

Book Review and Interview with the Author
Mike Abourezk

The Book: POLARIZING the CASE: Exposing and Defeating the Malingering Myth
The Author: Rick Friedman.
Publisher: Trial Guides, 2007.

I read lots of books about lawyering, and after awhile a lot of it starts to sound the same. The same recycled ideas, the same rules, the same strategies. But every now and then someone comes along with something that breaks the monotony. Rick Friedman's newest book, *Polarizing the Case*, is one of those.

In *Polarizing the Case*, Friedman deals head on with one of the biggest problems that plaintiff's and their lawyers face...the jury's natural suspicion that the plaintiff is probably just exaggerating for money. Once you conquer that wicked witch, you're almost home, Dorothy.

Book review: it's great. Here's some samples.

Friedman points out that in just about every injury case, the defense has an all too easy time trashing the plaintiff, because all the defense has to do is exploit the jury's natural suspicion. The defense can do this by pointing out meaningless inconsistencies in the plaintiff's story, or from the medical records, or from the tax returns. "The plaintiff testified she had been earning \$35,000 per year, but the tax returns show only \$32,000 of income —is she concealing a financial motive here? She says she went into the hospital about 9:00 a.m., but the hospital record shows 10:00 a.m. — where was she between 9 and 10?" From meaningless facts like these, the seeds of suspicion will grow.

Unlike the plaintiff, the defense need not tell a coherent story or present an actual theory of the case. Instead, the defense simply throws out inconsistencies and innuendo, gradually creating an uneasy stink in the courtroom. The defense avoids getting stinky themselves by never coming out in the open to call the plaintiff a malingerer, or a liar, or a cheater, or a fraud. Instead, the defense lawyer just keeps pointing out inconsistencies in what he calls the "puzzling" medical records, and sadly shakes his head as if to say, "we all know what is going on here, but I am too much of a gentleman to say it."

It works beautifully.

Friedman's book is called *Polarizing the Case*, because it outlines a strategy to draw attention to what the defense is doing, and force the defense to come out and do it in the open, so that the jury has two clear stories to choose from. He forces the defense to come out of the shadows and openly call the plaintiff a liar, or else stop with the attacks. As Friedman points out, usually the defense doesn't have a viable story of its own. The "inconsistency" strategy only works when it is done with a very subtle hand. It only works when it is carried out from a position of murky insinuation. It only works when the defense can hide in the shadows and take shots at the plaintiff and his lawyers from the safety of the underbrush. When the defense and its

witnesses come out of the shadows into the sunlight, they don't look so pretty, and we can shoot back at them.

So Friedman tells us how to get them to take a stand on whether they are calling the plaintiff a liar, a fraud, or a cheat. They will sense danger and try to retreat back into the safety of the shadows, but Friedman shows us how to block their retreat and either force them to embrace the malingering position or renounce it. If they admit they are calling the plaintiff a cheat, that's great. Now the jury has two clear positions to choose from, and the defense has to risk the possibility that some of that stink in the courtroom is going to stick to them. If they run the other direction and renounce that claim, that's good too. Now the jury has one clear story to evaluate.

Most often, though, the defense will try to avoid a black and white answer, and struggle mightily to stay in the grey. You will chase them all around the courtroom just trying to get a straight answer to simple questions ... is the plaintiff lying or not? Are you saying the plaintiff is faking? When that happens, it's okay ... just chasing them around the courtroom ... because at some point the attention of the jury now shifts away from the plaintiff and onto this ridiculous comedy of evasion being played out by the defense witnesses. Why won't they give a simple answer to simple questions? And there goes that defense lawyer again, talking about the plaintiff's inconsistencies!

Friedman is quick to point out that his approach will help you defeat the malingering defense if your client is not a malingerer. But if he is, you should drop the case as fast as you can. If he is an exaggerator, get him to stop, or drop the case. The book offers no help in presenting the case of a true malingerer.

The Author: Rick Friedman

Speaking of Polarizing, author Rick Friedman is a polar opposite of what I grew up thinking was the prototypical top gun trial lawyer. I mean that in a good way, because I have never really been comfortable around those guys. You know what I mean ... the flamboyant personalities who are always the life of the party, who always have just the right words, and always have just the right story to tell. They make me feel like dull normal.

Friedman is more like a character out of *Northern Exposure*. He dresses in blue jeans and untucked flannel shirts, and sometimes introduces his own presentations at seminars by telling a story of how young lawyers often come to watch him in trial, and they invariably come away *underwhelmed*. But Rick Friedman is not dull normal. One chapter into this book and you are no longer surprised about how he gets millions from juries over and over again.

Friedman graduated from Harvard Law School in 1979 and moved to Sitka, Alaska, to open a small town solo practice. He handled divorces, wills, and DUI's. But then he found out that he likes juries, and juries obviously like him. He started hitting verdicts in the millions, the *tens* of millions, and the *hundreds* of millions. His trial practice spread from Alaska down the west coast throughout the Pacific northwest, to California, and now all across the United States.

Anyway, when I was getting this book review together, I decided to contact Mr. Friedman to ask a few biographical questions. Here is what I found out:

Abourezk: You graduated from Harvard Law School and you went from there to Alaska to open a solo practice in a fishing village. That's a little unusual. Where did you grow up? Why did you go from Harvard to Sitka Alaska?

Friedman: I grew up in Rochester, New York. I had always wanted to see Alaska, and in my second year of law school, one of my professors encouraged members of his class to take summer jobs in the District Attorney's office in Alaska. He said he could help us get jobs. So I spent the summer between second and third year working in the District Attorney's office in Ketchikan, Alaska.

Abourezk: So you set out to be a lawyer in Alaska?

Friedman: I loved Alaska. I did not love the law. I almost dropped out after my first year of law school. In that first year I did not see anyone--professors, students or lawyers we read about--doing anything I thought was remotely interesting. In the second year, things got more interesting, but by the time I graduated, I was still not convinced I wanted to be a lawyer

Abourezk: How did you choose Sitka?

Friedman: I went to Sitka for two reasons; first, I had no job offers, and second, it provided me a way to hedge my bets. I figured I could open a practice, charge \$65 per hour, work part time, and spend the rest of my time writing novels. Needless to say, I did not learn much about law office economics in law school.

Abourezk: What happened to your plan of working part time and writing novels the rest of the time?

Friedman: I was writing a novel and working at the law practice. The law practice took more and more time, but I did keep working on the novel. After my first civil trial, I realized I was more suited to being a lawyer than being a novelist. I am more of a strategic thinker than a creative thinker.

Abourezk: What kind of practice did you open?

Friedman: My wife and I rented half of a duplex, and I opened a solo practice in one of the bedrooms. I handled anything that came in the door--DUIs, wills, divorces, you name it.

Abourezk: Wasn't it hard having no senior partner or mentor? How did you make up for that?

Friedman: Very hard. I read everything I could find on trial practice. I worked nights, weekends and holidays. I was scared to death. Things that now take me ten minutes would take hours. But fear is a great motivator and I learned a lot. And I am eternally grateful to the trial lawyers who took the time out of their own practices to write and try to teach others. Their books, articles and interviews

saved me.

Abourezk: Who did you read?

Friedman: I read everything I could get my hands on, by or about Gerry Spence, Moe Levine, Bill Barton, Al Julian, Phil Corboy, Ted Koskoff and a dozen others I can't think of right now.

Abourezk: At what point did you decide you liked being a lawyer?

Friedman: After my first civil jury trial. I represented a police officer fired for writing a letter of complaint to the City Assembly. We had a Section 1983 claim for violation of his First Amendment rights. The trial was intellectually and emotionally challenging in a way I had never experienced before. We won the case and the client used the money to go to law school himself.

Abourezk: Didn't you represent Joseph Hazelwood, the captain of the Exxon Valdez?

Friedman: There was a federal statute that said that if a captain of a ship reported his own oil spill, he had immunity from prosecution. I was hired to brief that issue and conduct the two week evidentiary hearing on Hazelwood's behalf. It was quite a circus. The law could not have been more clear, but what trial judge was going to give Hazelwood immunity? We lost that issue at the trial level, won it in the Alaska Court of Appeals, and lost it in the Alaska Supreme Court. In the end, though, Hazelwood was acquitted of all felonies, and convicted of a class B misdemeanor for "negligent discharge of oil."

Abourezk: Didn't one of your cases in Alaska end in a verdict of over \$150 MM against State Farm?

Friedman: Yes.

Abourezk: Your practice has exploded. Nowadays you try cases in many different states, all up and down the Pacific Coast, and all across the United States. How does a small town lawyer with a solo practice make that kind of transition?

Friedman: I'm not sure what you're asking? How to get the work? How to handle the different venues?

Abourezk: How did you go from an office in your bedroom, doing DUI's and wills to getting \$150 million dollar verdicts?

Friedman: We had a joke in our office that we wouldn't take any case that hadn't been turned down by at least 3 other law firms first. The \$150 million verdict falls into that category. If you are willing to take tough cases, there is always plenty of work.

Abourezk: You have litigated and tried several cases in SD. What kind of experience was that? How do we compare?

Friedman: The South Dakota judges I have been in front of have been top-notch--as good as you would find anywhere. The lawyers tend to be more courteous with each other

than in some of the other places I have practiced. In my experience, the quality of judges varies greatly from place to place; the quality of the lawyering is pretty much the same whether you are in Los Angeles or Sioux Falls.

Abourezk: ***Polarizing the Case* is your second book. Your first book, *Rules of the Road*, has really caught fire. I hear lawyers all over the country now using your lexicon. What prompted you to write this new book, *Polarizing the Case*?**

Friedman: I was actually in the process of writing what will now be my third book, *Becoming a Trial Lawyer: Beyond Technique*. I had one chapter addressing one aspect of the Polarizing technique, but kept getting calls and emails from lawyers asking how to defend against allegations of malingering. It was also one of the most common questions in the CLEs I teach. It finally dawned on me that "trashing the plaintiff" has been the defense of choice in all types of cases for the last 15 years. I realized that in my own cases, I had been doing things to beat the malingering defense that might easily be taught to others. I started teaching the Polarizing technique at CLEs, and it looked like it was helping people. So I interrupted my writing of *Becoming a Trial Lawyer* to get *Polarizing* out as quickly as possible.

Abourezk: **About the book, *Polarizing the Case*, what is the main message that you are trying to get across?**

Friedman: In a way, it is the same message as in *Rules of the Road*--we can not let the defense frame the issues. To be more specific, the message is that when the defense implies or insinuates the plaintiff is dishonest in any way, you can not leave that insinuation unaddressed. You need to force the defense to state its position--and then disprove it. The psychological message I am trying to get across is that plaintiff lawyers cannot win cases by being careful. We need to be bold--but in a well thought-out way. We cannot shrink away or tip-toe when they softly accuse our clients of lying, we need to push back.

Abourezk: **Well, let's see here, uh ... (muffled ...unintelligible)**

Friedman: Aren't you going to ask me where people can buy the book?

Abourezk: **Of course. Where can people buy the book?**

Friedman: At Trialguides.com. This is an amazing publishing company. They want to become the leading publisher of trial books for plaintiff lawyers. Actually, I think they already are. They have books by Moe Levine, Gerry Spence, David Ball, Don Keenan . . . the list goes on and on. It's a fun site to visit, even if you don't buy anything.

Abourezk: **I'm going there now.**

(Click...Dial tone)