

by Todd Jones, Esquire

***Polarizing the Case:
Exposing and Defeating the Malingering Myth***
by Rick Friedman
Trial Guides Publishing

Polarizing the Case should be required reading for every plaintiff's lawyer. Not only does Rick Friedman do a masterful job of formulating and describing a cogent, well-rounded and effective strategy for aggressively defeating the malingering defense, he shows the reader how to go about doing it in the real world. The reader understands immediately that the author has been in the trenches and is speaking from that experience rather than from an ivory tower.

Of the many things I admire about this book, chief among them is how it completes the circle that so many books of its kind leave wide open. Part I of the book is about identifying the problem, laying out the strategy and understanding the various psychological dimensions.

Part II, however, unlike other books, closes the loop by showing the reader, with an actual trial transcript (a trial which was conducted while the author was writing Part I of the book), how the strategy described can be implemented successfully at trial. Part I is the instruction. Part II is the demonstration.

Throughout the book, the author is self-deprecating and seems less concerned with impressing everyone with how smart he is than he is with teaching. For instance, in Part II, the transcript portion of the book, the author intersperses commentary like this: "as you can see, there is nothing fancy or remarkable going on here. Nothing you couldn't do." I found that kind of modesty refreshing in such an accomplished trial lawyer, a rare combination indeed.

The book not only describes and demonstrates how to carry off the Polarizing method, I also found it instructive and helpful more generally. There is, for example, a real world example of an excellent closing argument, one which not only applies the principles espoused by the book, but which also, among other things, demonstrates a creative way to address the issue of money with the jury.

Fundamentally, however, this book is about how to expose and defeat the malingering defense. It's about taking the fight to the enemy. It was written for every lawyer who has seen his or her good, honest client be made, directly or indirectly, to look like a liar, exaggerator or fake at trial. When the defense has "thrown down the gauntlet . . . this book will teach you how to recognize it, pick it up, and then stuff it down their throats."

We've all been there. You know your client's character is being attacked, sometimes directly, but usually by suggestion and innuendo, but you just aren't sure what to do about it. It can seem reasonable to ignore it or minimize it as best you can; to see it as transparent, self serving and devoid of substance. We think (or hope) no one will buy it. We don't want to dignify it with a response or magnify the issue, right? Wrong.

The sad fact is that it does work. The author likens the situation to the one the Kerry campaign faced when its candidate, a war hero, was attacked on his record of military service. It's natural to be incredulous, to be in shock that they would dare go there. Surely this will backfire. How stupid can they be? On the contrary. Unfortunately, if uncontested, these scurrilous attacks work and work well (did you know Obama wants to pull the plug on Grandma?) which is why the author argues, in the trial context, how important it is to address it boldly and comprehensively when even the slightest hint of its rotten odor wafts into the courtroom.



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.

To polarize effectively, not only do you not ignore the malingering defense, you make the issue of whether your client is a liar, a cheat and a fake THE issue in the case. Of course, the author is careful to admonish the reader that case selection is key. The strategy pre-supposes that the plaintiff actually fits the profile of someone who is honest and who has lay witnesses in her life that can counteract the defense tactic of calling the plaintiff a liar and an exaggerator.

The defense will resist bringing their strategy out of the shadows. Your job is to bring it out into the light of day, force them to take a position, then destroy that position.

For instance, when deposing and/or examining the defense doctor assigned with the duty of assassinating your client's character, the author shows you how to push him to accept an extreme position. The doctor will resist being direct and forthright about what he's doing, choosing, rather, if you allow it, to assassinate through with the back door weapons of insinuation and innuendo. Usually, the author explains, they won't want to be blunt about calling the plaintiff a liar or a fraud. The defense will seek the cover of some more amorphous position, but one which sufficiently muddies the waters and confuses the issues to inflict the damage necessary to sink the plaintiff's case. By the time Mr. Friedman was done with the DME doctor in the trial transcript, exchanges like this were occurring frequently:

Q: All right. So she's intentionally exaggerating all of her symptoms, but she's not lying?

A: Yes.

Author's note: This is the sort of position expert witnesses end up taking when they resist polarizing.

The author does an excellent job, both by description, then by trial demonstration, of showing how the very process of pushing the defense doctor to one extreme or the other (polarizing) makes him look like a weasel, largely due to his reluctance to take a position. I can't do the technique justice in this review, but the book clearly demonstrates how, through this process, a beautiful, empowering clarity emerges for the jury.

To return to the Kerry campaign analogy (I'm pursuing this analogy further than the author did), if Rick Friedman had been in charge of the Kerry campaign, instead of allowing the Swift Boaters to be the downfall of the campaign, their tactics would have been its saving grace. The response from the Kerry campaign should have been to make the respective military records of the two candidates a major issue in the campaign. Instead of shrinking from the issue, Kerry should have challenged Bush on the issue directly, openly, boldly and often. The campaign should have run ads on the issue comparing Kerry's war record to Bush's war record and other ads that would directly confront and contradict the Swift Boaters. The campaign wouldn't shrink from the fight, but, rather, see it as an opportunity to play on

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BOOK REVIEW

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a field where the campaign has an inherent advantage and where the other campaign can be exposed and defeated.

The author makes the point that jurors are usually in the position of making a judgment about the truth of the plaintiff's case. As we all know, defense lawyers are masters of chipping away at your case. If, however, the author argues, the case is about the truth of two stories (she is either a liar, a cheat and a fake or NOT) the story that is most true should prevail.

... the defense is forced to sponsor a particular view of the facts. The jury can then examine the defense story, and judge whether it is more or less credible than the plaintiff story. In short, polarizing the case give the jury two competing versions of the facts to choose from. The defense just can't hide in the brush and take pot-shots at plaintiff's case. The defense has to come out in the open so that we can shoot at them too.

This strategy relies heavily on lay witnesses. They are the tip of the spear and the primary means through which the big lie is exposed for what it is. When confronted with an onslaught of credible lay testimony which directly contradicts the malingering defense (the more stark the contrast the better), the defense crumbles and, if you're lucky and have done your job well, the jury has something to get angry about. Thus, when you know that your client is an honest,

upstanding person with the character, the life history and lay witnesses to prove it, you want the defense to call her a liar, a cheat and a fraud and you want them to do it unequivocally.

From an evidentiary standpoint, this approach, to some degree, relies on the judge accepting that the defense is attacking your client's credibility and character, which, in turn, opens the door to the character evidence you will marshal through your lay witnesses. The more effective the lawyer can be in pulling the defense out of the shadows and into the light of day, the more likely you will be to get the character evidence in.

Watch for opportunities to polarize the judge's attitude towards the case. If he sees the defense as accusing your client of being a fake and a liar, he will give you plenty of evidentiary room to fight back.

It does take some courage to go this route. It's unconventional. The strategy depends on the lawyer's willingness to be bold. If you have been successful in eliciting polarizing material in discovery, the author suggests you address the polarizing theme right off the bat in Voir Dire. Otherwise, you do it in opening, as follows:

You will hear a lot of witnesses, and see a lot of evidence in this case. But in the end, there is really only one major issue you need to decide: is Melinda Shepherd a liar, a cheat and a fraud? That is the defense in this case. And if she is a liar, a cheat and a fraud, you should send her out of this courtroom without a cent. But if you decide she is telling the

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truth, that she is truly injured, and the defense is attacking her this way to avoid paying for the harm they have caused, then your verdict needs to ensure that they do not profit from this tactic.

The book includes solid, practical advice for how to set up this approach, then execute it at trial. It includes good, practical advice on how to prepare your lay witnesses, how to set up and attack the DME doctor, how to conduct effective discovery and how the lawyer should conduct himself at trial.

Though the author is careful to point out that giving hard and fast rules where trial strategy is concerned is folly given the complicated nature of the beast, he does dispense practical advice, based on experience, such as allowing

other witnesses, not the plaintiff, to carry the weight of describing the injury and effects thereof. Plaintiff tends to come off as a whiner doing it him or herself, the author argues. Less is more. The author suggests that lay witnesses should be matter of fact because jurors are suspicious of overly emotional testimony. He believes in not overly rehearsing testimony and he believes the less time the plaintiff is on the stand, the better. Admonish the witnesses that it isn't their job to sell the case. That's the lawyer's job.

I suppose one of the reasons this book resonated with me is the fact that the trial in Part II just happens to be strikingly similar to a case I handled three years ago. Same issues (mild traumatic brain injury - great client and lay witnesses).

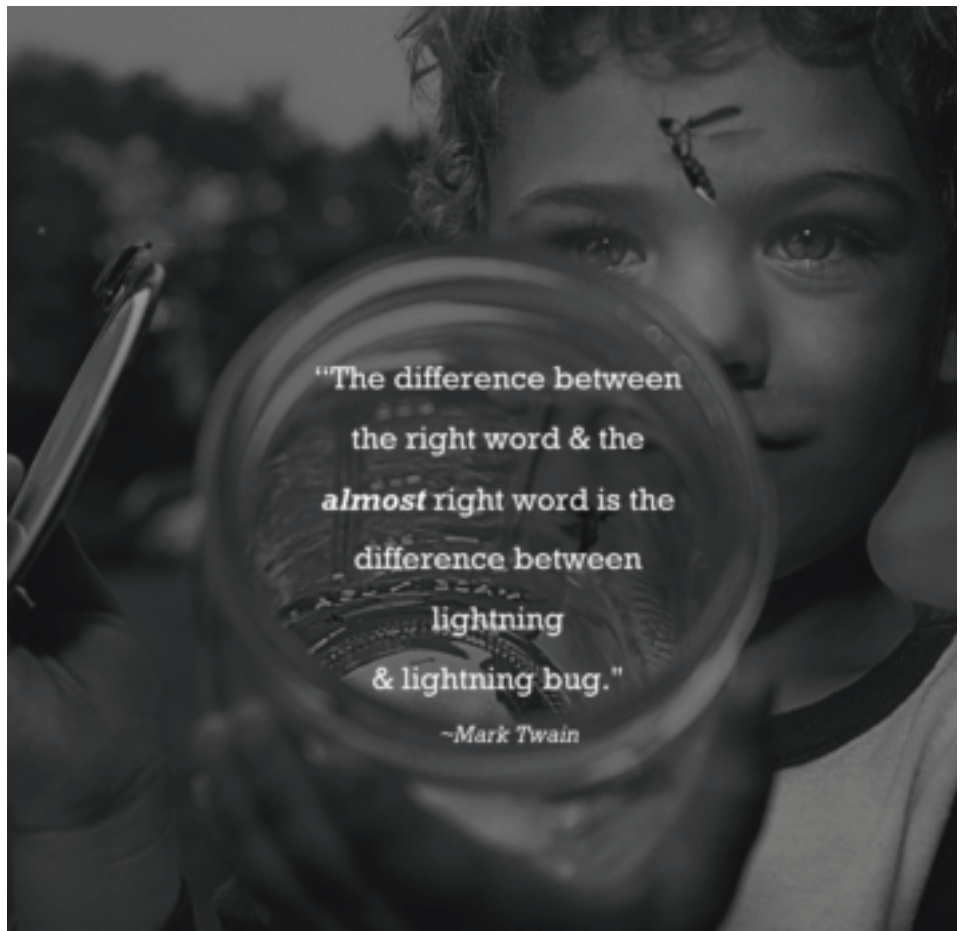
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PRESIDENT

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Of course, Carol could never be replaced, but we are happy to announce that Matt Hass, long time Government Affairs Director, will be stepping up to take the reins and help usher in a new and exciting era. While I'm sure future *Docket* articles, e-mails, meetings and discussions will be devoted to fully embracing and unveiling Matt's new vision for ATLA, I can offer a brief glimpse of what he has up his sleeve...

For one, Matt is making it his goal to thoroughly examine the structure of our organization so we can identify all strengths and weaknesses that may exist. He plans to devise ways that we can make ATLA stronger in the public policy realm while simultaneously providing more value to our members. Much of the details of his plans are still being worked out, but from what I've seen thus far, I'm convinced that it is going to be an exciting time in the life of our organization. I hope you'll commit yourself to being involved in the process and helping make ATLA an even stronger force for the future of our profession. •



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Same dynamics (hired gun neuropsychologist calling my client a malingerer). I even managed to settle the case for almost exactly what the author was offered before he took it to trial (my client didn't want to go to trial), but, after reading this book, it is obvious to me that I would have been much more prepared to take the case to the jury and get a great result had the comprehensive strategy outlined in this book been at my fingertips. I employed some of these strategies, frankly, of my own accord, but I, without this book, wouldn't have had the big picture concept, the comprehensive strategy, or the consequent conviction to follow it through every aspect of discovery and trial. It isn't until you see how forcefully the author polarizes the issues, at every step of litigation, that the approach begins to make so much sense. It requires boldness and aggression - malice aforethought, if you will.

If, through discovery and trial, the polarizing strategy has been fully utilized and implemented, the lawyer has set the stage for this sort of statement, which Mr. Friedman used in his closing:

I told you at the beginning of this case that the major issue you would have to decide is whether my client is a liar, a cheat and a fraud. Now you know why I said that. If she is faking her injuries, you should send her out of here with nothing. But if she is telling the truth, then they should be ashamed of themselves.

The jury returned a \$700,000.00 verdict in the Part II case. After reading the author's instructions on polarizing the case, then the demonstration, it isn't difficult to see why. •

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