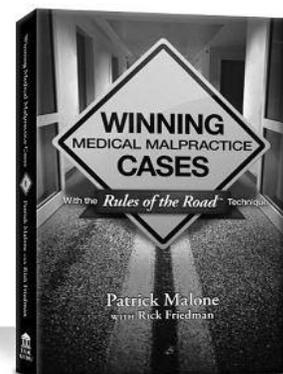


Book Review

By Jessica Hoffman Brylo, J.D., M.A.

Winning Medical Malpractice Cases with Rules of the Road Technique

by Patrick Malone and Rick Friedman



A while ago I bought the newest book in the “Rules of the Road” series titled *Winning Medical Malpractice Cases with the Rules of the Road Technique* by Patrick Malone with Rick Friedman. I am a big fan of the first two “Rules of the Road” books. The first version revamped and modernized the way many plaintiffs’ attorneys try cases, but as attorneys meshed “Rules of the Road” techniques with those David Ball propounds, a need for a second version emerged. Attorneys were eager to create a case based on rules but their formulation of those rules was sometimes a bit messy. The second version of “Rules of the Road” helped to clarify rules versus principles and how and when to apply them. It explained how to avoid some of the pitfalls attorneys might fall into as they created good, solid rules for their own cases.

I highly recommend both of the original Rules of the Road books. I am reluctant, however, to recommend this newest effort from Malone and Friedman.

The new book aims to apply “Rules of the Road” to medical malpractice cases from opening through closing. The authors include transcripts from various cases of opening statement, direct examination, cross-examination and closing argument. The format of the book works very well. It is certainly useful to have step-by-step instructions with full examples of the various parts of trial. They accompany examples with a commentary of things that the attorney could have done better or differently. For example, during an opening statement, there

will be parentheticals explaining things such as the importance of stating rules in terms of standards of care in heading off defense techniques. He also points out effective use of some visuals and the timing of when he shows jurors copies of medical records as he goes through the trial transcripts. For these small details, the book is wonderful.

My reluctance in recommending this book overall is a fear that the transcripts contain some strategies that may very well work for Patrick Malone but which might not work for every attorney. Specifically, the structures of the opening statements in the book violate many of the techniques and rules of a David Ball opening. This is not to say that David Ball’s template is the only effective method of doing an opening. However, when putting a book - meant to be some form of a “how to” book - out to the general attorney public, there is a danger in promoting methods that can be risky for a good majority of lawyers. The beauty of the David Ball method is not that it is the only way to do an opening but that it has been tested over and over and many attorneys have found it to be the most effective method across the board when you consider other variables such as attorney personality. One attorney may be able to get away with a different type of opening at which seven others would fail. There are things that Don Keenan, for example, does that only Don Keenan can accomplish. There are methods that a young attorney can use that older attorneys cannot. There are things Rick Friedman can do purely because

he is Rick Friedman. My hesitation with this book stems from a fear that others will try to copy some of the structure of Patrick Malone's openings which carry with them some dangers, such as being adversarial too early which can hurt a great many attorneys. That may work well for him, but every attorney comes across differently to jurors. David Ball's structure compensates for those differences in experience and personality. The beauty of David Ball's structure is that it serves as a roadmap for anyone. The risk in following the openings in this book is that they may not work if you are not Patrick Malone himself.

While Malone uses rules, undermines the opposing counsel and tells a story, the elements are in mixed orders and can

be hard to follow. At times, he sounds adversarial very early in opening, something most jury consultants, not just David Ball, advise against doing when you are working on the plaintiff's side. This is not to say that it will not work for you – but you should calculate your risk before doing so.

If, on the other hand, your goal is to understand the structure of a direct examination or cross-examination better, or to gain some ideas for closings, the book may be helpful to you. Just be wary of what you read, even from excellent lawyers or jury consultants. Ask yourself if there are traps you may encounter that they did not notice – maybe because of who they are and how others perceive them.

By all means, buy the earlier "Rules of the Road" books! Just be conscious of what you are buying when you purchase this one and read the opening sections carefully. ▲▲▲

Endnotes

¹ Published by Trial Guides (2012). Available at

www.trialguides.com/book/winning-medical-malpractice-cases/.

² RICK FRIEDMAN AND PATRICK MALONE, RULES OF THE ROAD™ SECOND EDITION: REVISED AND EXPANDED (2nd ed. 2010).

³ See for example, DAVID BALL, DAVID BALL ON DAMAGES 3 (3rd ed. 2011).

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