Alaska. The speed limit was 50 mph. To get to school, she would leave her house (A), walk down her driveway, and cross the road to the designated school bus stop (B). She had been instructed by the bus driver to be on the (B) side of the road before the bus arrived.

In this area of Alaska, it is dark until nine or ten o'clock in the morning for many months of the year. The roads are often icy.

One dark winter morning, while crossing the road, she was struck by a car (C) traveling approximately 55 mph. The school bus was nowhere in sight.

The claim against the school bus company focused on its placement of the school bus stop across the road from the girl's house and its requirement that she had to cross the road to get to her stop, *before the bus arrived*. The plaintiff argued that the stop, or student waiting area, should have been on the house side of the road, in the vicinity of (D). The bus driver should then have either picked her up on that side, while driving west, or alternatively, if driving east, should have stopped, displayed the stop sign, put on the flashing lights, and waved her across to the (B) side.

5. Refer to Figure 1-1 as you read the description of the case.

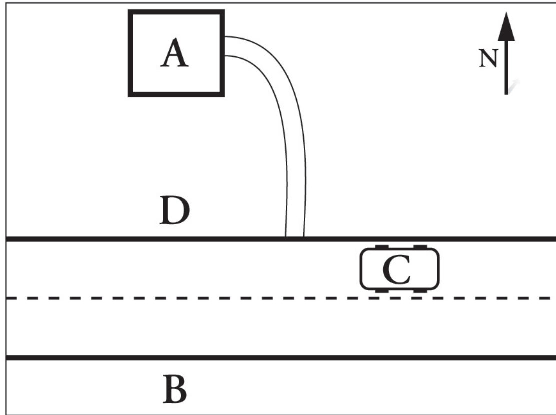

Figure 1-1

The bus company claimed it was reasonable to put the stop at (B) because there was a wider shoulder there, making it a safer waiting and stopping area. It was also reasonable to put the stop there, they claimed, because that was the most efficient place for it. The bus needed to travel east on the road to get to the school. To travel west first, so that students would not have to cross the road, would result in longer bus rides for the children and more expense for the school district. In addition, with the stop at (B) and the student already across the road, the bus could simply travel down the road, picking up students on the (B) side of the road, reducing traffic delays that would come from having to wave students across.

This is a difficult liability case against the bus company in almost any part of the country. The typical reasonableness negligence instruction makes it particularly hard. It might have been better to put the stop on the other side of the road, but can we really say the bus company's decision was *unreasonable*?

The defense will argue the bus company could have done several things. Each had positive and negative aspects. Each carried a cost and a possibility of injury. The company simply did its best to choose from among reasonable alternatives.

Here's another example from a medical malpractice case. A fifty-three-year-old man who had just eaten a heavy meal of spicy

food went to the emergency room with chest pain. He hoped it was just indigestion. The harried emergency room doctor looked him over quickly and agreed. The man dropped dead a few hours later of an undiagnosed heart attack. The "diagnosis" of indigestion was certainly reasonable for the victim to have entertained. Why not for the doctor too?

So there you have the problem: ambiguous or ill-defined liability standards strongly favor the defense—and many of our most difficult cases involve ambiguous or ill-defined liability standards. The more complicated or confusing the facts, the more difficult the problem.