Polarizing the Case

Exposing and Defeating the Malingering Myth

Also by Rick Friedman

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Author's Note

This book is based on various actual cases in which I have participated as counsel. However, the cases presented in this book are composites of actual cases, and the names of all litigants, witnesses, and counsel (other than my own name), and various other identifying details, have been changed. For these reasons, any similarity between the fictionalized names, and other particulars in this book, and real individuals, companies and cases is strictly coincidental.

Acknowledgements

Hacking through the underbrush, heading towards his goal, an author (at least this author) often loses sight of both the forest and the trees. This book is much better than it would have been, without the help of Kim Dvorak, Gary Fye, Jim Gilmore, Jackie Shepherd and Trina Tinglum, who kept reminding me of the forest and the trees. I am grateful for their help, and hope I have not disappointed them by not following more of their suggestions.

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To Jackie, Kasi, and Cade,

Who warm my heart and delight my spirit.

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Introduction

WHEN I began practicing law in 1979, it was rare for defense lawyers to accuse a plaintiff of malingering. Maybe they knew jurors would not be receptive to such arguments, absent definitive proof. Perhaps jurors have always been receptive, but defense lawyers back then felt constrained by their role as officers of the court, or by basic human decency. Whatever the reason, they usually refrained from attacking people as liars and cheats when they knew it wasn't true.

I enjoy speculating about such things, but don't pretend to know what accounts for the change. What I do know is that the malingering defense seems to crop up everywhere now. In personal injury cases, large and small, in medical malpractice, even contract cases, the defense will frequently find a way to imply, insinuate, or outright accuse the plaintiff of being a liar, a cheat, and a fraud.

Most plaintiff lawyers have had the unfortunate experience of watching a strong case defeated by preposterous allegations of malingering. We may chalk up the verdict to a random bad jury or a biased judge. But then it happens again. And again. Not just to us, but to our professional friends and associates.

These tactics can be seen most clearly in what the insurance industry has labeled "Minor Impact Soft-Tissue" (MIST) cases. About fifteen years back, the industry made a decision to plug into public suspicions about plaintiffs and aggressively litigate these cases. The result has been to create the conventional wisdom in the plaintiff's bar that these low impact cases cannot be won.

Of course, these tactics are not limited to MIST cases; they crop up everywhere, and it is often difficult to know how to deal with them.

This book has a modest goal: to quickly and efficiently provide a blueprint for defeating the malingering defense. Actually, it is a guidebook for wrapping the malingering defense around the neck of the defense lawyer and strangling him with it.

Part I progresses through the various stages of preparing and trying a case, showing how to polarize and defeat the malingering defense. I make no effort to comprehensively cover each stage. I am simplistic for the sake of clarity. Each chapter tries to explain what must be accomplished at that stage to defeat the malingering defense at trial. The chapter on written discovery, for example, makes no attempt to outline all written discovery you should propound in a particular case.

Part II shows polarizing principles in action. This part uses real trial transcripts to show the polarizing process from start to finish.

The insurance industry has done a spectacular job of convincing the public—our jury pool—that people who make injury claims are not hurt and are exaggerating for monetary gain. It's not generally true, but it is powerful because it can be true—even if infrequently. This book is not for cheaters. None of us want to help anyone get away with what amounts to larceny. This book is designed to help you protect the innocent victims of this widespread character-assassination.

The morally bankrupt strategy of accusing honest victims of being liars, cheats, and frauds has dominated American courtrooms

for too long. I hope this book will help you get your clients the justice they deserve.

Part I

Description

1

Defining the Problem

and Taking it Seriously

JUST A few years ago, who would have thought that a presidential candidate with numerous combat decorations could be successfully attacked for his lack of patriotism when running for president of the United States? Who would have thought his courage could be questioned, or his right to his medals put in issue?

That his opponents thought they could do this and get away with it tells us a lot about them. But candidate John Kerry's response tells us a lot about ourselves.

I have no inside information about the thoughts or feelings of the Kerry campaign's decision-makers, but I suspect they were similar to those many plaintiff lawyers have as the malingering defense unfolds:

- I can't believe they are so stupid as to attack us on this basis.
- This is the best thing that could happen! The voters (jurors) will hate them for this.
- My best strategy is to say little or nothing; I won't dignify their attack with the credibility a response might create.

- I can't believe they dare to keep repeating these ridiculous allegations.
- I'll stick to the issues. The voters (jurors) will see that I am the good, serious, trustworthy one, not the type to get down into the mud and wrestle with pigs.
- The voters (jurors) will see how desperate they are to keep making these ridiculous allegations.
- I can't believe we lost.

President Bush never attacked directly, but only through an Orwellian-named group, "Swift-boat Veterans for Truth." When called upon to renounce the group, he noted that they had First Amendment rights as citizens, and as President, it would be improper for him to attempt to chill those rights. He was not questioning Senator Kerry's patriotism or valor, and the voters could draw their own conclusions.

Similarly, defense lawyers rely upon IME (Independent Medical Exam) doctors to attack the plaintiff. They simply present what the medical doctors have to say, along with other "facts," and let the jurors draw their own conclusion from such "evidence."

Since that about exhausts my political knowledge, I'll leave the analogy behind. Let's turn to the courtroom, where I think I can speak with some authority on this subject. Every experienced trial lawyer has learned this lesson the hard way: ***If you don't address the implication, insinuation, or accusation of malingering, YOU WILL LOSE!***

Why do baseless charges of malingering take root and blossom in the jury box? There are multiple reasons. Among them:

- We have been bombarded with propaganda from corporate America, pounding home the message that trial lawyers and plaintiffs are greedy tricksters, out for an easy buck at the expense of responsible citizens. Anyone sitting on the plaintiff's side of the courtroom is immediately viewed with suspicion and distrust by many (if not most) jurors.

- Many people think they know someone who has tricked the judicial system and recovered money they didn't deserve. Question a jury panel about attitudes towards lawsuits and you are almost certain to hear at least one potential juror describing a neighbor or co-worker who successfully tricked the system.
- We are trying to motivate jurors to take action. Taking action requires intellectual effort and emotional energy. Agreeing with the view that plaintiff is a fake saves the juror emotional energy and intellectual effort.
- Faking is easy to understand. A juror may not understand fibromyalgia or the mechanics of a mild traumatic brain injury, but he certainly understands (or thinks he does) faking for money. Simply stated, the jury is more comfortable on this intellectual terrain.

This last point is important, and forms the basis for the trial tactics discussed in this book. Most jurors consider themselves good judges of character. Many consider themselves experts. All are comfortable making character judgments; they have done this all their lives.

Most of us prefer doing something we are good at over something we are bad at. People who are good at analyzing intellectual arguments, technical data and large volumes of information go to law school. The rest do other things, and when they find themselves in the jury box, they prefer to make decisions based on what they already know and understand rather than based on newly-acquired unfamiliar information. No wonder they gravitate to suggestions that this whole messy confusing trial can be decided by looking only at the plaintiff's motivations.

This is why we get trials where plaintiff's medical experts demolish the defense medical arguments—yet a defense verdict results.[1]

Think of this as two battles taking place in the courtroom simultaneously. One is an intellectual battle over plaintiff's medical condition. Medical experts discuss test results, examinations and medical literature. The other battle is over plaintiff's motivations. Is she really experiencing the symptoms she reports to the doctors? Does she really want to get better? What kind of person is she, anyway?

Defense lawyers understand they can lose the first battle and still win the war. In fact, they don't have to win ***any*** battle. They only have to create enough doubt about the plaintiff's character and motivations to sap the jury of its energy or desire to act. This is why the defense can throw a bunch of incoherent dust in the air and still consistently win cases.

Ties go to the defense. The preponderance-of-the-evidence-in-favor-of-the-plaintiff cases go to the defense. If a plaintiff is going to win a case in which there is even a suggestion of malingering, we have to be willing to enter the battle over plaintiff's motivations. If we do this well, we may not even have to win the first battle—over the medical evidence—to win the war. But if we don't enter the character/motivation battle, we will lose every time.

Let's take a moment for a little introspection. Plaintiff lawyers also prefer doing something we are good at over something we are not so good at. Many of us are comfortable analyzing intellectual arguments, technical data and large volumes of information. We have made our way through the world relying heavily on our ability to do this. "To a hammer, everything looks like a nail." Many of us have become intellectual hammers, pulling out that reliable tool whenever we are anxious or scared.

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1 Throughout this book I use the term "defense verdict" to indicate a grossly inadequate award, not just a "zero" award.

When the defense starts impugning plaintiff's motives, we grab our intellectual hammer. We spend more time with our experts, order more tests, and dig deeper into our legal and medical research. We work hard. We are good at all these things. They make us feel comfortable.

That jurors might ignore the intellectual "facts" and make their decision on another basis scares us. It makes us feel out of control and inadequate. We don't know how to fight on the amorphous battlefield of motivation, where innuendo and cheap shots are the weapons of choice for the defense.

So we tend to ignore that battlefield, or step onto it defensively, halfheartedly, and we get clobbered. Or worse, we try to use the same weapons the defense uses—sarcasm, innuendo, attacks on opposing counsel—and we go down in flames.

Here is the lesson: ***if you even suspect the defense may try to imply your client is faking or exaggerating, you must put on your armor, pick up your sword, and charge into battle on this issue.*** They have thrown down the gauntlet. The rest of this book will teach you how to recognize it, pick it up, and then stuff it down their throats.