

## EXCERPTS FROM *POLARIZING THE CASE* by Rick Friedman

Page 8: ***If you don't address the implication, insinuation, or accusation of malingering, YOU WILL LOSE!***

Page 9: 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.

Page 10: 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?

Page 10: 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.

Page 13: With a malingering defense, any inconsistent fact looks suspicious.

Page 14: As any trial lawyer knows, inconsistencies are found everywhere in the documents underlying a lawsuit. Most are inconsequential and innocent differences in perception or recollection. But as the defense attorney keeps pointing them out, they begin to look sinister.

Pages 27: I shouldn't have to say it, but I do: the treating doctor is critical in any case in which you anticipate malingering or secondary gain allegations-direct or indirect. If you asked a hundred jurors who they would most like to hear from to help them evaluate plaintiff's physical condition, I have no doubt all would choose the treating doctor over lay witnesses or hired experts.

Page 28: So let's be clear: ***you need to interview the treating doctor before the complaint is filed.*** If for some reason you are unable to do that, ***you need to interview the treating doctor at the earliest opportunity.***

Page 29: You are trying to get the doctor to do the same thing you will try to get all other witnesses to do -- ***take a position:*** is your client faking or not?

Page 30: From your first contact with potential medical experts prepare them for the likelihood that the defense will say your client is a malingerer ... Be blunt with your doctor. “Is my client a liar, a fake and a cheat, or is something else going on?” Ask for his help in answering this question. Chances are, after some investigation, the doctor will be willing to give you a list of signs and symptoms that point in the direction of your client not malingering.

Page 31: PROBABLY THE most difficult case to win these days is the Minor Impact Soft-Tissue (MIST) injury case. In these cases, the malingering defense - explicit or implicit - is endemic.

Page 32 – 33: In the complaint, you want to do two things related to polarizing the case: (1) repeat specific language from the medical records and (2) make allegations that invite the defense to state its position that plaintiff is a liar. Both techniques are designed to force the defense to take a position about plaintiff, her symptoms and conditions, and about her treating doctors. A portion of Melinda Shepherd’s complaint might look like this: ... [*Allege treatment received, as documented in the records, and allege it was reasonable and necessary.*]

Page 33 – 34: Notice what we are alleging as to each significant doctor visit: (1) plaintiff reported these symptoms or conditions, (2) she was actually experiencing these symptoms or conditions (that is, she is truthful), (3) the doctor made a specific diagnosis, and (4) it was a correct diagnosis ... You will later incorporate these same allegations into requests for admissions.

Page 34: Even better, there may be cases where the defense has no medical records but alleges somewhere in its answer that plaintiff is exaggerating or malingering. This is a knee-jerk response for some defense lawyers. If it happens in your case you will be pointing it out to the jury in opening statement: “Even before they had a single medical record, Mr. Hardboil was accusing Mrs. Shepherd of being a liar, a cheat and a fraud.”