As lawyers, we venture into complex fields of human endeavor—medicine, engineering, insurance—and ask the jury to follow us there. Each field has innumerable standards, customs, principles, rules, and regulations. Most lawyers like nothing better than to immerse themselves in this material. That’s our job. But many lawyers fail to appreciate that only a small portion of this material is actually relevant to the dispute the jury must resolve; even less is actually material or significant to that dispute; and still less is actually helpful to having the dispute resolved in the plaintiff’s favor. The failure of the plaintiff’s lawyer to recognize these distinctions is responsible for many meritorious cases being lost.

At its most basic level, the purpose of the Rules of the Road technique is to educate, first the plaintiff’s lawyer, then the judge and the jury, about the basic principles in the field that require the dispute be resolved in the plaintiff’s favor.

Are there principles that require the dispute be resolved in the plaintiff’s favor? Absolutely, if you have properly screened the case. Does that mean the Rules of the Road technique can guarantee victory? No. But properly articulated Rules of the Road...
can make you more successful at every stage of litigation—from screening the case to its appeal.

The next chapter discusses how to find source material for Rules of the Road and how to fashion that material into usable Rules. In general, the process starts by looking at the material you'd refer to while litigating any case, such as statutes and regulations, case law, contracts between the defendant and another party, professional literature, training manuals, expert testimony, ethical codes, and commonsense imperatives.

You review this material to see if it contains principles that could help you formulate Rules of the Road.

**Attributes of Rules of the Road**

There are five basic attributes of every good Rule of the Road, and you must work hard to make sure your Rules meet each of these attributes.

A Rule of the Road should be:

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.

Let’s discuss these attributes in order.

**Attribute 1: Must Prescribe Conduct**

A Rule of the Road, first of all, is a statement of conduct that the defendant should (or should not) do. It must be prescriptive, not merely descriptive, and it must be aimed squarely at the defendant. It has this basic structure:
A [type of defendant] should (or should not, depending on the case and the Rule) do ______ [fill in relevant conduct sought to be enforced by plaintiff].

This initial attribute of a Rule of the Road was left out of the first edition of this book, and its omission has caused many lawyers to stumble. Simply stated, there is a difference between a principle and a Rule (a difference that we will observe from this point forward in this book). This distinction is so important that chapter 5 is devoted to clarifying it.¹

For now it is enough to note that a Rule must require conduct and must identify who is to exercise that conduct. “A patient can get injured if the surgeon does not carefully identify what he is supposed to be cutting” is a good description of what can happen without appropriate conduct, but it is not a Rule, because it does not say in a straightforward way what the prescribed conduct should be. In a case where the surgeon admits he did not know what he was cutting, the Rule, based on this principle, might be: “A surgeon should not cut human tissue unless he knows what he is cutting.”

Attribute 2: Easy to Understand

As we will discuss in chapter 4, “Developing a Working List of Rules,” potential Rules come from a variety of sources. But many, such as those from textbooks or regulations, are written in a style that is opaque to the layperson. So we need to translate them. Here’s an example.

Suppose in your research you come across Cal. Code of Regulations § 2695.4(a):

¹. There is a lesson here about the importance for plaintiff’s attorneys of carefully defining their terms. In the first edition, we assumed the reader would use the same definition of “rule” that we had in mind: “a prescribed guide for conduct.” But if you look at any dictionary listing of the acceptable definitions of “rule,” another definition is “a usually valid generalization.” (See, for example, the Merriam-Webster entry for “rule,” definitions 1-a and 2-a.) Many of our readers obviously went with that second definition.
Every insurer shall disclose to a first-party claimant or beneficiary, all benefits, coverage, time limits or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant. When additional benefits might reasonably be payable under an insured’s policy upon receipt of additional proofs of claim, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer’s additional liability.

Which makes a better principle for the jury to use in judging the insurer’s conduct?

◆ The language of the previous regulations?

or

◆ “The insurance company should assist the policyholder with the claim”?

That’s an easy choice, isn’t it?

Look at appendix B, “Sample Insurance Bad Faith Rules of the Road” and you’ll see a Rule list from a commercial property case. Rule 2 is: “Company should assist the policyholder with the claim.” This Rule is helpful in almost every bad faith case.

Here’s a principle from the failure-to-diagnose context. We found the following quotation in a leading internal-medicine textbook:

The first kind of strategic error is to fail to weigh the consequences of being wrong. . . . Where the cost of error is high, even a slight risk of a false-negative result is unacceptable.

2. Look at appendix A, “Annotated Rules of the Road.” This is an example of what we call a master annotated Rules of the Road list. We will discuss the assembly and use of such lists later. For now, note that Rule 3 in appendix A is very similar to the Rule quoted above. The main difference is that the Rule in appendix A is annotated with sources for the Rule.

A juror-oriented way to express that principle as a Rule might be:

A doctor facing a potential life-and-death situation needs to be really sure of his diagnosis before deciding it’s safe to send the patient home.

In chapter 4, we discuss how to secure the defendant’s agreement with your simple expression of a Rule. For now, it is enough to understand that your goal is to present the jury with the simplest, most understandable expression of the Rule that you can.

**Attribute 3: Defense Cannot Credibly Dispute It**

To be useful, a Rule of the Road either must be endorsed by the defendant and its witnesses or must be so persuasive that the defendant loses credibility by resisting it.

In a bad faith case, most claims handlers will readily agree that part of their job is to assist the policyholder with the claim. They may not believe it, but they know that is the right answer. They instinctively know that resisting that proposition puts them on the slippery slope to Witness Hell.

If the witness denies an obligation to assist the policyholder, he loses credibility, and so does his employer. You can decide how and when you take advantage of that. You can show him the regulations and ask if he agrees they apply to him. Or, you can get him further out on a limb, denying that he has a duty to reveal additional coverages to the insured (for example), or denying he has any duty to provide claim forms or instructions. *So the policyholder paid for this coverage, is entitled to it under the contract, but you can keep it secret from him? You know he wants to file a claim, but you can hide how he should go about it?* In the end, he either has to admit he has a duty to assist, or he looks like the representative of an unreasonable and recalcitrant insurance company.

In a malpractice case, the defendant doctor should concede her obligation to rule out serious, treatable problems before deciding that the patient has a benign condition. If she does not, she, too, is on the road to Witness Hell.

All good Rules are like this. There is no “safe” answer. Disagreeing with the Rule should hurt the defense as much as or more than
agreeing with it. If a doctor endorses a text as authoritative—or has written it himself—he is going to look bad disagreeing with a simple, straightforward principle stated in that text.

In some cases, we can find a relevant principle that has such moral force that it can be used as a Rule, even if not written down anywhere. In this book, we call these Rule sources “common sense” or “moral imperative” sources. For example, relative to the bus stop case discussed in chapter 1, “Defining the Problem,” we used the following Rule (see appendix C, Rule 4):

If there is more than one reasonable and practical place to locate a waiting area, the one safest for the child should be designated.

When we first articulated this Rule in the case, it existed nowhere in writing (at least that we could find). Yet how could anyone possibly argue with it? In fact, the defendants did not. Each of their witnesses, without hesitation, endorsed this Rule.

Here are some other examples of “common sense” or “moral imperative” Rules that share the attribute of being impossible to credibly dispute:

◆ [Claims handlers] [doctors] [engineers] [accountants] should not destroy documents to hide or disguise their conduct.

◆ A doctor should always listen carefully to the patient’s description of symptoms.

◆ An insurance company should not use biased consultants to assist in investigation or evaluation.

◆ Claims handlers should not use racially derogatory terms when communicating with policyholders.

◆ Company should pay the claim unless there is a good reason not to.

◆ A [type of defendant] should not lie to a [type of plaintiff].

◆ If a company can make its product safer at a modest cost, it should do so.
A doctor should prescribe the lowest effective dose of a drug, to avoid dangerous side effects.

A surgeon should not cut any internal structure without making sure what it is.

Anyone who resists any of these statements in front of a jury immediately loses credibility. Even in deposition, resisting a Rule will likely make a witness feel ridiculous and cause him to backtrack and agree with you.

Here is the deposition testimony of a surgeon who, in taking out a patient's gallbladder, mistakenly severed the connection between the patient's liver and the rest of the body (the common bile duct) instead of the connection between the gallbladder and the liver (the cystic duct). Actual transcript:

Q: Dr. Smith, is there a rule in gallbladder surgery that a surgeon should never ligate or divide any structure until he is absolutely certain what its identity is?

A: There is no such rule.

Q: Well, are you allowed to guess what you're cutting before you cut it?

A: You have to take reasonable precautions of identifying the structures and preserving them.

Q: So you have to take reasonable precautions of identifying structures before you cut them?

A: Yes.

Take a minute to think of one of your cases. Are there basic moral truths about your case that can be stated in simple, direct language? Will the defendant look ridiculous contesting the accuracy of the statement? You may have the beginning of your Rules of the Road list.

Let's pause and consider the intersection between two key Rule requirements: “easy to understand” and “defendant cannot credibly dispute.” Because a good Rule must meet both of these requirements, we are doing more than translating technical terms
from the defendant’s business/profession into plain English. Ultimately, the most successful Rules do not merely allow the jury to enter the defendant’s world; they also bring the defendant’s conduct into the world of motive and character familiar to the jury. Human greed, arrogance, and thoughtlessness underlie so many instances of harmful conduct. That’s why the search for clear moral imperatives, both easy to understand and dangerous for the defendant to resist, is a critical part of the Rules technique that we believe can pay off handsomely for plaintiff’s lawyers. We explain this in more detail in chapter 4, “Developing a Working List of Rules.”

**Attribute 4: The Defendant Has Violated It**

By “violated,” we mean the defendant breached the letter or spirit of the Rule. Ideally, you will be able to prove, beyond all doubt, that the defendant violated a specific Rule in very definite ways. You never want to use a Rule with which the defendant can prove it complied. For example, you don’t want to invoke a Rule that says, “Insurance company must disclose all possible coverages to the policyholder,” if your claim file shows the company did just that.

On the other hand, you don’t need absolute proof of violation to make a principle valuable as a Rule. If the spirit of the Rule was violated, that may be enough. Remember our original purpose in using the Rules technique: we are trying to make an ambiguous standard more specific, more meaningful. We are trying to bring clarity to a complex and confusing fact pattern. You should always ask yourself, “Can I prove this Rule was violated?”

One problem we will bookmark for now and return to later is this: when your Rules are too vague, you can believe the defendant violated them, and the defendant can sincerely believe she followed them, because your terms are so ambiguous that they mean different things to different people. For example, the “rule” “A doctor should always be careful” meets two attributes—easy to understand and hard to dispute—but it runs into trouble because it doesn’t prescribe conduct and you cannot clearly prove that the defendant violated the Rule. The solution, when constructing a
list of Rules for a case, is to never stop with a vague truism “rule” but to flesh it out with specific conduct that you can prove the defendant violated.  

Consider this next Rule, some version of which is often the first Rule in almost all our bad faith trials:

Company must treat its policyholders’ interests with equal regard as it does its own interests. This is not an adversarial process.

Case law in almost every state supports the first sentence. Almost every adjuster will agree with the second sentence. If the jurors find in our client’s favor, chances are they will have concluded this Rule was violated. But it is included here, not because we can “prove” a violation, but because it sets the proper tone for the case. It provides a vehicle for educating the jury about the fact that insurance is not like any other business. “Buyer beware,” “survival of the fittest,” and “laissez-faire economics” have no place in the adjustment of claims. Again, by the end of the case, the jury should be convinced that the spirit of this Rule was violated because of the other specific Rule violations.

Attribute 5: The Rule Is Important

The Rule needs to be important enough in the context of the case that proof of its violation will significantly increase the chance of a plaintiff’s verdict.

This attribute of a Rule should go without saying, but the mistake of ignoring it is made often enough to warrant discussing it here. Not every Rule violation is worthy of attention at trial.

4. In their path-breaking book, Reptile: The 2009 Manual of the Plaintiff’s Revolution (Balloon Press 2009), our colleagues Don Keenan and David Ball suggest an archetype for a general Rule:

“A [type of defendant] must not needlessly endanger the safety of [type of plaintiff].”

We agree this is a good starting place for a Rule that might apply to your case, but we stress that you can never stop at this starting line, because Rules that are so general, and never get more specific, can be readily sidestepped by defendants at trial. We know Don and David agree with this.
For example, if you have only two minor incidents where the insurance company failed to assist the claimant with the claim, this Rule may not belong on the list you show the jury. This is not like issue-spotting in law school. Your case does not get better in proportion to the number of Rules you add to your list.

Defense attorneys make good issue-spotting lawyers because their fundamental job is to create problems, not solve them. The more problems that can be ginned up in a case, the happier the defense is. Remember complexity, confusion, and ambiguity?

Our job on behalf of the plaintiff is to solve problems, not create them. So we need to reduce our list of Rules to the basic core that is outcome-important to the case and hard to fight.

We’ve all heard the advice “Keep it simple.” The reason the advice is sound in the Rules context is because we want to avoid handing the defense ammunition that they can use to create complexity, confusion, and ambiguity.

Usually, we will keep a running annotated list throughout the litigation, similar to those in appendix A, “Annotated Rules of the Road: A Master List,” and appendix D, “Bus Stop Safety Principles Annotated.” We finalize the jury copy in the days before trial. Often, it is only in these final days that we will know which Rule violations are important enough to include in the final, jury-ready list.

We also usually find that we need to keep editing and massaging our list of Rules as the case progresses, a process we will detail in these next several chapters.
Developing a Working List of Rules

Early in the case, you should begin constructing an annotated working copy of your Rules of the Road. The annotations form a quick reference to the various sources of support for each Rule. For example, take a look at appendix A, “Annotated Rules of the Road: A Master List,” which is a master list Rick Friedman used as a starting point in several bad faith cases. Also, look at appendix D, “Bus Stop Safety Principles Annotated.”

You will use your own annotated working copy in various ways throughout a case. The annotated list of Rules is a living, working document. Other chapters will discuss how to use this document; this chapter focuses on its construction.

Sources for Rules

Rules can be found in many places. Here are the common Rule sources:

◆ Statutes and regulations
◆ Case law
• Contracts between relevant parties or entities
• Court rulings in your case
• Jury instructions
• Testimony of your experts, their experts, or their lay witnesses
• Policy and procedure manuals
• Other training manuals, quality-control procedures, or operations manuals of the defendant
• Admissions in pleadings
• Textbooks and articles from the professional literature
• Industry guidelines or mission statements
• Ethical codes or guidelines
• Common sense or moral imperatives

We want to emphasize that while you will start your annotated Rules list early, you will regularly revise it throughout a case as new information comes to your attention. You found a new case or a new textbook? Court ruling in your favor? Major admission by a defense witness? Review your annotated list to see if you can add the new information—either as additional support for a Rule you have already drafted, or perhaps as an entirely new Rule.

**Jury Instructions as Rules Sources**

Jury instructions comprise a major source of Rules for your annotated list. And now (faint drum roll), the most important advice in this book:

Draft proposed jury instructions at the beginning of every case.

Years ago, before cell phones, iPods, and continuing-legal-education courses conducted via the Internet, almost every CLE
Developing a Working List of Rules

speaker would make this point: *at the very beginning of a case you should draft a set of proposed jury instructions.* We have become so preoccupied with the stealth, authoritative, antilawyer juror who will destroy our case no matter how perfectly we try it that we don’t hear as much about the basics in CLEs anymore. Or maybe the instructors just gave up, the way some dentists give up telling patients to floss.

So let us tell you. This is basic: *at the very beginning of a case you should draft a set of proposed jury instructions.* The less experienced you are with the type of case you are prosecuting, the more important this is. The more complex the case, the more important it is.

Plaintiff’s lawyers work hard. Many think nothing of routinely working nights and weekends. Tell plaintiff’s lawyers that wearing the color brown to court will increase the chances of victory, and new suits in shades of taupe and chocolate will quickly sprout in courthouse hallways. Tell them PowerPoint will make them more effective in court, and soon a tangle of new projection equipment will crowd their trial tables. Tell them you recall a case from Arkansas in the 1960s, right on point . . . just can’t remember the name right now . . . it should really help their case, and they will flog the search engines for hours to find the citation. But tell them they should draft jury instructions more than three weeks before trial, and you will get the same look you get from your dog when you try to explain the Rule Against Perpetuities.

*Nothing focuses the mind of a trial lawyer like a set of jury instructions.* The jury instructions are “the bottom line,” as the MBAs like to say. They determine what evidence is relevant. They determine what you have to prove to win. They reveal what affirmative defenses can hurt you. They are the ultimate, strongest Rules.

Lawyers who say jurors don’t pay attention to jury instructions:

♦ Are lazy and looking for an excuse to avoid the hard work of thinking about instructions.

♦ Lost a trial, don’t know why, and are looking for an excuse.
Don’t have much experience trying cases.

All of the above.

Do jurors sometimes misunderstand jury instructions? Yes. But whose fault is that? Do jurors sometimes ignore or disregard jury instructions? Yes, but often because the instructions have not been properly presented and argued by the lawyers. Usually, jurors pore over the instructions, looking for help in making their difficult decisions.

An often overlooked benefit of having the jury instructions clearly in mind early in the litigation is that they can influence the judge. Citing a pattern instruction in a brief dealing with summary judgment, motions in limine, or even discovery motions can effectively focus the judge on the appropriate issues. Yet citing instructions to the judge seldom occurs. We suspect this happens so little because the lawyers working on motions have not yet thought about jury instructions. Neither have the judges, but when you remind them, they will take notice.

Jury instructions can help with your experts too. In professional-negligence cases, for example, experts commonly trip over the concept of “standard of care.” They often assume, wrongly, that a very large majority, even 99 percent, of their peers must practice in a certain way for that practice to become the “standard of care.” When you tell experts to focus on the language from your state’s jury instruction—what a “reasonably competent” or “reasonably prudent” practitioner would do in similar circumstances—the experts can focus on what competent care consists of and not worry about what a pollster might find in a survey.

If you have worked numerous cases in a particular area, maybe you don’t need to prepare jury instructions before filing suit, because you already have memorized what the instructions will look like. In all other cases, just do it.

In the movie Prelude to a Kiss an old man and a young woman inadvertently exchange bodies. The mind and personality of the young woman reside in the old man’s body, and vice versa. At one point in the movie, the old man reflects on how he would live differently if he could be young again. His conclusion: “I would floss more.”
Developing a Working List of Rules

Doing your jury instructions early is like flossing. The benefits are provable, even obvious. Yet it brings no instant joy. So it is easy to put off.

Will your draft jury instructions change as the judge makes rulings, you add or drop causes of action, or the facts change? Of course. But you will always have, clearly in mind, in every deposition, conference, or oral argument, the elements necessary to win your case.

Will your friends and colleagues make fun of you? Will they think you are a nerd? Yes. But after you have litigated a case with a set of jury instructions in hand from the beginning, you may agree this is one of those good habits of litigation hygiene that should not be put off.

You might want to think about flossing more too.

**Incorporate Jury Instructions into Your Rules**

When you have finished drafting your jury instructions, you may be surprised to discover principles embodied in those instructions that you can incorporate into Rules of the Road.

This all-purpose negligence instruction can prove useful in almost any injury lawsuit:

Negligence is a relative concept. A reasonable person changes [his][her] conduct according to the circumstances or according to the danger that [he] [she] knows, or should know, exists. Therefore, as the danger increases, a reasonable person acts in accordance with those circumstances. Similarly, as the danger increases, a reasonable person acts more carefully.¹

¹. **Standardized Civil Jury Instructions for the District of Columbia** (1998 ed.) No. 5–3. Maryland puts it more succinctly: “If the foreseeable danger increases, a reasonable person acts more carefully.” **Maryland Pattern Jury Instructions** No. 19:3 (2004 ed.).
That last sentence can readily become the springboard to specific principles that can form the foundation for later Rules. For instance:

As the danger to the patient increases, a doctor should act more carefully.

Or even more specific:

Because a patient can’t protect herself while under general anesthesia, the surgeon has to be much more careful than if the patient were awake.

Think about the idea for a minute. It’s really a core concept of negligence law: “A reasonable person acts more carefully as the foreseeable danger increases.” Many states have cases approving such language in jury instructions. And many of the Rules we will want to fashion in injury cases spring from this idea.

Pattern jury instructions give plenty of fodder for Rules of the Road in insurance bad faith cases too. Look at the following California Judicial Council’s pattern instruction on first-party bad faith.

2332. BAD FAITH (FIRST PARTY)—FAILURE TO PROPERLY INVESTIGATE CLAIM-ESSENTIAL FACTUAL ELEMENTS

[Name of plaintiff] claims that [name of defendant] breached the obligation of good faith and fair dealing by failing to properly investigate [his/her/its] loss. To

2. A federal pattern instruction says: “Any increase in foreseeable danger requires increased care.” O’Malley, Grenig & Lee, 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS, No. 120.12 (5th ed. 2000).

3. A recent case reversing a trial court for failing to allow such an instruction is Pannu v. Jacobson, 909 A.2d 178 (D.C. 2006). For a list of some of the older cases from around the country approving similar language, see 3 Harper, James, and Gray, THE LAW OF TORTS (2nd ed. 1986) section 16.9 at 473 n.12.
establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] suffered a loss covered under an insurance policy with [name of defendant];

2. That [name of plaintiff] notified [name of defendant] of the loss;

3. That [name of defendant] unreasonably failed to properly investigate the loss and [denied coverage/failed to pay insurance benefits/delayed payment of insurance benefits];

4. That [name of plaintiff] was harmed; and

5. That [name of defendant]’s unreasonable failure to properly investigate the loss was a substantial factor in causing [name of plaintiff]’s harm.

When investigating a claim, an insurance company has a duty to diligently search for, and to consider, evidence that supports an insured’s claimed loss. An insurance company may not reasonably and in good faith deny payments to its insured without thoroughly investigating the grounds for its denial.4

From this, you could make a Rule that states: “Insurance company must properly investigate a claim.” That is not much better than the vexing “reasonableness” language. But the last paragraph has the makings of one or two good Rules for your annotated list:

1. An insurance company must thoroughly investigate a claim before denying it.

Or, you could phrase it like this:

4. Emphasis added.
2. An insurance company must diligently search for and consider evidence that supports the claim.

Depending on your case, these two might be combined into a single Rule:

An insurance company must thoroughly investigate a claim and diligently search for and consider evidence that supports the claim.

On the other hand, Rule 2 could itself be divided into two Rules:

An insurance company must diligently search for evidence that supports the claim.

An insurance company must diligently consider evidence that supports the claim.

How you ultimately phrase the Rule for the jury will depend on exactly what facts you have to present and how defense witnesses have testified regarding your various formulations. For example, if the claims people never interviewed people you claim they should have interviewed, you might prefer the first version of Rule 2, immediately above. If they interviewed people, but your claim is that they ignored what these people had to say, you might prefer the second version. You will also want to consider how strongly the defense witnesses agreed with or resisted each of these versions.

You might have the same or similar concepts expressed several ways on your annotated Rules list. Shortly before trial, you can decide what formulation to present to the jury.

However you divide up the Rules on this idea, the annotation in support of any of these Rules will include “CACI 2332,” the original jury instruction. We say “include” because you will eventually get witnesses to endorse these Rules, and you will also include their testimony in the annotation.5

5. For an example of this, see appendix A.
Appendix E, “Proposed Jury Instructions in a Disability Bad Faith Case,” is what we submitted in a case a few years back. If you compare it to appendix A, “Annotated Rules of the Road: A Master List,” you will note how jury-instruction principles end up in the Rules of the Road, and the Rules of the Road end up in jury instructions. For example, some version of the second instruction in appendix E is commonly given in first-party bad faith cases.

INSTRUCTION NO. ___

An insurer’s obligation of good faith and fair dealing includes giving at least as much consideration to the insured’s interest as to its own. To meet the obligation of good faith and fair dealing the insurer must fully inquire into possible bases that might support the insured’s claim. It may not in good faith deny payments to its insured without thoroughly investigating the foundation for its denial.


The three italicized statements are also on our Master Rules of the Road list in appendix A, “Annotated Rules of the Road: A Master List.”

2. Company must treat its policyholder’s interests with equal regard as it does its own interests. This is not an adversarial process.6

5. Company must thoroughly investigate the claim.

12. An insurance company may not ignore evidence that supports coverage.

6. The first sentence comes from the *Egan* case. The second sentence is a “spirit” or “moral imperative” Rule. If an adjuster argues that adjusting a first-party claim is an adversarial process, then he is in effect saying that when you buy insurance, you are buying an adversary, and maybe, a lawsuit. They will never disagree with the second sentence.
Yet another could be added, based on the instruction:

Company must seek out evidence that supports the claim.

Again, the exact formulation will depend on your facts and the testimony of the defense witnesses. The important point is that there will often be substantial overlap between principles in your jury instructions and principles in your Rules.

**Administrative Regulations as Rules Sources**

An administrative code provision can form the basis for a Rule, as well as for a jury instruction. Some courts resist giving jury instructions on detailed provisions of law—even if the instructions accurately state the provision and the provision applies to the case. Still, proposing instructions based on regulations can be worthwhile. Let’s look at one example, instruction #4 from appendix E.

**INSTRUCTION NO. ___**

The Alaska Administrative Code provides that any person transacting a business of insurance who participates in the investigation, adjustment, negotiation or settlement of a claim under any type of insurance must document each action taken on a claim. The documentation must contain all notes, work papers, documents and similar material. The documentation must be in sufficient detail that relevant events, the dates of those events, and all persons participating in those events can be identified. The documentation may include legible copies of originals and may be stored in the form of microfilm or electronic media.

If you find that the defendant violated this law, you may consider this in deciding whether or not it breached its duty of good faith and fair dealing in this case.
Suppose the insurance adjuster claims he had the file materials reviewed by an in-house expert before denying the claim but the file contains no reference to this review. Knowing this, and knowing the administrative code provision referenced in the instruction above, you might draft a Rule that says:

The claim file must contain detailed documentation of each action taken and all work performed on a claim.

So you now have both a proposed instruction stating this principle, as well as a Rule.

Avoid the Implied Cause of Action

When you are working with administrative regulations and statutes as sources of Rules and jury instructions, watch out for one trap the defense often tries to lay: confusing the judge by using a violation of a statute or regulation as "evidence of negligence" and using the same violation as an "implied cause of action." These are completely distinct legal doctrines. Plaintiffs almost always are better off on the familiar ground of using such violations as evidence of negligence (or deliberate misconduct). As one legal treatise classically puts it:

The almost universal American and English attitude is that where legislation prescribes a standard of conduct for the purpose of protecting life, limb, or property from a certain type of risk, and harm to the interest sought to be protected comes about through breach of the standard from the risk sought to be obviated, then the statutory prescription of the standard will at least be considered in determining civil rights and liabilities.7

In the bad faith context, for example, defendant may argue against our code-based proposed jury instruction on the ground that no cause of action exists for violation of this provision of the administrative code. We will tell the judge that we do not claim any separate cause of action exists; the code contains a standard relevant to claims handling. While there may not be a private cause of action under a state’s unfair claim practices act and regulations, the terms of such act and regulations are properly considered in determining whether an insurer’s conduct amounts to bad faith.8

Don’t get too hung up on the distinction between “negligence per se” and “evidence of negligence” when putting statutory or regulatory violations into your lawsuit and your proposed jury instructions. The only difference is whether the court will find negligence as a matter of law (negligence per se) or leave the issue for the jury to consider (evidence of negligence). Most courts are reluctant to find a defendant guilty of negligence as a matter of law, so the modern trend is to allow the evidence of statutory or regulatory violations to come in for the jury’s ultimate decision. This suits us fine. Leaving the decision to the jury gives the plaintiff more room to put in evidence of the purpose of the statute or regulation and thus drive home its importance as a Rule of the Road.9


9. For an instructive case showing how a plaintiff made a fatal misstep by failing to elicit testimony about the purpose of the statute at issue (the federal Food, Drug & Cosmetics Act) and how the defendant violated it, see McNeil Pharmaceuticals v. Hawkins, 686 2d 567 (D.C. 1996). (Judgment for the plaintiff reversed due to failure to have an expert testify as to each statutory and regulatory provision put before the jury, how it was violated, and why it was relevant.)
Never underestimate how hard a desperate defendant will fight to keep statutes and regulations from being incorporated into jury instructions. If they lose on the “no implied cause of action” tactic, defendants may still argue that the rules as expressed in statutes or regulations are not a proper subject for an instruction but should be addressed through testimony or other evidence instead. You can then argue:

1. The instruction accurately states the law regulating the defendant’s conduct.

2. The standardized civil-jury instructions in your jurisdiction, which are usually the product of negotiation among leading lawyers on both sides plus judges, recognize that statutory violations are an appropriate subject for instruction.

3. Whether the regulation was followed by the defendant is relevant to numerous issues in the case (which may include the defendant’s state of mind, interactions with government agencies, and normal operating procedures).

4. If we don’t get an instruction, our expert certainly may testify about the statute or regulation.

5. If our expert may not testify about this law, he may certainly testify to the standard expressed in the law, which is also the standard in the industry.

6. Actually, we are entitled to both an instruction on this issue and to have our expert testify about it.

A smart, self-confident judge will recognize you are entitled to have your expert testify to how claims handling (or drug labeling, or whatever else is at issue) is affected by the law and to have jury instruction on the same laws. In a traffic case, it is common for the court to instruct on the legal speed limit where the accident occurred and allow the experts to testify to that speed limit. This is no different.

When you ask for your Rules of the Road to be expressed in jury instructions and present them through witnesses or exhibits,
the wording may vary somewhat, but the Rules remain the same. The goal is for the jury to hear you sponsor a Rule throughout the trial and then hear the judge endorse that Rule when instructing the jury. Who could ask for more?

A final word about using violations of statutes and regulations to construct Rules: you may have come across a statute or regulation (or case law, for that matter) that contained relevant ideas for your case but did not seem necessarily appropriate for a proposed jury instruction. Put those ideas in your annotated Rules. Ask your expert and the defense witnesses about them. You may get them to endorse a concept as a Rule that the judge would never give as an instruction.

*Caution:* don’t go overboard. Only include legal concepts relevant to the facts or disputes in your case. You are not creating an academic list; you are creating a working lawyer’s litigation tool.

**OTHER SOURCES OF RULES**

Now that you’ve formulated some Rules from your draft jury instructions, it’s time to look at the myriad other sources of Rules.

**Textbooks, Articles, and Industry Guidelines**

Texts, academic articles, industry trade publications, industry mission statements, codes of ethics, and similar material are all great sources for Rules. Principles that seem applicable to your case should be formulated into Rules and added to your annotated Rules list.

A lot of elbow grease needs to be applied in sifting through this source material. We talk about this more in chapter 7, “The *Daubert*-Proofed Expert,” because good objective literature is critical to *Daubert* motions. For now, a few principles can be emphasized:

* First, do the research yourself, or use a trusted assistant. *Never* delegate this task solely to your testifying expert. While an expert may be helpful, an obsessive plaintiff’s lawyer finds more good gems than any expert. Why? Because
you know (or should know) more about the entire case and how it needs to be argued than an expert ever will.

◆ Second, never limit your search to what you can get with a few Google clicks. The Internet has a great cache of information, no question. But some of the best material hasn’t made it online yet. You or your assistant must make the trek to the old-fashioned library, sit down, and crack open the books.

◆ Third, follow the footnote trail. You are likely to find sort-of-relevant material before you find the really good stuff. Persistence pays. Once you get close to your goal, start checking all the footnotes and references carefully. This is where the best source material often hides.

**Contract Provisions**

Surprisingly, plaintiff’s lawyers often overlook contract provisions. Used as Rules of the Road, they can be powerful offensive weapons.

Contracts between your client and the defendant may contain duties or standards that were breached by the defendant. Read the contract carefully. The contract may incorporate by reference public laws and codes that themselves contain duties or standards breached by the defendant.

Contracts with third parties may also contain provisions that help formulate Rules. This is particularly true of contracts with public entities, which you can usually find through informal discovery such as Freedom of Information requests to the contracting agency. These contracts may articulate standards and designate responsibility between entities.\(^\text{10}\) If one of those entities is a defendant, and a standard was breached, you may have a new annotated Rule.

In the school bus stop case, for example, the bus company originally claimed the parents determined where the child should

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\(^{10}\) Licensing applications and certificates of authority for insurance companies may contain an agreement to conduct all aspects of the business with high standards, which may be expressed in ways that lead to Rules of the Road.
wait for the bus. The contract between the school district and the company, however, showed the company had that responsibility. Defense witnesses had to admit this, and the court eventually ruled as a matter of law that the company had the duty to designate bus stops. This ruling supported rules 2 and 3 of our Bus Stop Safety Principles (see appendix D).

Even if contract provisions don’t create an official legal duty, they likely create standards, which a party to the contract would have trouble disclaiming as unfair or inapplicable. So, be alert for all contracts in the vicinity of your case, and read them carefully.

**Admissions in the Answer to the Complaint**

If you have drafted proposed jury instructions and an annotated Rules list, you are now ready to draft the complaint. Draft your complaint with an eye toward gaining more support for the Rules on your list, or adding more Rules to your list.

Suppose in the bus stop case, for example, you have a Rule that looks like this:

Children should be trained not to cross the arterial road until after the bus arrives and driver gives signal.

Annotations to this Rule would look like the following.

School Bus Safety Curriculum Guide (Ex. 37, p. 2)

National Association of State Directors of Pupil Transportation position paper on “Transporting the Nation’s School Children.” Says: “Stopping traffic in areas where children get on and off school buses, and are often crossing the street has proven to be beneficial in protecting students who must cross the street to reach the bus or go home. Stopping traffic creates a safer environment for young children who are not as adept as adults in negotiating their way through traffic.”

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Developing a Working List of Rules

Alaska School Bus Driver Training Manual: “Drivers of school buses have full responsibility for the safety of students while they are boarding the bus, on the bus, leaving the bus, and crossing the road.”

National Standards for School Transportation, page 276, appendix E: “Pupil shall cross the road or street in front of bus only after bus has come to a complete stop and upon direction of the driver.”

One section of your complaint might look like this:

1. Defendant [school bus company] is a member of __________, which publishes “National Standards for School Transportation.” The standards articulated in this publication represent “____________________” [insert statement from standards explaining high goals of the standards].

2. Defendant subscribes to and attempts to follow the standards articulated in this publication.

3. On page 276 of this publication, the following is stated: “Pupil shall cross the road or street in front of bus only after bus has come to a complete stop and upon direction of the driver.” This standard applied to the stop where the plaintiff’s accident occurred.

Another section of the complaint might look like this:

1. Defendant requires all of its drivers to attend the Alaska School Bus Driver Training class, sponsored by the State of Alaska. It requires all drivers to pass this class before being allowed to drive its school buses with children aboard.

2. The training manual for this class provides, at page ____, that “Drivers of school buses have full responsibility for the safety of students while they
are boarding the bus, on the bus, leaving the bus, and crossing the road.” Defendant’s drivers are taught this principle by the State of Alaska. Defendant’s drivers are taught and reminded of this principle by defendant’s own instructors and publications.

Our goal is for the defendant to admit some or all of these allegations and thus give more support for our statement of the Rules.

Not every Rule of the Road should be addressed in your complaint. You may not want to alert the defendant early that you believe it has violated industry standards. You may want to ask about a principle for the first time at a deposition, or even at trial. But you should think about incorporating Rules into the complaint. It may surprise you how many Rules the defense will endorse early in the case, before they know better.

By now you should have a good start on your annotated Rules of the Road. It is time to clarify the critical distinction between a “principle” and a “Rule.”
In chapter 13, we talked about how to finalize your Rules into three lists, one for the jury, one for the judge, and one for yourself. Now that you are almost ready for trial, it’s time to outline an opening statement.

Your opening statement should not be a mechanistic recitation of the Rules and their violation. Instead, as we discussed in the chapter on fitting the Rules into your case story, you use the Rules to support the story you are telling and to undermine the defense story.

There is no single right way to use the Rules of the Road in an opening statement. We can show you what has worked for us and explain why it has been effective. But because every case is different, you will need to find what works for your cases.

Generally, here is the format we follow in the liability portion of our opening:1

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1. Damages are an essential topic for the plaintiff’s lawyer, which we don’t say much about in this book. Damages deserves a book of its own, and it has a masterpiece, in David Ball on Damages—The Essential Update: A Plaintiff’s Attorney’s Guide for Personal Injury and Wrongful Death Cases (2nd ed. National Institute for Trial Advocacy 2005).

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Brief overview of the facts. We start in a neutral, just-the-facts way. Remember, premature advocacy can be a credibility turnoff to skeptical jurors. You want to win them over with the facts.

Description of the Rules. We like to describe in some detail how the defendant’s industry or profession is supposed to work, but in a general way, focused on what matters for this case. In a medical case, for example, you might focus on the importance of teamwork and clear communication among the members of a patient’s hospital care team.

Why the Rules are important and make sense. This usually is part of the Rule description but deserves special emphasis. Some people will follow a rule simply because it is the rule. Most people need to understand the reason for a rule before they are willing to follow it—or hold others to it. Jurors are no different. At some point during the trial, you must explain to the jury why the Rule or standard makes sense. Opening statement is a logical place to do that. It’s also very helpful to talk about the history of the Rule if you have a credible history to tell.

How the defendant broke the Rules. Here we transition back to the case by saying that the plaintiff is suing the defendant for breaking the standards (Rules). Then we go back through the chronology of the case, in more detail than in the introduction, explaining at each point how the defendant violated industry/professional standards. Here, we might first preview testimony of experts.

Undermine the defense excuses. Then we will go through the defenses in detail and explain why they are wrong: because they don’t fit with the basic standards/rules.

We like this structure because it gives us the chance to go through the critical facts at least three times (introduction, Rules violations, and defenses-undermining) but in a nonrepetitive way. By the time we sit down, the jury has become familiar with
the basic chronology of the case and will know all the plaintiff’s theories and the plaintiff’s response to the defense excuses.

We also like this structure because it capitalizes on a basic strength of the Rules approach: *it keeps the focus on the defendant and its conduct.* Repeated social-science studies (including extensive work by AAJ) have confirmed that the more time spent with the spotlight on the defendant, the greater the chance of a victory for the plaintiff. Implicitly, if not explicitly, we tell the jury that all of us have gathered in this courtroom because of the conduct of the defendant, because the defendant broke the Rules and hurt someone.

Some Rules are so basic you may want to start your opening with them. In personal injury cases, jury consultant David Ball likes to coach the plaintiff’s lawyers to make these the first words out of their mouths when they stand up to talk to the jury:

Ladies and gentlemen. There’s a rule that you’re going to hear a lot about in this case. If you are careless, and you hurt someone, you are responsible for all the damage that you have caused.

In a malpractice case, you might add:

It doesn’t matter if you’re an important person [*or, in a products case, an important company*] or if you are busy doing good work. If you are careless, and you hurt someone, you are responsible for all the damage that you caused.

Of course, no opening in a big case is complete without a blizzard of defense objections. Let’s talk about some of the predictable ones.

**Handling Objections to Opening**

In opening statement, you want to introduce the jury to the Rules of the Road. You have your board with your list of Rules.
You want to show it to the jury. The defense is likely to object. Here are some of the common objections and responses.²

OBJECTION: This has not been premarked as an exhibit.³

RESPONSE: It is not intended to be an exhibit and go to the jury. It is illustrative. It is a summary of the testimony the jury is going to hear in this trial. It will save a lot of time to present the information this way, as opposed to my discussing each witness and what each is going to say about these things.

[These standards are not controversial—even the defense witnesses agree with them.]

OBJECTION: Counsel is instructing the jury on the law; that is the court’s function at the end of the case.

RESPONSE: These are not legal standards, these are insurance (or bus or medical or aviation) industry standards. The testimony will be that these are basic principles accepted by everyone in the industry. Some of them may also be incorporated in the law, but that is not what I intend to talk to the jury about—nor will the witnesses who will testify as to these standards.

². With regard to the responses, we are not suggesting you use all those described for a particular objection. You need to figure out what will be most persuasive to your judge: some, all, or none of the responses.

³. This is the kind of objection that you can sometimes head off by adroit pretrial maneuvering. Think about proposing a list of stipulations to be agreed to at the pretrial conference, including boilerplate-like authenticity of exhibits and a few others that give both sides more flexibility at trial, such as:

- Demonstrative aids are enlargements of evidence or argument that are intended to help educate the jury but are not being offered into evidence as exhibits.
- Demonstrative aids containing medical illustrations will be exchanged ___ weeks before trial.
- Demonstrative aids consisting of enlargements of documents with explanatory text or markings need not be exchanged before trial.
- Demonstrative aids consisting of text only need not be exchanged before trial if they are intended to help educate the jury but are not being offered into evidence.
OBJECTION: This is argumentative.

RESPONSE: This is not argument, this is evidence. Your Honor, I have put together an annotated chart for you, so you can see the evidentiary source of each principle. I am not making this up. I am not arguing. I am telling the jury what the evidence will show: that Acme’s own manual and claims manager agree that Acme has a duty to assist the policyholder with the claim. This is a quick, efficient way to give the jury an overview of the evidence they are going to hear. That is the purpose of opening statement.

If the judge seems to be leaning toward the defense on this issue, ask if there would be any problem with your writing these principles on a blackboard as you give your opening. Say that using the board is the same thing, just written out ahead of time, in neater script.

You can also argue that clearly you can say to the jury, “The testimony will be that everyone in the insurance industry, including Acme’s witnesses, recognizes that insurance companies should assist the policyholder with his claim.” If you can say it to the jury, why not show it? It will make things go much faster.

If the judge still will not let you show the board to the jury, say something like this in opening:

During this trial you are going to hear that there are nine basic principles that apply to the type of surgery that was performed in this case. These principles are so basic and commonly accepted that I don’t believe you will hear a single witness disagree with them. Some of these principles are stated right in the hospital’s own manual. The first is . . .

Then, just discuss each principle as if the board were there.
**Concluding Thoughts on Opening Statement**

The Rules approach can help you avoid a mistake we frequently see in openings.

The trial books and CLE speakers all tell us we must show the jury how much we believe in our case. Many lawyers misinterpret this to mean they must be emphatic and emotional in opening statement. This is a big mistake.

At this stage of a trial, the jurors do not trust you. They have no reason to. Everyone knows “lawyers can’t be trusted.” They will see your emotion as a cheap parlor trick.

Stated another way, at the opening-statement stage, jurors are still trying to decide if they can trust you—and your emotions. The best way to show them they can trust you is to show them standards that cannot be disputed (your Rules) and evidence that shows those standards have been violated.

Emotion at this stage accentuates your bias. Better to show the jury that you can back up everything you are saying. Show them the documents; show them pages from depositions. Show them they don’t have to take your word for anything—it’s all here in black and white.

This doesn’t mean you should adopt a flat, detached tone. You should be animated and involved with your story. If you don’t sound interested in what you’re saying, no one else will be interested either.

Show the jurors you care about your case by showing them you cared enough to do the work, to be meticulously prepared, and to back up everything you tell them. You must trust them to understand and have the appropriate emotions. You don’t have to tell them how to feel or what to think.