

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).