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Combatting Fraudulent Damages and Getting A Case Dismissed for Fraud on the Court

I. Steps to uncover exaggerated and/or fraudulent claims

A. Tools available to Claims Professionals

The claims professional today has more tools available to him at than ever before. With the explosion of social media, claimants everyday freely disclose to the world (or at least their friends) personal information about their lives, wants, and desires that were nearly impossible to gather in the past no matter how much time and money was devoted to it. Therefore, it is important that the claims professional thoroughly investigate, capture, and preserve any relevant photographs, videos, and comments regarding the claimant's current and past conditions and disposition.

Information that previously was not readily available (drug use, criminal activity, depression, financial distress, expectations, and conversations about claim, etc.) is now as close as a laptop or cell phone to assist the claims professional in her investigation and evaluation of a claim. Even if the claimant rarely uses social media (or limits public access), it is important to investigate his work, hobbies, sports, fitness centers, where he may be mentioned, tagged, photographed, or videotaped by a friend, significant other, or co-worker.

It is also important to research the websites and blogs of the Plaintiff's employer for references to any recent activity of the Plaintiff.

B. Tools available to Defense Counsel

Defense counsel should also periodically check Plaintiff's social media accounts for references to recent physical activity, vacations, or discussions about their injuries or claim. The internet tends to bring out the extremes in people who either wish to brag about everything they can still do, or to solicit empathy from family and friends about how they accident has curtailed

their abilities. Despite being warned to avoid social media by their counsel, people have a need to share, and are prone to discuss their case, either in the abstract or in detail.

In addition to all of the regular discovery tools available (interrogatories, Request for Production, subpoenas, depositions, etc.), counsel should utilize state or Federal Freedom of Information Act (FOIA) requests whenever possible for criminal backgrounds, accident reports, or other documents maintained by governmental agencies. Unlike with discovery, FOIA requests allow counsel to obtain documents and information without the other side's knowledge.

In jurisdictions (as in Florida) where there is no ongoing duty to update discovery responses, counsel should periodically propound update discovery to monitor any new accidents, injuries, claims, etc.

Plaintiff's attorneys tend to use the same experts and doctors. Defendants should use discovery and investigation (of the Secretary of State) to uncover any partnerships that any expert may have with other experts or related businesses involved in the litigation, including surgery centers and diagnostic centers. Letters of protection (LOPs) should be exposed for what they are, bias of the expert to testify favorably for the Plaintiff in order to ensure payment. Counsel should also investigate any formal or informal relationships between Plaintiff's counsel and Plaintiff's experts.

Defense Counsel and the claims professional should develop a strategy regarding retaining their own experts, both as consultants and as testifying experts. Rather than just retaining the same experts that the Plaintiff retains, the strategy should weigh the benefits of whether and what type of experts should be retained, and whether to use the expert only as a consultant vs. an expert to be called at trial.

C. Moving to dismiss case for fraud on the Court

Early and thorough discovery and investigation may disclose misstatements and inaccuracies made by the Plaintiff. If the misstatement is directly relevant to the damages claimed by the Plaintiff, counsel should set forth how it violates the integrity of the legal system and the subject litigation. When caught in a misstatement, Plaintiff's will always claim they misinterpreted the question(s) or didn't understand. The argument for dismissal is strongest when not only you can show knowing fraud by the Plaintiff, but also that counsel knew of fraud, and failed to correct it. This can be shown in cases when counsel previously represented the Plaintiff in a similar claim yet failed to correct or amend the misstatement by her client.

II. The Explosion of (Unnecessary) Unrelated Surgery

In the 1980's diagnostic imaging was all the rage. The MRI was a game changer with respect to litigating personal injury claims, as it presented a clear image to a jury of herniated discs or other spine abnormalities; never mind how they got there. In almost any personal injury

case nowadays, a doctor has either recommended surgery or has performed surgery on the Plaintiff. Some of the procedures which lead to disputes regarding causation include:

- Cervical & Lumbar Discectomies with fusion
- Percutaneous Discectomies of the cervical and lumbar spine
- Arthroscopic procedures for meniscal tears of the knee
- Arthroscopic procedures for SLAP tears of the labrum
- Arthroscopic procedures for rotator cuff tears

PRE-TRIAL DISCOVERY

Early on, it is important to orchestrate a successful defense by requesting records and analyzing them. Tools to consider:

- ISO Search
- Prior loss records
- Prior radiology films
- Social Security records
- Depositions
- Motion Practice
- Venue Issues

SOCIAL MEDIA INVESTIGATION

Today it is imperative that the claims professional and defense counsel conduct a social media investigation of the plaintiff. Remember to conduct your social media search as early on as possible, before these platforms are shut down or modified by the plaintiff. It is also important to periodically review the Plaintiff's social media postings throughout the case, and especially during trial.

EXPERT WITNESSES

While the plaintiff's counsel will be sure to present their expert witness to validate the injuries, it is very important for the defense to present their experts as well. The engagement of expert witnesses for the defense, especially in high exposure cases, is worth its weight in gold. Individually, they each offer a perspective of their particular expertise. When presented together, are more difficult to challenge. The proper presentation of the multiple expert witnesses to support your defense is extremely powerful, collectively. Some experts to consider:

- Spinal surgeon
- Neuro-radiologist
- Trauma surgeon
- Biomechanical Expert
- Accident reconstruction Expert

TRIAL

Experts will try to present to the jury that surgery was the only option: They may state that they did a progression of treatment; Physical therapy was attempted to no avail, pain management and conservative treatments failed. Surgery was the only outcome they could accept.

Letters of Protection (LOP), Liens, Reimbursement agreements

It is important to uncover and expose any financial interest an expert has in a case. Often doctors will treat Plaintiff's under a Letter of Protection (LOP), which says that if there is a recovery (by settlement or trial) the attorney will agree to protect the doctor's lien. Clearly LOPs make the doctor an advocate for the Plaintiff in order to ensure payment of his outstanding services.

WHAT TO LOOK FOR WHEN EVALUATING A SUSPICIOUS CLAIM

It is important to re-create the accident (at least on paper or in your mind) to determine whether the accident could have caused the injuries that the Plaintiff now relates to the accident. Most treating doctors don't spend much time on "how" the accident happened, since they are only concerned with treating the Plaintiff. Therefore, it is imperative that counsel have a complete understanding of the mechanism of injury from the Plaintiff, witnesses, videos, photos, and other physical evidence. Armed with a thorough understanding of the mechanism of injury, combined with the typical causes of the Plaintiff's injuries, defense counsel can often get the Plaintiff's doctor to refute the Plaintiff's description of the accident. Things to consider: