CUTTING THROUGH THE DEFENSE FOG

Countless plaintiff lawyers have looked to the Rules of the Road *approach, which* **Rick Friedman** *pioneered in the book he wrote with Patrick Malone, for help structuring their cases, proving liability, and fighting defense distortions. Friedman, of Bremerton, Wash., has written and spoken extensively about how to overcome obstacles that plaintiff lawyers face both in the courtroom and more broadly in their careers.*

Fellow trial lawyer **Sonia Chaisson** *talks with him about his work and his thoughts on jurors' values, evolving rules, and moral advocacy.*

Interview by Sonia Chaisson

Q: Rick, you have changed the way lawyers try cases, and you have been a willing teacher to many who are struggling to excel as trial lawyers. In your book *Rick Friedman On Becoming a Trial Lawyer,* you write that you are not a natural trial lawyer, which is difficult to believe. Can you say a little bit about that?

A There are people who are naturally comfortable speaking in public and connecting with other people in an easy, friendly way. I was not one of them. I was shy and awkward all through childhood, college, and law school. Like many good trial lawyers, I am an introvert by nature. That doesn't mean we can't be good trial lawyers, but it does mean we aren't "naturals."

Q How did you overcome your fear and become more comfortable in the courtroom? What drove you?

A I was afraid in the courtroom, and I didn't like being afraid. I kept going back so I could get over it. About five or six years into practice, I suddenly realized that the jurors didn't care much about me. I realized I was just a bit player in the

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drama that was each juror's life. They didn't care how I dressed or whether I was smooth or awkward. All they cared about was whether I was a trustworthy source of information. I knew I could be that.

That freed me up quite a bit. Not that I wasn't still scared and nervous, but I felt like a weight had been lifted off of me—a self-imposed weight. Over time I have come to see that shyness or self-consciousness in the courtroom is its own form of arrogance: "I am the most important person in the room; everyone is watching me; if I make one wrong move, the whole case will come crashing down—see how important I am?"

Q Did you just have an epiphany, or had you taken some steps to get over your fear before then?

A It was an epiphany in the sense that it felt like it happened all at once. It was probably a result of maturing. Realizing I wasn't as important to the jurors as I thought I was made a lot of my performance anxiety dissipate—though, I have to say, I still had severe performance anxiety up until a few years ago. Ultimately, the more you are in the courtroom, the more comfortable you will get.

Q When you say you are a bit player in the drama that is each juror's life, what do you mean?

A I mean that we are not as important in the jurors' minds as we are in our own minds.

If we are not as important in the jurors' minds as we believe, : is?

First, the juror's own life and world. A distant second would be laintiff and the defendant. We are , at best.

How do we connect to the juror's own life and world? What can work—including your books *Rules e Road* and *Polarizing the Case: sing and Defeating the Malinger- lyth*—teach us about this?

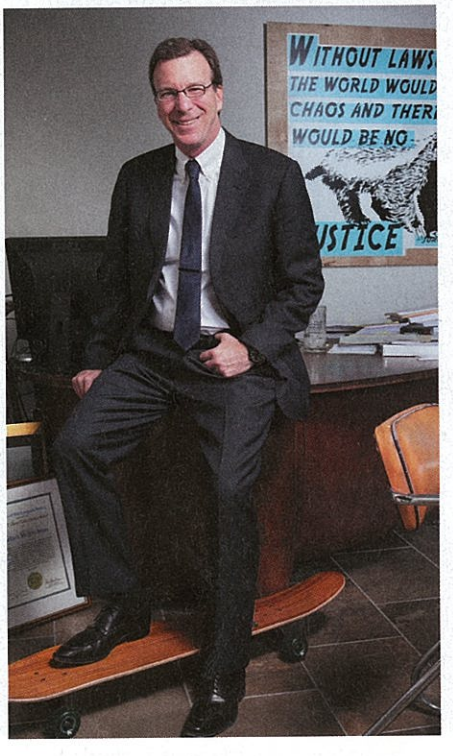
Gerry Spence's Trial Lawyers Col- . lege does a very good job of teach- wyers how to connect to the juror's d. *Rules of the Road* and *Polarizing ase* help jurors see that values that nportant to them are at stake in the These are techniques for cutting ugh the defense fog and showing : is really at issue.

How do these techniques help lawyers show jurors that their es are at stake in the trial?

With *Polarizing*, the jury sees that . the case is not about someone try- o get money for an injury. Instead, it out the defendant trying to escape onsibility by calling the plaintiff a a cheat, and a fraud. With *Rules of the l*, every human member of society—corporations—has a stake in safety s being followed. Once the jurors that there are well-established, sputed safety rules that apply to the ation, they have a stake in enforcing e rules.

A friend of mine, Jim Wren, says in his book *Proving Damages to Jury*, "Jurors want to believe they doing the right thing for the right son. . . . The jury is here to restore er. As the hero of the story, the cannot write a happy ending, but n provide the right ending with full justice and standing for strong community values." Is this what you mean?

"Jurors want to believe that the life a person lives, and the character they display, counts for something. Jurors don't like liars and cheats, but they also don't like someone being called a liar and a cheat if that is not true."



A In part. Jurors certainly want to believe they are doing the right thing. How can they figure out what that is? Almost always, it is by reference to their own values. Is the verdict fair or right? Do they want to live in a world where this is the outcome in a fact situation like the one at issue?

Jurors want to believe that the life a person lives, and the character they display, counts for something. Jurors don't like liars and cheats, but they also don't like someone being called a liar and a cheat if that is not true. That a plaintiff who has lived an upright life would be called a liar and a cheat by a defense lawyer—so the defense lawyer's client can avoid paying for damages he caused—is abhorrent to most jurors. They don't want to live in a world where a defense lawyer can get away with that. At that point, the case is not about money but about the defense tactics that are involved in calling a good person a liar and a cheat.

Q I've heard you talk about moral advocacy. Can you share what you mean by that?

A If we strip away the surface of most cases—and even many evidentiary issues in a courtroom—what we see is a clash of moral values. On the surface, the case may look like a 53-year-old accountant trying to get money from a 20-year-old college student who caused a rear-end collision. In fact, what is going on is a clash between human values and corporate values.

The plaintiff is in effect saying, "I am no longer pain free, and my pain is meaningful and important to me." On the other side is a defense lawyer, espousing and defending corporate values, in effect saying, "Your pain has little or no economic value and therefore is unimportant."

The plaintiff says, "This injury keeps me from playing ball with my son—one of the most important things in my life." The defense lawyer, espousing corporate values, says, "Your relationship with your son has no economic value and is therefore unimportant." Generally speaking, plaintiff lawyers argue for the meaning and importance of human values; defense lawyers pay lip service to those values but in fact argue for corporate values that say all human beings

are fungible, with little to no economic value and therefore little to no worth.

Q When you are facilitating groups, what are some of the questions you hear most about the *Rules of the Road* approach? Why was there a second edition?

A In the first edition, we missed an important distinction between principles and rules. We intuitively understood the distinction but did not make it clear in the book. This is a critical distinction. It is also the area where most people get off track in using the rules approach. Most questions about the rules somehow involve a misunderstanding of this distinction.

The second most common type of question has to do with whether the defense has found a way to combat this approach. The answer is still "no."

Finally, a third mistake that is very common has to do not with drafting rules but with implementing them. In deposition, lawyers are too impatient and too determined to force witnesses to accept the rule—exactly as they have written it. As we say in the book in more detail, it is important to be patient and allow the witnesses to help you write the rules.

Q Failing to tell the jury the reason for the rule appears to be a common mistake. What are some other common mistakes lawyers make in devising rules?

A Not understanding that throughout the litigation, the rules are evolving and being refined—or they should be. As new information comes in and new understanding evolves, the rules have to evolve, too.

Also, you can't just take rules from another similar case and figure you're good to go; the rules have to be individualized for each case.

And probably one of the biggest mistakes is drafting rules that are too general to be helpful.

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Q Your point about rules being case specific and evolving in the litigation bears emphasis. Is this true at trial? Can you develop a rule at trial through witnesses?

A Yes, the rules can evolve even during trial, though that is not to be encouraged. But sometimes, if a witness is quarreling with just one or two words on my board, I'll just take a marker and change the words to get agreement.

Q Is there a danger to having too many rules?

A Having too many rules gets confusing to the jury and also runs the risk of looking like you're nit-picking. The most I have ever used in trial is 12, and in hindsight, I could have reduced those to 10.

Q How compatible is *Rules of the Road* with another popular approach—the one offered in *David Ball on Damages 3*?

A Completely. David was one of the first people to read *Rules of the Road* and was an early promoter of the book. Pat and I are in his debt for speaking so often and so favorably about it.

Q I have observed that some lawyers become almost mechanical when trying to apply methods like *Damages 3* and *Rules of the Road*. What general advice would you give them?

A Everyone is searching for the trial lawyer holy grail. That is, the one formula, technique, or approach that can be applied with little or no thought and that will guarantee a good result. It is human nature to want that to exist. It is even human nature for some of us to think, on occasion, that we have found it. But the truth is, it doesn't exist and never will.

Winning trials for plaintiffs requires hard work and a lot of creative thought. The techniques and ideas that have worked for others can help tremendously in making the hard work more efficient and enjoyable, and they can be a great springboard for your own creative thought. But they are not a substitute for either. T

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