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Richard M. 'Mike' Hodges
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Dealing with Malingering Claims

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It is a common defense tactic to claim your client is either 1) consciously lying about the injuries, 2) unconsciously lying about the injuries or 3) that there is no physical reason for the pain therefore your client must be lying in some fashion. There are many ways to deal with these claims. I want to address some suggestions for discovery to try to defeat malingering claims outright as well as trial tactics if the defense proceeds to trial with a malingering defense.

Through discovery, you may be able to defeat defense malingering claims. The defense doctors use some common tricks to justify malingering diagnoses. The tricks are often outright lies and misuse of testing materials. I strongly recommend that you read Dorothy Sims' book *Exposing Deceptive Defense Doctors* to understand the specifics, but here are some of the common themes:

1. Using a Test That Does Not Test for Malingering.

Look up the manual on any test the defense gives your client to find out for what purpose its developers created it. Often doctors will use tests psychologists designed to test memory. When your client fails, the doctors claim the client is malingering. A test can only test what it was designed to test. Do not let the doctor claim otherwise.

2. Misinterpreting the Raw Data. You may want to ask the doctor for the raw data and ask one of your experts to re-analyze it. Some doctors will skip computer analysis and instead calculate a score by hand. They do this so they can either leave out certain questions that they know show actual injury or because the computer analysis at the end gives a succinct statement that the client is either malingering or not and they do not want to be tied to such a definitive conclusion.

3. Altering Testing Conditions. If your client has a real injury that causes them pain or if your client has brain damage, the testing conditions can be crucial to their performance. Most tests require that the participant take the test without distractions and in a quiet place. Clients with problems concentrating

may not test well simply because they were disrupted. Other doctors will administer only parts of the test and leave out the sections that would show your client is not malingering. If you get the raw data, you will be able to tell if the interpreter missed something.

4. Ignoring Other Causes. If the doctor administered the correct test in the correct way and the results showed malingering, it still does not mean the client was in fact malingering. Clients may test poorly for many reasons: 1) they are in pain and cannot concentrate, 2) they have damaged brains and cannot concentrate or test well, 3) they are angry at the defense doctor for being treating them poorly so they do not care about the test results, 4) they are having an off day, or 5) many other explanations. Find out from your client how they felt on test day and what they think happened. Get the doctor to agree to the importance of testing conditions as well as the fact that a result of malingering is also consistent with the injuries your client has.

If you get through discovery and the defense is still going to claim malingering, you need to go through all of the relevant above issues with the doctor on the stand. If done correctly, the doctor will not seem credible. In addition, it is now time for "polarizing" techniques as set out by Rick Friedman.¹ I want to caution about using polarizing in certain situations, however. I often see attorneys ready to jump on the polarizing train without clearly understanding if their case is right for that tactic. What follows are three of the most common mistakes I see in applying polarizing techniques.

1. Wrong Case: To use polarizing methods correctly, the defense must be in some way calling your client a liar. I have seen attorneys wanting to polarize a case where the defense is claiming the client over or under-treated. This is not the same as contesting the pain your client feels. It is more akin to claiming the doctors misled your client in the treatment process and that they should not have to pay all of the medical bills. Polarizing works best when used on

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cases that focus on the damages for pain and suffering or physical impairment in which the defense is arguing that the pain is not real or that your client is reporting more pain than he/she really has.

2. Wrong Client: Not every client is good for polarizing. If your client has anything that will tend to make jurors doubt their sincerity, you cannot base your case on jurors either believing or disbelieving your client. Check their Facebook and other social media pages. Look for status postings or photos that show your client river rafting when he is claiming serious back pain or talking to friends about an upcoming soccer game. If the defense has surveillance video of your client doing anything inconsistent with his or her injuries, do not polarize. If your client will not come across as completely genuine and truthful on the stand, do not polarize.

3. Wrong Timing: There is debate amongst consultants as to when to start polarizing. Rick Friedman tends to advocate using it early on in opening and making the case all about choosing whether your client is lying or not. Others, like David Ball and I, tend to wait until later in opening to start polarizing. In my opinion, the polarizing techniques seem too adversarial for you to use early in opening. Jurors do not trust you yet so it is risky to ask them to believe not only you, but also your client. I prefer to wait until the end of opening to discuss polarizing issues. If you are unsure how much the defense will push a malingering issue or what they will say about it, consider holding off on any polarizing in opening. If you accuse the defense of game tactics and they never play that game, you seem disingenuous. Be certain that the defense is going to push the lying issue

before you bring polarizing into the case at all. ▲▲▲

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Endnote

¹ RICK FRIEDMAN, POLARIZING THE CASE: EXPOSING & DEFEATING THE MALINGERING MYTH (2007).

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Mike helped me with some insurance coverage issues. I think he actually enjoyed that stuff. What a great guy.
- Ed Carlstead

Mike was a total gentleman, a great guy, a real expert who gave freely of his vast knowledge. He was energetic, enthusiastic, untiring and vigorous. It is up to the rest of us to carry on with the qualities he exhibited.
- James A. Cederberg

Mike Hodges was humble and gentle in a reasoned inspired life. Mike was a man whose wishbone did not replace his backbone for causes that

were just, a man who understood that to know himself is the foundation stone of knowledge. Mike was not always led in the path of ease and comfort, but he traveled under the stress and spur of difficulties and challenge. It was here that Mike stood up in the storm and shared his compassion for others who sometimes failed.

Mike was a man whose heart was clear, whose goals were high; a husband, father, grandfather, friend, and man who mastered himself before he sought to master others; one who led us in laughter, yet never forgot how to weep; a mentor who reached with us into the future, yet never forgot the past.

Mike Hodges was serious, yet he never took himself too seriously. As we carry on, and we will carry on his legacy Instill in us his humility, so that we, like him, may always remember the simplicity of true greatness, the open mind of true wisdom and the meekness of true strength.

- A Poem for Mike Hodges by Greg Gold - adapted from the letter *Build me a Son* by General Douglas MacArthur

United we stand.

- Mike Hodges