

**RULES OF THE ROAD
TECHNIQUE**

Based on *Rules of the Road* (2nd ed.)
by Rick Friedman and Patrick Malone

ATTRIBUTES OF RULES OF THE ROAD

- A requirement that the defendant do (or not do) something.
- Simple: easy for the jury to understand.
- A requirement the defense cannot credibly dispute.
- A requirement the defendant has violated, even if the defendant only violated the spirit of the requirement.
- Important enough in the context of the case that proof of its violation will significantly increase the chance of a plaintiff's verdict.
- Specific as to what it requires of the defendant.
- A requirement that exists to prevent the kind of harm that happened to the plaintiff.
- The rules are different from 'principles,' which are non-prescriptive truths relevant to safety – the reasons for the rules.
- The rules are not the story, which must stay front and center.

**EXAMPLES FROM ONE OF OUR
CASES**

Example of a principle from
Officer's deposition

Q: And if officers don't follow
their training at any time,
people can -- innocent people
can get hurt, correct?

A: Correct.

Example of a rule from
Officer's deposition

Q: Officers should not use
force just to teach someone
a lesson, correct?

A: Correct.

SOURCES FOR RULES OF THE ROAD

- Jury instructions: draft proposed jury instructions at the beginning of every case, so you know what you have to prove, and incorporate them into your rules
- Industry guidelines or mission statements
- Contract provisions: these may contain or reference duties or standards that were breached
- Statutes
- Textbooks or articles from the professional literature
- Case law or court rulings in your case
- Administrative regulations: these can form the basis for rules or jury instructions
- Ethical codes or guidelines
- Deposition testimony or expert reports
- Policy and procedure manuals, training manuals, quality-control procedures, or operations manuals of the defendant
- Admissions in pleadings
- Common sense or moral imperatives

DRAFTING THE COMPLAINT

- Include some or all of your rules in the complaint.
- This forces the defendant to admit or deny these rules.

DISCOVERY IN GENERAL

- Tie each discovery request to a principle or rule, so a judge can see why each request is justified
- Look for new rules to add to your annotated list
- Keep alert for new principles, too
- Look for support for your rules or principles: e.g., try to get the defendant to admit, in detail, the reason for a rule's existence
- Look for violations of your rules or mistakes the defendant made
- Draw out exactly what the excuses are, if any, for breaking the rules
- Look for new sources of rules, whether in-house or outside the defendant organization (see p. 83-84)
- Ask about your rules at depositions (see p. 74-102)
- Look for agreement or disagreement with your rules from defense witnesses

**EXAMPLE FROM CROSS-
EXAMINATION BY RICK FRIEDMAN
IN BUS STOP CASE**

Q: Okay. Would you agree, then, that a child's designated waiting area should be located on the same side of the road as the child's home unless it would be unsafe to do so?

A: Correct.

WHAT SPECIFICALLY TO ASK FOR FROM THE DEFENDANT

- Policy and procedure manuals
- Training manuals
- Personnel manuals
- Internal company documents that describe how the company conducts its activities
- Contracts that might contain applicable standards
- Books, literature, or publications the defendant trained with or uses for reference (see p. 172-174)
- Admissions (see p. 73-74)

EXPERTS

- Include your rules in your expert's report.
- Force the defendant's experts to admit, in detail, the reason for the rules' existence.

MOTION PRACTICE

- Put the relevant rules close to the front of briefs (see p. 129-136)
- This section of a brief can be labeled ‘Underlying Legal Principles’ or ‘Uncontested Principles and Standards’
- A section containing the relevant rules shows, for example, why specific discovery should be permitted (or shows a genuine issue of material fact as to whether the defendant’s conduct can be considered “reasonable”)

FINALIZING THE RULES

- Modify the wording of the rules as the litigation proceeds (e.g., based on a defense witness's wording).
- Fit the rules into the story of your case, so they hint at character and motive.
- Use words like 'should,' 'responsibility,' and 'must,' not words like 'duty.'
- By this time, you should have 8-12 rules or fewer.
- Create three versions of your list of rules: one for the jury without annotations, one for the judge with annotations to evidence but not legal authorities, and one fully annotated list with all the rules that could become relevant.
- Do not directly or indirectly suggest that the rules are the law, even though some have their basis in law.

VOIR DIRE

- There's no need to talk about your rules during voir dire, unless you think the jurors might excuse the rule violations in your case.
- In the latter situation, get the jury talking about safety rules in general, discuss the reasons for such rules, and discuss what excuses their violation.
- Watch for jurors who have to follow or enforce safety rules at their jobs, and get them talking about why those rules are important to the safety of coworkers or the general public.
- Address the burden of proof: "In trials like this, jurors make their decisions on the basis of whether my side is more likely right than wrong," etc.

OPENING STATEMENT

- Show the rules to the jury on a poster board or screen
- Explain why the rules make sense
- Talk about the history of the rules, if possible
- State that the plaintiff is suing the defendant for breaking the rules (or ‘standards’)
- Explain how the defendant violated industry or professional standards
- Explain why the defenses don’t fit with the rules
- Keep the focus on the defendant and its conduct
- Be prepared to handle objections (see p. 153-155)
- Emotion at this stage accentuates your bias

**EXAMPLE PARAPHRASED FROM
THE BOOK**

‘At the end of this case, the judge is going to ask you to decide whether the amount of force two police officers used while seizing my client was reasonable under the circumstances. If the judge were to ask you if a driver employed by the police department drove from Minneapolis to St. Paul in a reasonable manner, you would all know how to judge that. You would know what it means to cross a double-yellow line. You would know what it means to go fifty miles an hour in a school zone. You would know what it means to be applying makeup or reading the paper while doing sixty-five on the highway. Well, **there are principles and standards for seizing a suspect that are just as basic and commonly understood as the rules of the road for driving a car.** To understand this case, and to understand how to make the right decision in this case, you need to understand these principles and standards.’ (See pages 15-17.)

DIRECT EXAMINATION

- Ask about your rules.
- If your client followed the rules, emphasize it.
- Don't ask your experts about the rules' sources, unless the defense disputes your rules.
- Consider having at least one of your experts identify statements from treatises or literature that they regard as reliable authority, so you can cross-examine defense experts with that material. (See pages 160-161, 170-172.)

CROSS-EXAMINATION

- Seek favorable concessions first: start your cross-examination with the annotated rules and begin with the rules the witness is most likely to concede.
- Read the primary source and then ask, “Do you agree or disagree with this?”
- If the witness disagrees with a rule, pick follow-up questions based on your annotations. (See pages 164-168.)
- Rule violation hurts the defendant’s credibility as to factual disputes.

CLOSING ARGUMENT

- Put the key instructions on liability and damages on poster boards and use them to summarize the evidence (see p. 176-179)
- Prop up the poster board of the rules, too
- Address the burden of proof (see p. 179-180): “Are we more likely right than wrong?”
- Explain what the rules require, why they are fair, why they are important, and what harm can be caused if they are violated
- “You, the jurors, get to decide what sort of world we are going to live in” (see p. 183)
- “Ladies and gentlemen, the answer was right on his own shelf in a book that he just hadn't bothered to read in years”
- Avoid the phrase ‘pain and suffering’
- “If these rules had been followed, no one could criticize the defendant” (see p. 184)