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You have the option when suing insurers
Rick Friedman exposes the myth of “malingering”

Polarizing the Case: Exposing & Defeating the Malingering Myth
Rick Friedman
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Polarizing the Case: Exposing and Defeating the Malingering Myth by Rick Friedman is one of the newest releases published by Trial Guides, LLC. Friedman is well-known to many trial lawyers for his ground-breaking work, Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability, which he co-authored with Patrick Malone.

Last year, the Consumer Attorneys Association of Los Angeles asked Friedman to speak to its members about Rules of the Road at its Master Speakers Series. He was kind enough to agree, but insisted that he wanted to spend some of his time discussing the concepts he had developed in Polarizing the Case. With his passion for the topic, there was no stopping him, and in a few hours, he provided an overview of the concepts contained in this new book.

Those concepts fit squarely into the changing times faced by plaintiffs’ injury lawyers at trial. We have all felt the change: from the devastating impact of MICRA to the growing jury bias which has made MIST truly a four-letter word.

The significance of Friedman’s material can best be appreciated when viewed in the context of trial trends over the past few decades. In the ’80s, a lawyer did not have to be gifted in trial techniques to be successful. He signed up the client, sent a demand letter and cashed the insurance check. Then, the insurance industry got smart and started its war against compensating people who were injured. Through advertising and the media generally (and with a lot of help from Republicans and conservative Democrats), they set out to convince the American public that many auto collisions are faked and people who make claims usually are not really hurt.

What is scary is that it worked. In less than a decade, much of the public had been convinced that our civil justice system was broken, juries were out-of-control and victims of negligence were frauds.

Because lawyers lack the resources of a company like Mercury Insurance, we cannot fight back with the same techniques that were used against us, such as television advertising. We have to do it in the courtroom, one trial at a time. To accomplish our goal, each of us must devote time and energy to the study and understanding of how juries make their decisions and how we can influence those decisions with effective advocacy.

Resources like Friedman’s book are essential if trial lawyers are to adapt to this new landscape.

As anyone who read Rules of the Road already knows, Friedman’s writing style is easy to read. Although strange to consider a trial guide a “page-turner,” Polarizing the Case is just that.

The malingering defense

The book begins with an explanation of the malingering defense. Most of us tend to associate this with a claim by the defense that our client was not injured or is not as severely injured as is claimed. However, the malingering defense is...
more pervasive and used more deviously than this. Over the past 20 years, the defense bar has perfected the ability of calling our clients liars, cheats and frauds without ever uttering those words.

Without strong evidentiary support, accusing a party of being a liar will usually backfire in trial. Juries do not generally tolerate such harsh words. However, the defense has developed an effective technique enabling it to make this unseemly accusation surreptitiously so that neither the jury nor plaintiff’s counsel may recognize what it is doing. In fact, the defense lawyer may not even realize that he or she is using this technique.

This defense tactic can be used in various forms throughout the litigation, but it is most effectively accomplished through the defendant’s medical expert. The defense expert testifies about plaintiff’s injuries and the typical response to the type of trauma sustained. He or she then opines that the plaintiff is not as severely injured as claimed or that plaintiff should not have been injured at all. These dubious opinions are reinforced because the medical professional who is, after all, the expert comes with a certain amount of respect and credibility. Before you know it and possibly without you ever realizing it, the jury is questioning the credibility of your client and his or her testimony about the injury sustained.

All too often, according to Friedman, trial lawyers deal with these accusations by jumping into the fray and in doing so, allow the defense to define the battlefield. Plaintiff’s counsel takes on the challenging and often impossible task of confronting the malingering defense head-on by imploring the jury to believe that the client was injured as badly as claimed and certainly worse than the defense would lead the jury to believe. Such a strategy plays to the strength of the defense by inviting a compromise verdict, dragging down the value of the case.

As Mr. Friedman explains, if plaintiff’s counsel asserts that the client’s injury is an 8 on a 10 scale, and the defense argues that it is more like a 4, a jury is likely to split the difference and find it is actually a 6. Friedman encourages lawyers not to get caught up in this game of compromise. Instead, he says, push the defense to take a stand and clarify its position. While they may be making it sound like they are conceding the injury is a 4, by attacking the plaintiff’s credibility, they are actually arguing that it is a zero. Take them there.

Rather than allowing the defense to challenge your client’s injuries, and in doing so, her credibility, force the defense to state its position. A defense expert who...
claims that most soft tissue injuries resolve within six to eight weeks and any treatment beyond that time frame is not necessary or helpful is really saying that your client, who claims to have suffered longer than this, is a liar, a cheat and a fake. If that is the defense position, make them own it.

Winning the battle

At its core, Polarizing the Case is about forcing the defense to acknowledge that its position is really that all plaintiff witnesses are liars. That is a battle we can win.

Applied effectively, the jury’s decision will no longer be where in the middle to meet. There will be no middle. You force the defense to come out and say, “Your client is lying about being injured. Her doctor is lying about her injury. Her family and friends are lying.”

The decision the jury will then have to make is, “Are all of these people liars, or is the defendant and its lawyer just trying to avoid responsibility for its actions?”

According to Friedman, defense medical examiners can be divided into four categories: (1) those who come out and actually accuse your client of malinger; (2) those who imply or insinuate that your client is malingering; (3) those who claim that something is wrong with your client, but it is not what the plaintiff is claiming it to be; and (4) those who help your case. Polarizing the Case provides a roadmap for dealing with each type of expert.

Defeating the malingering defense is a two-step process. Plaintiff must offer evidence that she is not a liar, a cheat or a fraud. Doing this is relatively simple, but crucial. Lay witnesses become pivotal to your case. This plays to your advantage in many ways.

Lay witnesses

Lay witnesses are at your disposal to interview and usually are not deposed by the other side. Friends, family, co-workers, bosses, even ex-spouses can testify to the impact the injury has had on plaintiff’s life. They can provide the evidence you need to show that the plaintiff is not working not because she is lazy, but because she is injured. Lay witnesses are rarely deposed by the other side so defense counsel is usually reluctant to vigorously cross-examine them at trial. Unlike the defendant, they have no stake in the litigation, and unlike all of the experts, they are not getting paid for their testimony. Jurors can relate to these witnesses, which makes them extremely attractive to plaintiff and very dangerous for the defense.

Polarizing the Defense provides a step-by-step process to force the defense to select and stick with the trial theme of the malingering plaintiff, which is no longer likely to be successful. Chapter-by-chapter, each phase of the lawsuit is analyzed from this perspective: Screening and Preparing; the Complaint; Written Discovery; Deposing the Defendant and Defense Lay Witnesses; the Defense Medical Report; Deposing the Treating Doctor; Deposing the Defense Medical Doctor; Calling the Expert’s Bluff; Motions in limine and Trial Briefs; Tone at Trial; Van Dine; Opening; Direct Exam; Cross-Exam; and Closing.

Each chapter explains the process of polarizing the case and provides examples of how to effectively apply the strategy to defeat the defense. The examples are not cut-and-paste prefabricated discovery and litigation tools, but a guide to help the reader understand and apply the concepts to any case.

If you have been dissatisfied with the amount of the verdicts you have been getting or would like some fresh ideas to improve your presentation of damages at trial, Polarizing the Case is worth your time and money.