

Opening Statements: Applying *Rules of the Road* to Employment Cases

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The book, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability* (2d Ed. 2010), by Rick Friedman and Patrick Malone, addresses the problem of proving one's case where the standard of liability is vague and/or open-ended. This is a problem faced by personal injury lawyers who in order to prove negligence must show that the defendant failed to use a *reasonable* standard of care; or, in a malpractice case, that a doctor failed to act as a *reasonably* competent practitioner; or that a manufacturer made an *unreasonably dangerous* product; or an insurer breached its duty of *good faith and fair dealing*.

Friedman and Malone warn plaintiff lawyers of the perils of such ill-defined standards of liability. Jurors may become confused in understanding the meaning of "reasonable" and may invent their own standards; defendants will exploit the ambiguity by making the definition overly complex or adding caveats and escape clauses.

To guard against the three evils of **Confusion**, **Complexity** and **Ambiguity**, Friedman and Malone urge plaintiff attorneys to concretize open-ended standards of liability by breaking them down into a set of rules. These rules, according to the authors, can come from a variety of sources:

- Statutes and regulations
- Case law
- Contracts between relevant parties
- Court rulings in your case

- Testimony of each side's experts or lay witnesses
- Policy and procedure manuals
- Admissions in pleadings
- Textbooks and articles from the professional literature
- Industry guidelines or mission statements
- Ethical codes of guidelines
- Common sense or moral imperatives

Rules of the Road at 31-32.

The rules themselves, write the authors, should have five attributes:

1. A requirement that the defendant do, or not do, something.
2. Easy for the jury to understand.
3. A requirement the defense cannot credibly dispute.
4. A requirement the defendant has violated.
5. Important enough in the context of the case that proof of its violation will significantly increase the chance of a plaintiff's verdict.

Id. at 22

At first blush, it is not clear whether the Rules of the Road will be especially helpful in employment cases where liability standards generally are defined by statute and are not so indefinite as those set by common law. But just by scratching the surface a little, it is easy to find ambiguity lurking within the statutory, regulatory and case law's liability standards in employment cases. For instance, under Title VII, an employer will be liable for a supervisor's sexual harassment if it failed to exercise reasonable care in preventing and correcting sexual

harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1988). Or, in a retaliation case, a plaintiff establishes liability by “show[ing] that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68 (2006).

At this year’s NELA National Conference, Dennis Egan, longtime NELA member and trial attorney *par excellence*, told the audience that he has been using *Rules of the Road* in his employment cases since 2009, and swears by its teachings. Dennis described how he used *Rules of the Road* in a sexual harassment trial, *Carla Ingraham v. UBS Financial*, which resulted in a \$10.6 million verdict.

Dennis culled Friedman and Malone’s list of rule sources for the ones most applicable to an employment case. They are: policy and procedure manuals; statutes and regulations; case law and jury instructions; and admissions.

Dennis then recounted that in Ingraham, for his opening, he showed the jurors a hardboard with the following Rules of the Road written on it:

- **Employers like UBS have the legal responsibility TO MAINTAIN a workplace FREE of discrimination and harassment – that means PREVENT IT from happening in the first place.**
- **UBS policies state: All members of management and employers are responsible for ensuring that harassment DOES NOT occur.**
- **All employees have the right to work in an environment FREE of discrimination and harassment.**
- **All employers who KNOW or SHOULD KNOW that discrimination is happening – no matter how it comes to their attention – have the legal responsibility to immediately root it out and destroy it.**

- **UBS “like all employers, has the responsibility to protect from retaliation their employees who report possible discrimination, harassment, and retaliation.**

Two things stand out from Dennis’s Rules. First, each one is inarguable. In the 21st Century, no employer is going to deny employees have the right to work in an environment free of discrimination and harassment. Second, those policy and procedure manuals, so often used against plaintiffs (e.g. “you never complained about the harassment to your manager or to HR, even though the employee manual – which you received a copy of – says that if you are harassed, tell your manager or HR, did you?”) are here put to good use – setting the stage for showing that the employer made a promise to all of its employees to not tolerate any workplace of bias and harassment, and broke that promise.

Dennis then explained how, when examining the employer’s witnesses, he uses the hardboard with the Rules of the Road. When a witness confirms the validity of one or more Rule, Dennis then marks the Rule with a “T,” for True, and the witness’s initials. By the time of the closing, according to Dennis, the jury is so familiar with the Rules he doesn’t have to repeat them and saves his energy for showing how the defendant violated them and for damages.

In 2011, NELA/NY member Margaret Macintyre and I represented a social worker, Liz Siracuse, in a disability discrimination/FMLA case. Ms. Siracuse had worked for a social service agency for 16 years. She received excellent performance evaluations, held a M.S.W. degree, and, all agreed, was absolutely devoted to her job. Ms. Siracuse was diagnosed with cancer, resulting in her taking short leaves of absences for treatment. Eight months after her diagnosis, an opening arose for a supervisor of counselors. The agency passed over Ms. Siracuse for the job in favor of a candidate who was less senior, lacked an advanced degree and who was herself surprised that she got the promotion over Ms. Siracuse.

The case was tried to a jury, and we received a verdict on the discrimination claim -- somewhere south of \$10.6 million. *See Siracuse v. Program for the Development of Human Potential*, 07 CV 2205, 2012 WL 1624291 (E.D.N.Y. Apr. 30, 2012).

Margaret and I did not have the benefit of knowing about *Rules of the Road* when we prepared the opening statement. Instead, we prepared a traditional opening statement, describing the evidence in the most persuasive way without crossing over into argument. Had we followed the precepts of *Rules of the Road*, here is what we may have said in our opening:

At the trial, you are going to hear a lot about workplace rules, rules that an employer, like PDHP, must follow. These are rules that both side agree should be followed.

The First Rule of the workplace is: “An employer should promote the most qualified candidate for the job.”

The evidence shows that PDHP violated this rule when it did not promote Ms. Siracuse to the supervisor job, and, instead, promoted a less qualified candidate.

The Second Rule of the workplace is: “In deciding who is the most qualified candidate, an employer needs to consider whose education, job performance and professional experience is superior.”

The evidence will show that had PDHP followed this Second Rule, it would have selected Ms. Siracuse for the job because she had worked for the agency for 16 years, while the person who got the job had been there only four years; she had a Master’s degree in Social Work while

the successful candidate did not have an advanced degree; she had vast experience in counseling, while the person selected by PDHP had very little.

*The third rule is that in making a promotion decision, **an employer should abide by its own workplace guidelines.** The evidence shows that PDHP violated this rule too. One of PDHP's guidelines PDHP is that all of its supervisors must hold an advance degree. Yet the person chosen for the Coordinator job did not have an advanced degree while, as noted, Ms. Siracuse, held a Masters in Social Work.*

*The fourth rule is, **an employer, in deciding who to promote, should not hold it against a candidate having taken a medical leave of absence against her.** The evidence will show that after she received her diagnosis of cancer, Ms. Siracuse continued working , but some days did not come in because of radiation treatment. However, by the time PDHP made its promotion decision, Ms. Siracuse's doctor had given her a clean bill of health. The evidence will show that PDHP officials, despite what Ms. Siracuse's doctor said, believed she would continue to miss work because of her illness and denied her the promotion.*

*And the fifth and final workplace rule is: **"An employer may not deny someone a promotion because she has had a disability."** None of PDHP's managers would dispute this rule; in fact, PDHP's employee manual states that it is prohibited to discriminate against someone because she has a disability. At the trial, besides hearing that Ms. Siracuse was the more qualified candidate, you will hear testimony from two PDHP managers involved in the promotion decision admitting that when speaking to the Executive Director, Eileen Dwyer, about who to promote, they told her of their concerns about Ms. Siracuse's health.*

The Rules of the Road, first presented during the opening, lays the foundation for a compelling summation. Once again, counsel may take out that hardboard, and go through each Rule, saying to the effect: “I told you during the opening that we would prove that defendant violated each of these Rules, and we did.” And, then, after demonstrating how each Rule was broken, you mark each one with a decisive check “√.”

Using the Rules of the Road goes a long way in resolving the **Confusion, Complexity** and **Ambiguity** that the jury experiences when determining whether the defendant discriminated against the plaintiff. By convincing the jury that the defendant violated basic rules of the workplace, the defendant is confirmed to be the wrongdoer. From there, it is only a short step for the jury to conclude that the defendant also broke the law.