Praise for *Winning Medical Malpractice Cases*

"This book is a gift to victims of medical malpractice and their attorneys. Even experienced plaintiffs' malpractice lawyers will learn a great deal from the authors' observations, explanations, and practical advice. This is a wise and useful guide to the representation of clients in medical malpractice cases."

—Stephen Wizner, dean of faculty, National Board of Legal Specialty Certification; William O. Douglas Clinical Professor Emeritus of Law and professorial lecturer, Yale Law School

"I started putting sticky markers on pages where I wanted to go back and make note of a nugget that I wanted to remember for sure. Before I knew it, I had used up a couple of pads of stickies! That's how many great new ideas I found in here, and I've been trying medical malpractice cases for forty-two years."

—James Bostwick, past president, International Academy of Trial Lawyers, member of the Inner Circle of Advocates, *Best Lawyers* Trial Lawyer of the Year in Medical Malpractice

"Rick Friedman and Patrick Malone's original *Rules of the Road* book was a breakthrough in litigating personal injury cases and fighting against those who would destroy our tort system. This follow-up book by the outstanding Patrick Malone is an informative and important work that helps bring their powerful technique to the medical malpractice field, where those who are injured face the largest of stacked decks."

—Charla G. Aldous, member of the Inner Circle of Advocates, past recipient of the Trial Lawyer of the Year award for the Texas Chapter of the American Board of Trial Advocates

"An essential new book. The copious real-life examples and analysis show how any well-prepared lawyer can create an algorithm to guide the jury toward a win for the deserving plaintiff. This book is a must before starting work on your next malpractice case."

—Michael Koskoff, president of the Inner Circle of Advocates

"Any lawyer who has tried a malpractice case against Patrick Malone is apt to comment, 'You can't outwork him.' In this book, this consummate trial advocate demonstrates that he not only works harder, but smarter too. The examples from actual cases give those who handle cases of medical negligence an invaluable shortcut in their preparation and a masterful battle plan for success."

—Jim M. Perdue Sr., distinguished adjunct professor, University of Houston Law Center; author of *Winning with Stories: Using the Narrative to Persuade in Trials, Speeches and Lectures, Who Will Speak for the Victim?* and *I Remember Atticus: Inspiring Stories Every Trial Lawyer Should Know*

"A superb service in providing attorneys with sound and tested practical wisdom which will allow them to succeed in bringing justice to their clients. This is required reading for anyone who represents victims of medical negligence."

—Kathleen Flynn Peterson, past president of the American Association of Justice; partner, Robins, Kaplan, Miller & Ciresi, LLP

"Every reader of this book will gain practical tips into all aspects of courtroom litigation. Malone manages to make the reader understand what a jury will be thinking as evidence is presented, and he demonstrates how persuasion can be done more effectively in every facet of the trial."

—Judith A. Livingston, first woman and youngest admitted member of the Inner Circle of Advocates, named 2011 New York Malpractice Lawyer of the Year

"Pat Malone and Rick Friedman show how the Rules of the Road [technique] applies to medical negligence cases. They truly take the reader from theory to practice. But most important, they show by example what all those who advocate for patients strive to achieve—taking the seemingly complex and reducing it to its most essential, simple, easily understood form."

—Ed Lazarus, trial consultant and litigation coach, Winning Works, LLC

"Pat Malone has taken fundamentals of persuasive communications and placed them into the critical framework of what juries value and believe about our medical care system."

—Congressman Bruce Braley, past president, Iowa Trial Lawyers Association

"The blending of the Rules of the Road into specific cases, from voir dire through closing argument, is handled brilliantly. This book is an invaluable tool for all trial lawyers. I highly recommend *Winning Medical Malpractice Cases: With the Rules of the Road Technique* to any trial lawyer interested in exploring innovative ideas and techniques which will most importantly inure to the benefit of our clients."

—Joseph A. Power Jr., past president of Public Justice
and the Illinois Trial Lawyers Association

"Pat Malone's book is a must-read for the beginner trial lawyer and the seasoned practitioner. It provides a 'how-to' guide from a master in the field of trial advocacy, brimming with helpful tips and great ideas on every page."

—Tom Moore, two-time recipient of the Lawyer of the Year
designation from the *National Law Journal*

"A breakthrough for medical malpractice trial lawyers. Malone and Friedman's book has so much wisdom to digest that I'm reading it again and again."

—James Bartimus, fellow of the American College of Legal Medicine,
International Academy of Trial Lawyers,
and International Society of Barristers

Winning Medical Malpractice Cases

With the Rules of the Road™ Technique

by

Patrick Malone

with Rick Friedman

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Also by Patrick Malone

Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability

The Life You Save: Nine Steps to Finding the Best Medical Care—and Avoiding the Worst

Also by Rick Friedman

Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability

Polarizing the Case: Exposing and Defeating the Malingering Myth

Rick Friedman on Becoming a Trial Lawyer

Moral Core Advocacy: Finding the Heart of Your Case (CD/DVD)

Winning Trial Strategies: Framing Issues and Attitudes for Trial (DVD set)

Stop Your Whining and Go to Trial (CD/DVD)

To my wife, Vicki, who made it all possible

—Patrick Malone

Contents

Publisher's Note

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, experiences, and judgment. Readers should also consult applicable rules, regulations, procedures, cases, and statutes (including those issued after this book's publication) and make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

For the case presented in part 3, *Jameson v. Lewis,* the names and other identifying details of participants, litigants, witnesses, and counsel (other than the authors of this book) have been fictionalized.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

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Foreword by David Ball

First, this book is by no means solely for medical cases. Its guidance applies to every kind of case, so don't be deterred by the title.

Second, lawyers call my partner or me almost every day for help developing and applying Rules of the Road. We start by asking callers what Rules they have in mind. We quickly learned that what seems easy is not. For a variety of reasons, most trial lawyers—including first-rate ones—need all the help they can get in developing and using the Rules of the Road without falling prey to dangers and misunderstandings. Lawyers also call Pat Malone and Rick Friedman—to whom every trial attorney and plaintiff's trial consultant must forever be indebted for writing *Rules of the Road*—for help with the Rules, so Pat and Rick have learned what my partner and I learned: it's harder than it looks. So we can all say in chorus, "We thought this would be easy, but it ain't!"

Let me amend that chorus. It ain't so easy when you first try it, but as you work on it with guidance, the Rules of the Road become one of the easiest powerful trial tactics we have. At the start, the Rules of the Road carry a "don't try this on your own at home" warning.

That's why it was not enough for Rick and Pat to have written their landmark *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*. When someone has written any great trial strategy book—and *Rules of the Road* is certainly among the greatest—it behooves the author(s) to provide means of follow-up. This means seminars, workshops, conferences, and—as in this case—follow-up books that take concept into practice. So far, Rick and Pat have done more than their share of seminars, workshops, conferences, and now—with *Winning Medical Malpractice Cases with the Rules of the Road Technique*—they provide a worthy and worthwhile follow-up book. It's a candid look inside the minds of two of the nation's finest trial lawyers applying Rules of the Road to their own cases, taking us beyond "what to do" and

into "exactly how to do it." They model the ways they prepare the case, do their openings, take testimony, and sum up.

Are the Rules of the Road really important enough that you have to go to the trouble of two books? Well—yes! Mastery of the Rules of the Road is a sine qua non of competent plaintiffs' practice. Rules take jurors from a "lawsuits are bad" to a "sue for justice" stance in the space of a few minutes; they even make some jurors want to yank the licenses of offending doctors and other professionals who transgress the Rules of the Road. This is because rules like these, since long before the dawn of history, have been humanity's primary guide for behavior. The Rules of the Road appeal not merely to our logical sense, but even more to the most fundamental parts of our decision-making brain. And the Rules help us discover the holy grail of good advocacy: extreme simplicity. With well-developed and presented Rules, we forever get rid of complex medical, financial, engineering, legalistic, and scientific trials. In their place we have only simple cases—cases that focus almost entirely on the clarity of what the defendant did wrong, why it was wrong, and how it caused harm.

This is why I tell attorneys that if they are not thoroughly familiar with the Rules of the Road, they need to stop taking new cases until they are. And they need to pursue every possible means to develop mastery-level skills with the Rules. Trial lawyers need the Rules of the Road for every size and kind of case from (the badly titled) "MIST" (minimum impact, soft tissue) cases, through cases involving every level of physical, emotional, and mental injury, to cases dealing with complex commercial litigation, intellectual properties, and civil rights. Every wrongful act that causes needless harm is, in some significant way, a voluntary violation of a safety or protection rule. And every such violation (by a defendant, though not necessarily by a plaintiff) will, properly deployed, meet with juror disapproval and provide robust motivation for jurors to decide the case—including damages issues—the plaintiff's way.

Many lawyers and trial consultants still don't quite know how to use the Rules of the Road, so they not only make bad choices, but blather uninformed advice to their colleagues. By doing

so, they are breaking the Rule that says, "Do not teach something until after you know how to do it." With *Winning Medical Malpractice Cases with the Rules of the Road Technique,* you will be taking a great stride in learning how to do it, you will be better positioned to take advice and support from others on how to do it, and you will have a lot more justification for telling your next potential client that you are indeed the lawyer he or she needs.

One final but important note: the Rules of the Road interlock with every other good approach to advocacy. The Rules are fundamental to Reptilian advocacy and *David Ball on Damages*. Whatever your current approaches may be, a skilled use of the Rules of the Road will make them even more useful. Please understand that we are all engaged in a great battle with forces that seek—and are dangerously close to—the shuttering of America's civil justice system. We are in this together. In courtrooms we are now winning together. And the Rules of the Road help bind us together. Use this current volume to start making yourself a Rules of the Road expert, please—it is a matter of the survival of us all.

—David Ball
November 2011
Durham, North Carolina

Preface

Here is how I structured this book. Part 1 introduces the problem—the epidemic, we could say without exaggeration—of patients losing far more than their fair share of medical malpractice trials. I discuss how plaintiffs' attorneys can improve their chances by using the Rules of the Road techniques and framing their cases to fit core values and beliefs of average Americans about the health-care system and the medical profession. The ideas in this introduction come from my own work and that of some of the most successful plaintiffs' attorneys in the country, members of the Inner Circle of Advocates.

Parts 2, 3, and 4 give extended examples of how Rick Friedman and I have achieved success using the Rules of the Road and related techniques in three of our own trials. Part 2 features the case of *Wood v. Tzeng,* one of my surgical malpractice cases. I include the opening and closing statements, the direct examination (and voir dire cross-examination) of the plaintiff's expert, the cross-examination of the defendant surgeon, and the cross-examination of the defendant's two surgical experts.

Next, in part 3, is *Jameson v. Lewis,* a birth-injury case that Rick Friedman tried until his adverse examination of the defendant brought a mid-trial settlement. Excerpted in this book are the voir dire, showing how Rick explored Rules of the Road ideas with potential jurors, the opening statement, and the defendant's examination.

Part 4 sets out another case of mine, *Semsker v. Lockshin,* a delayed diagnosis cancer case against a dermatologist and a family practitioner. Their patient died from what is known in medicine as a "handoff error," a miscommunication between a specialist and a primary-care doctor. I include both defendants' adverse examinations and the direct examination of the plaintiff's experts in dermatology and primary care (showing how I explained Rules of the Road for each defendant with both the experts and the defendants on the stand) as well as opening and closing statements.

In all three trial transcript sections of this book, Rick and I give commentaries to explain our tactics and strategies at each of the crucial steps in these trials. You'll see our thoughts and ideas appear throughout the transcripts:

[Text like this shows what we were thinking, either at the time or in hindsight, to help interpret the trial for you.]

The trials featured in this book went reasonably well, but we do not hold them up as unalloyed triumphs. You will see plenty of missteps and stumbles. When we wish in hindsight that we had done something differently, we try to point that out and explain why. If failure is a better teacher than success, we've certainly had occasion to be taught much. In the *Semsker* case, for example, we won a policy-limits settlement with the internist defendant just before closing argument, and then won a verdict against a secondary dermatologist defendant, but the jury voted against us on our main case against the primary dermatologist. We give our thoughts on why this happened at the end of part 4.

Part 5 of the book explores the nuts and bolts of malpractice advocacy from client and case selection through trial preparation. You will find advice from leading malpractice attorneys around the country on critical aspects of winning these difficult and demanding, but very satisfying, cases.

I close the book with a final thought and then with some suggested reading completely unrelated to medical malpractice, but quite interesting for any student of how people make important decisions.

—Patrick Malone

Acknowledgments

I want to thank the members of the Inner Circle of Advocates, perhaps the premier plaintiffs' attorney organization in the United States, for wise advice, inspirational example, and generous support, without which this book would never have seen print. Special thanks to Inner Circle members Mike Becker, Mark Bocci, Dennis Donnelly, Gary Fox, Don Keenan, Jim Leventhal, Paul Luvera, Randi McGinn, Brian McKeen, Liz Mulvey, and Steve Yerrid, who let me steal/borrow some of their secrets to success.

I also want to thank Don Beskind, Jim Lees, Brian Nash, Lisa O'Donnell, and Jonathan Petty for their insightful ideas and generous help.

A special tribute to two fine attorneys with whom I tried two cases featured in this book: Jon Thornton and Leonard Dooren. Jon and Len embody three attributes that I think are essential in any successful plaintiff's lawyer: optimism, perseverance, and courage.

Except where otherwise indicated, quotations from trial attorneys in the text are based on personal communications between me and the person quoted. I thank Dennis Donnelly, Jim Lees, Paul Luvera, Randi McGinn, Liz Mulvey, and Brian Nash for graciously granting permission to quote from our communications.

—Patrick Malone

PART ONE

What Matters and What Doesn't

1

Why We Lose and How We Can Do Better

Why do patient advocates lose so many medical malpractice trials? And what can we do about it? Those two questions inspired this book.

The statistics are daunting. Three of every four verdicts in malpractice trials favor the defendant. We wish we could take comfort that those numbers might be skewed because insurers select those cases they want to try and settle the rest out of court. But the fact is that the majority of claims made to large malpractice insurers—78 percent in one major study of fifty-state data published in 2011[1]—are closed with no payment to the plaintiff. That's no payment—as in zero dollars.

1. Anupam Jena et al., "Malpractice Risk According to Physician Specialty," 365 *New England Journal of Medicine* 629–36 (2011).

At the same time, an ever-swelling number of families need the help of patient advocates[2] to hold health-care providers accountable and help prevent harm to others. The epidemic of preventable injuries in the U.S. health-care system shows no signs of abating. The latest evidence estimates that one in three patients admitted to hospitals experiences a medical mistake, and the cost of fixing the harm caused by these errors adds up to $17 billion a year.[3] The familiar number of 98,000 preventable deaths from medical errors per year understates the death toll by at least half.

Add to that the run of headlines about the health-care industry: Big Pharma corrupting academic medicine with million-dollar payoffs disguised as speaking and consulting fees, doctors cashing in with high-volume back-surgery mills, and wave after wave of patient safety scandals in kidney dialysis, radiation therapy, and hip implants, to name but a few. The need for skilled and passionate patient advocates has never been greater.

One undeniable thumb on the scales of justice has been the campaign by the U.S. Chamber of Commerce and its allies to demonize plaintiffs, their attorneys, and tort lawsuits in general. The "white coat" marches on state legislatures with the message that lawsuit accountability threatens patients' access to quality medical care—the opposite of reality—have also hurt.

Yet here is a curious fact. Talk to the top attorneys who do malpractice work day in and day out, and you will find success rates that are quite different from, really the reverse of, the national averages. They win three of four trials, or better, and

2. Most readers of this book are patient advocates, but likely seldom describe themselves that way. The term has been corrupted by hospital managers to refer to a hospital employee who acts as a go-between when some controversy has arisen between the patient's family and the hospital staff, but whose ultimate loyalty lies with the hospital. For reasons given below, I believe words matter and we should recapture this term for the true patient advocates who are solely devoted to their clients and have no conflict of interest.

3. The journal *Health Affairs* published these and other scary numbers in a special issue in 2011 funded by the Robert Wood Johnson Foundation; http://healthaffairs.org/blog/2011/04/07/new-health-affairs-hospital-errors-ten-times-more-common-than-thought/.

hardly ever close a case without putting money in their client's pocket. How do they do it?

Rick Friedman and I have sat at the feet of some of the masters of the plaintiffs' bar over the last decade in the Inner Circle of Advocates. We have learned their winning techniques and have developed some of our own. The Rules of the Road concept, which Rick Friedman first tried in an insurance bad-faith case, adapts well, as it turns out, to medical malpractice cases.

In this book, we use extensive excerpts from trial transcripts to show by example how the Rules of the Road method works in malpractice cases. Just as useful to you, we hope, will be the other methods shown in these transcripts that we learned from trial masters. Some of these techniques fit hand in glove with the Rules of the Road method, such as the Reptile concept pioneered by Don Keenan and David Ball.[4] Others are trial advocacy concepts that can work in any case, but seem to fit especially well with malpractice advocacy.

Before we jump into the demonstration of specific techniques in parts 2, 3, and 4, I want to sketch out in this introductory chapter some ideas about why so many meritorious cases are lost, how we can do better, and where the Rules of the Road approach and related techniques can help.

First, I want to make three assertions about what counts with juries:

Words matter.

Values matter.

Beliefs matter.

When plaintiffs' advocates lose sight of these three fundamentals, they give a huge edge to their adversaries. What do I mean?

4. David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009).

Words Matter

Part of the core of the Rules of the Road technique is the firm conviction that we need to carefully think through every word we use, especially when we are teaching liability issues to the jury. We get to go first in the trial, and that gives us the chance to frame the issues with words that favor our side. We should not squander this opportunity. The difference between the almost right word and the right word, as Mark Twain said, is the difference "between the lightning bug and the lightning."

Lest you think words are mere semantics, ponder for a moment why conservatives have done so well in recent years with middle-class voters despite pushing policies that seem to favor the rich. Look at the way they use words. They favor "tax relief," not mere "tax cuts." They oppose "job-killing tax increases." They pillory the "death tax," never mentioning the more accurate but less vivid "estate tax." They are disciplined, relentless, and repetitive in their choice of words, and the adversary who accepts their terminology has already lost the battle.

Plaintiffs' attorneys use careless language in countless ways. Two quick examples. They ask the jury to "award" money to the plaintiff, which neatly reinforces the Chamber of Commerce attack on "lawsuit lottery." Yes, the word "award" is often found in standard jury instructions, but that doesn't make it any better, especially when a far better word is close by: "verdict." Advocates who ask for a "verdict" can explain that the word literally means "speaking the truth," and that segues into another important advocacy technique for malpractice (and other) trials, empowering and ennobling the jury. (More on this below.)

The second example of poor choice of words is specific to malpractice. Lawyers talk constantly of a "breach of the standard of care" instead of a "violation of a safety rule." "Breach" is not a bad word; it just carries widely different meanings, from a rip in a fortification to a violation of a contract. And "standard of care" is a necessary term of art, but one that we must constantly put into a meaningful framework for the jury. When we fail to discipline ourselves to couple "standards" with "safety rules," we leave room for

the adversary to reframe standards as conventions or customs, with no more significance than grammatical or spelling conventions—"*i* before *e* except after *c*." The plaintiff's experts say "shall," and the defense experts say "will," and does it really matter? It doesn't, whenever we let "standards" lose their mooring to safety. One more problem with the "standard of care" terminology is really an opportunity—the path less taken. The term is "standard of care," not "standard of practice." But how often do patient advocates point out that "standard of care" requires a doctor who cares?[5]

The other reason that words matter is that a properly deployed choice of words becomes a weapon in its own right, evoking layers of meaning in listeners' minds that don't have to be spelled out. When George W. Bush said in a 2004 State of the Union speech that the United States didn't need a "permission slip" from the United Nations to invade Iraq, he instantly and compactly made the case, whether you agreed with him or not, that the United States was the adult (teacher) here, and the children (students) were the other members of the UN.

Do you want to be a teacher for the jury in your cases? You should. There is no more persuasive place for the patient advocate to stand in the courtroom than behind the teacher's podium. A calm, clear accumulation of facts needs little argument to prove persuasive. Yet the choice of words can prove an immense help.

How about this for a vivid choice of words for a Rule in a malpractice case: "Worst first"? That was Denver attorney Jim Leventhal's artful term for the differential diagnosis Rule of the Road, which we had more clumsily stated in the first *Rules of the Road* book as: "A doctor who is diagnosing a patient's symptoms has a duty to rule out the most dangerous, treatable potential diseases first." Jim, another Inner Circle member, used "Worst first" with great success in an aortic-dissection case against an emergency-medicine doctor. His adverse examination of the defendant introduced the concept of differential diagnosis with "Worst first":

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5. See the closing argument in the *Semsker* trial at chapter 20 for a riff on this thought.

Q: When you evaluate somebody for chest pain, you look at worst first, right?

A: You look at life-threatening conditions, yes.

Values Matter

In the war to win hearts and minds, the side that connects better to the jurors' hearts—their core values and principles—will win every time, even if the opponent has some good "facts" on its side. That is one key reason why we recommend that plaintiffs' lawyers spend a lot of time exploring the core principles, and the Rules of the Road that flow out of those principles, that are waiting to be discovered in any case. The right approach to winning cases involves showing the jury how values important to them line up with a plaintiff's verdict. Accountability for the choices we make is an important conservative value that lines up well with plaintiffs' cases. Another is equality of treatment. Although equality of treatment can apply in any plaintiff's case, it has special resonance in medical care, where innocent patients sometimes are treated less well than others because they lack money, insurance, or social status. Greed and its opposite, generosity, form another axis of values in health care. Putting the patient first is an important value threatened by greed. So values matter, because the way we want others to be treated powerfully influences how we make decisions.

Beliefs Matter

Beliefs are different from values. Values speak to how people would like the world to be. Beliefs speak to how people think the world actually does work. People think they know how the world works, whether they really do or not. Cognitive scientists call these beliefs "frames," deep-seated mental structures through which people experience the world. All of us use frames to understand facts. So all facts we throw at someone must pass first through a frame before the other person will understand them.

Paul Luvera of Seattle, a top advocate and wise man of the plaintiffs' bar (and a past president of the Inner Circle of Advocates), was the first to introduce us to the concept of "frames" and specifically to the work of UC–Berkeley linguist George Lakoff. Lakoff has written a string of fascinating books on how regular people make important decisions like, for example, which presidential candidate to vote for. Bottom line: values and beliefs beat dry facts and issues every time, in the voting booth and in the jury room.[6]

Paul Luvera explains it this way:

> For many years I have preached to lawyers that the most important thing they need to accept is: "A trial is a battle of impression and not logic." Decisions are not simply made on the basis of intellectual analysis of the testimony and evidence. Emotion plays a huge role. Neuroscience has proven that the great majority of our decisions are made at a subconscious level and then ratified by our intellect with reasons for our decision. Furthermore, this is done without our realizing it.

Malpractice cases are rife with competing "frames" about how the health-care system works. Plaintiffs' lawyers know about these instinctively. The problem is our failure to recognize how important the frame is to the resolution of the case in the jurors' minds. For example, is the doctor devoted to her patients, a true caring individual, or one whose motives are to maximize earnings and minimize hours at the bedside? Is the doctor smart and up-to-date or way past his prime and ready to retire? Is the hospital a caring and curing institution or a scary medical factory?

Most people want to believe that doctors (and other care providers) are smart, caring individuals. But they are quick to adopt the frame that doctors are arrogant, busy, and indifferent because it's familiar to them from painful experience. The attitude toward the defendant that takes hold can drive the decision.

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6. More about Lakoff and some other interesting scientific writers on decision making in the "Suggestions for Further Reading" on p. 577.

Placing Medical Facts into the Framework of the Jury's Values and Beliefs

Don't mistake our emphasis on the importance of words, values, and beliefs to mean that we believe the facts of a medical malpractice case are trivial. The medical facts of any case matter—a lot. Defense attorneys and judges will crush any plaintiff's case that is not thoroughly grounded in modern medicine. But plaintiffs' lawyers can exhaust themselves climbing the mountain of work in learning the medicine, preparing the experts, and answering all the bogus half-truths from the adversary. Or worse, they can become so enamored of their own new "junior doctor" expertise that they want to show off to the jury. Whatever the reason, the patient advocate who doesn't work hard to fit the medical facts into the values and beliefs framework that the jury already knows is cruising for a bruising.

New Jersey attorney Dennis Donnelly, another past president of the Inner Circle of Advocates, says:

> If the patient's attorney allows a malpractice case to be only a debate about some complex, confusing, and abstract medical issue, the case will fail. That is why defense lawyers always try to smother human interests with medical abstractions which reinforce the myth of medicine as a mystery. That is also why, like the dementors in *Harry Potter,* defense lawyers want to suck the life out of your cases and make them only about an abstract standard of medical care. If you fall into that trap while learning the medicine, your case will be terminally infected.

Don Keenan, one of the most successful plaintiffs' advocates of modern times and coinventor of the Reptile concept (and also a past Inner Circle president), calls this the TMI problem: too much information.

It's plain hard work to boil a case down to only those facts that matter, and it's not just lawyers who harbor the TMI infection.

The French mathematician and philosopher Blaise Pascal, in words later cribbed by Mark Twain, apologized to a friend for the length of a letter, writing, "I would not have made this so long, except that I do not have the leisure to make it shorter."

Expert witnesses typically are little help in avoiding the medical TMI trap. That's not what we hired them for. Their job is to stay focused on the medicine. But sometimes they can help us discover the human frame of our case that makes for a persuasive story.

Some plaintiffs' lawyers take away the wrong lesson from this discussion about simplicity and human story frames. It's not that jurors are too thick to follow a detailed medical debate. Plenty of them have lots of sophistication. The point, rather, is that when cases concern only abstract medical issues, the natural deference of juries to the medical profession will mean fewer verdicts for the plaintiff. Only when the plaintiff can put the case into a more familiar human frame will the jury be less deferential, especially when we can show that the defendant's conduct violates the jurors' deeply held values and beliefs.

Note that talking a different way doesn't mean changing your beliefs as a plaintiff's advocate. Nothing could be more harmful to your odds of winning than pretending to adopt positions you don't believe in. Why? Because other core values are authenticity and honesty, and jurors can smell their absence.

Finding the Persuasive Frame

Modern American medical care may be the best in the world in some ways and for some patients. But it is chockablock with problems at the human level that make for persuasive story frames if they fit what happened to your client.

Common complaints about medical care are:

- My doctor is too rushed. He doesn't listen. He spends most of his time tapping on his laptop screen.
- The hospital sends a different nurse to my room every day. How do they know what I need?

- I can't get through to the doctor's office to find out about my test results. I guess they must have been okay, or they would have called me.

A recent stillbirth malpractice case in which our firm represented the devastated parents is a good example of how the persuasive frame needs to be searched out. Our client presented to a northern Virginia hospital for a scheduled induction of labor to give birth to twin daughters. Over the ensuing nine hours that led up to a crash C-section, during which one of the babies was born dead, the fetal monitor strips showed plenty of decelerations and loss of variability, enough to make our experts recoil in horror. We could have stopped the discovery there and would have had an abundance of material for a good medical discussion at trial focused on how one interprets the squiggles on the monitor strips.

But we knew one basic rule of malpractice litigation: the defense always gets experts to defend the indefensible. And even when their opinions are laughable to us, still some jurors will see it as a tie between the plaintiff's experts and the defendant's experts. And plaintiffs lose ties.

So we followed our own internal Rule:

- Step the discovery up to the next level. Look for the systemic flaw that explains why the individuals behaved as they did and how the injury was not some random happenstance.

After three motions to compel, we found the gold nuggets. The main nurse monitoring our mother's labor had been assigned to a second laboring mother, in violation of the recommendation from the society of perinatal nurses that all high-risk mothers, as ours was, be given one-on-one nursing care. This nurse entered most of her notes about both patients at the end of her shift, sitting at a computer terminal at the nurses' station, making dozens of entries in the hospital's electronic medical record about her whereabouts and observations over the past eight hours. The "audit trail" showing when and where the electronic entries were made also showed that the nurse claimed to be attending both

patients at identical times in her shift—the proverbial feat of being in two places at once.

So now the story shifted dramatically. The case was no longer a battle over reading fetal monitor strips. This was about a hospital that wanted to jam as many patients as possible into its profitable labor and delivery unit, with overworked nurses who tried to cope by creating fictitious entries in the record.

Sometimes it's not an institution that deserves the sharper focus, but an individual health-care provider who would rather shy from the spotlight of your case. Dennis Donnelly tells this story:

> A young, appealing female OB forgot to follow up and discover that an important prenatal screening test had not been done. Seen only from a medical perspective, there were other screening tests done and the patient also failed to realize she had never gone for the test, so there were many medical and moral excuses which would allow a jury to absolve the defendant. However, her gruff, cold boss, the male managing partner who ran the practice, adamantly denied any responsibility to have a system in place to catch missing test results. Instead, to protect himself, he insisted that his young associate was "on her own," and since he never saw this patient during the critical time frame when follow-up was required, he had no responsibility whatsoever.
>
> Framing the case to include an allegation that the managing partner failed his own employee and the standard of care in managing an obstetric practice allowed the jury to see the medical error in a context they completely understood: a bad boss who offered no support. That made it no longer merely an abstract, irrelevant medical debate. The result was not only a 100 percent liability verdict, but an allocation of more percentage liability against the male managing boss than against the frontline female obstetrician.

Here's another reframing example, courtesy of Jim Lees of West Virginia. Jim is a unique trial lawyer. Jim not only wins case after case in trials all over the country, but has found the time to run hundreds of focus groups for fellow plaintiffs' attorneys to help them find the right frame for their trial stories. That has given him a keen eye and ear for the human story within the medical story that resonates with the jury's view of how the world works (beliefs) and should work (values).[7]

In a recent case of Jim's in Pittsburgh, a five-year-old boy had died twenty-two hours after outpatient surgery to cut out his tonsils. The medical debate concerned the wisdom of sending home a child who had already shown hints of a sleep apnea problem. What made this already tragic case unstoppable was a chart Jim created. It showed the surgeon in the center surrounded by a ring of the twelve patients he had scheduled in a four-hour block between two operating rooms. The unsaid message came through loud and clear: "assembly-line medicine" and "exploitation of children for profit."

New Mexico attorney Randi McGinn, an Inner Circle member and a courtroom tornado who has flattened many adversaries with her dynamic, creative style, looks for the greed factor in her malpractice cases and, more often than not, finds it. Randi's approach to discovery is simple: follow the money. She asks these sorts of questions:

> Is the big hospital chain bringing in foreign nurses or doctors so they can pay them less? Are they making them work four twelve-hour shifts in a row? Treating lower paying Medicare/Medicaid patients different than patients with insurance? Not using portable X-rays, because it takes more employee time and less patients can be processed? Making employees like ER doctors, physician's assistants, and nurse practitioners fill a quota for the number of patients they process per hour?

7. You will see some of Jim Lees's focus group handiwork in the transcript of the *Wood* case in part 2 of this book.

The danger in quota medicine, Randi notes, is that it encourages the provider to violate the Rule of differential diagnosis to rule out worst first. Instead, the provider reaches for the easiest, most time-efficient diagnosis with the rationalization that if something is really wrong, the patient can always come back.

That leads Randi to a basic Rule or frame for many of her cases:

- Money-driven decisions are dangerous for patients.

These frames are not a substitute for the medical ins and outs of the case. You are not throwing out the medical details. You are fitting a more recognizable frame around them. The snugger the fit, the better the frame.

Finding Better Frames by Listening to Clients

Now, here's something even better. The building blocks of persuasive case frames often come not from the adversary through arduous depositions and motions to compel, but straight from your client. If you listen. And if you respect your client's role in the human story of the case as a key active player, not just a passive vessel of injuries and damages.

In our stillbirth case mentioned above, respecting the client's story meant taking her seriously when she insisted that the nurse had left her alone through large stretches of the night, despite the beautifully documented record that showed the nurse in attendance every fifteen minutes like clockwork. This led us to the audit-trail documents that validated our client's account.

In another case (*Wood v. Tzeng,* which we feature in part 2 of this book), a critical detail emerged only after I went back and reinterviewed the client. The detail was simple. In the first get-acquainted meeting of the surgeon with the patient in the patient's hospital room, the surgeon *never laid a hand on the patient to examine him.* Some plaintiffs' attorneys would have entirely disregarded this early fact, because it had no proximate causal link to the outcome. But it was a telling fact that fit the

frame of the uncaring surgeon pressuring the patient into unwise elective surgery to fill the surgeon's OR schedule.

Many clients come to plaintiffs' lawyers with similar stories. Recurrent themes include:

- The doctor left the hospital after the surgery, went on vacation, turned the care over to someone else.
- When things went awry, the doctor simply disappeared. No phone call, no email, nothing.
- No apology or explanation ever crossed the doctor's lips.

All these scenarios—abandonment, indifference, evasion—violate the fundamental need of every patient: "I want someone who cares about me." Doctors have a sacred trust to care about their patients. When they break that trust and hurt a patient, they must pay.

But not every case has an abandonment or indifference subtext. Sometimes the doctor struggled with a diagnosis and simply came up wrong. The defense is "clinical judgment," and it can be powerful. Why is "clinical judgment" so appealing as a defense? It plays into the theme of doctors treating patients as individuals, not as cookie cutouts; this is the "doctor who cares about me." And plaintiffs' lawyers reinforce this frame inadvertently when they talk about "standards" and "consensus"—which can sound like treating all patients the same.

We can successfully reframe many of these cases by pointing out that it was the doctor who lumped the patient into a diagnosis or treatment box with all other patients, when this patient had something different that required individualized care. But the patient advocate must be sensitive to the adverse framing to see this.

For example, in a misdiagnosis case in which a forty-two-year-old woman died of a bacterial infection that her internist misguessed as the flu, we found it was important to show that the doctor had treated her like every other patient whom he thought had the flu, disregarding something fatefully different about her. Worse, what was different about her was a vaginal

discharge, which he arrogantly decided he didn't need to test. A simple noninvasive test (a swab of the patient's discharge and a bacterial culture) would have given the correct diagnosis in time to have saved her life with ordinary penicillin.

The Rules of the Road technique helped us adjust the frame of the case ever so subtly to emphasize the doctor's cookie-cutter approach and his arrogance—a human story that the jury had no trouble grasping. The successful Rules of the Road:

- A doctor should know his limits and act accordingly.
- A doctor should test rather than guess.
- A doctor should pay attention to what is different about this patient, rather than only those things that are similar to other patients.

Stirring Jurors to Take Action for Fellow Patients

Jurors are like everyone else. They want to be respected and treated as the unique creatures that they are. When they see a fellow human, another patient, not treated right by an uncaring medical system, that can stir them to action. But one more thing is needed.

Jurors need to understand their own job in all its civic majesty, and "majesty" is no overstatement. The jury system represents the full expression of an advanced democracy, where the people speak and the powers that be are forced to listen.

My own favorite historical quotation on this subject, which I paraphrased inadequately in one of the trial transcripts included in this book (pp. 333–34), comes from Alexis de Tocqueville's *Democracy in America* (first published in 1835):

> The institution of the jury places the real direction of society in the hands of the governed, and not in that of the government. The jury system as it is understood in America appears to me to be as

> direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.[8]

In the malpractice arena, jurors do not merely decide private disputes between patients and their caregivers; they resolve difficult questions about what standards should exist for patient safety and how they should be enforced. Too many plaintiffs' lawyers fail to teach this vital civic lesson to jurors. They not only miss an opportunity to help jurors feel better about all the time invested in trial away from their families and jobs; they also greatly shrink their chances of winning justice.

The great advocates have long known this. Moe Levine, one of the pioneers of the plaintiffs' bar in the 1960s and 1970s, told jurors this in a closing argument:

> Your verdict is important. It may very well be one of the most important decisions you've ever made, either way. If you find the defendant not guilty, you will have approved a system of hospital practice, and will have exonerated fault, and will have given approbation to a continuance of the conditions that you heard described. If this is your choice, if you feel you must, you will. But if you think it's wrong, if you think it ought to be stopped, by your verdict you should say to these hospitals: these are human beings, small human beings, but human beings, important within their little family unit if not to the rest of the world. Treat them with tenderness; treat them with love. They came to you and they offer you their bodies, asking only, "Do for us what needs to be done." They entrust themselves completely to you.[9]

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8. This quotation and another about the role of juries in civil trials come from *Democracy in America,* vol. 1, chap. 16. For a better appreciation of Tocqueville's powerful and subtle argument, read the entire chapter at http://www.nalanda.nitc.ac.in/resources/english/etext-project/history/democracy1/chapter32.html.
9. *Moe Levine on Advocacy* (2009) at p. 373.

One of today's most successful patient advocates, Steve Yerrid of Tampa, attributes his streak of record-busting plaintiffs' verdicts in malpractice cases to three things coming together in the case: "Great clients, a worthy cause, and a courageous jury." Like Moe Levine before him, Yerrid (also an Inner Circle member) knows that courageous juries are made, not born. The right framing by the plaintiff's lawyer can inspire a jury to deliver a courageous verdict, but only if done with great care and sensitivity.

Don Keenan teaches that the plaintiff's advocate must understand how the natural desire of juries to do good fits within the framework of a trial. The plaintiff's lawyer in any trial necessarily spends a good deal of time attacking the defendant. Defense lawyers do the same to the plaintiff. But if that is all that happens, the trial becomes a negative, sour experience—a choice for the jury about which side they find less distasteful. A great lawyer like Keenan knows that the sensitive advocate must not merely tear down, but must build up. The idea is not to instill fear, but to inspire courage. The strong plaintiffs' verdicts come when the jury is empowered and ennobled to do good. What could be more uplifting than to inspire the jury to render a verdict that protects the community from harm and helps medical providers deliver treatment that is caring and safe?