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The Psychology of a Plaintiff attorney and How 3D Imaging is Transforming the Litigation Landscape

I. THE MIND OF A PLAINTIFF'S ATTORNEY

A. YOU HAVE TO LOOK AT IT FROM THEIR PERSPECTIVE

THE LESS WORK THEY HAVE TO DO, THE BETTER

"If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle."

— Sun Tzu, The Art of War

Three-dimensional imaging can swing a war in the defense's favor, or verify that Plaintiff has the upper hand.

If Plaintiff's attorneys can see the 3d Imaging studies with their own eyes that their client's injuries are not legitimate, they are going to bail out, or settle for nominal amounts. On the other hand, if worker's comp carrier have verification through three-dimensional imaging that Plaintiff does have a legitimate injury, they are more likely to resolve cases pre-suit and avoid the cost of litigation.

Want to step inside the head of a Plaintiff's attorney? It is not an easy thing to do. But in order to better defend a case, one must understand and anticipate the psychology of how they operate on a day-to-day basis.

They usually carry an exorbitant amount of files. If they have a file count of 180, are they really giving each case the attention it deserves? They routinely do not vet their clients, or their clients' flat-out lie to them.

The fact is that this is a volume-driven business. They want to get paid as fast as possible, and do the least amount in the process.

They don't want to spend time litigating a case, not knowing if they are ever going to get paid. They complain about having to attend long depositions, or sit in court for hours. Their time is valuable. They are not being paid hourly.

That is why they push so much to settle cases in the pre-suit stage. Yet, how do we know their clients are legitimately injured or not?

The only true way to know is through three-dimensional imaging. That way, both sides will know where they stand before they head into battle.

CASH-FLOW CONSTRAINTS

James Gordon: "Mrs. Anderson, you're looking at four guys who are broke. We lost everything trying this case."

Anne Anderson: "How can you even begin to compare what you've lost, to what we've lost."

- From the movie, "A Civil Action"

Companies are charging Plaintiff attorneys and worker's comp carriers less than a \$1,000 for a three-dimensional imaging review, with a written opinion in 48 hours. Wouldn't it benefit both sides to know presuit the strengths and/or weaknesses of their case before they engage in expensive litigation costs?

Defense lawyers bill by the hour, and carriers are in a pinch to keep litigation costs down. The lifestyle of a Plaintiff's lawyer is a feast-or-famine mentality. Simply put, they do not make a cent unless there is a settlement, or a verdict.

They could go through an entire case, spend \$75,000 in costs, and get no-caused. At the same time, they could also make a nice contingency fee without doing a ton of work.

The reality is, many Plaintiffs' attorneys are cash-flowed constrained. They are not sure whether the lights will stay on next month. Lawsuits can become very expensive between discovery, expert witness fees, and certainly trial.

Plaintiffs in lawsuits sometimes have trouble paying their bills while waiting for resolution of their cases, which may take one to two years. Yet, even if a settlement occurs, or a trial victory is secured, payments may be delayed by months or years due to appeals.

That is why many of them resort to borrowing money at staggering interest rates of 30-40 percent charged by these litigation finance companies. There are two types of borrowing: pre-settlement funding, and post-settlement funding. In pre-settlement funding, many finance companies charge a flat upfront fee of 10-20 percent of the advance. Post-settlement funding is where the attorney receives an advance based on the discounted value of the determined legal fee. The rates are cheaper, since there is less risk involved.

IS THIS A GOOD CASE OR NOT?

“Beware of a client who's suing on principle and paying by the hour. He rarely gets his money's worth.”

— Pete Morin, Diary of a Small Fish

Once an employer report of injury is filed, the employer controls and directs all of the medical treatment within the first 28 days after the injury. If an MRI is warranted, wouldn't it behoove the worker's compensation carrier to be able to immediately obtain the MRI films, upload them, and have an outside company convert it to a three-dimension image, get a written opinion from a board-certified radiologist at a hospital, and know right away whether the case is legitimate or not. Once the 28-day time frame elapses, a plaintiff's lawyer may get involved. If the video is damaging to the plaintiff's case, send it over to them.

They will think twice about pursuing their case. This technology enables earlier resolution of claims and eliminates pre-existing conditions.

On the other hand, if the MRI is not conducted within the first 28 days, then the Plaintiff (and their lawyer) can choose where to go for imaging.

The reality is, in a volume-driven business, Plaintiff's attorneys are not unlike defense attorneys. They simply want to know the truth: Is this a good case or not?

Is it worth the time to invest in this case? With hundreds of files to tend to, they want to focus as much time on the cases that carry value, and less on those where there are no objective injuries, or a lying Plaintiff.

So what they do to ensure that their cases are legitimate?

II. WHAT'S CAUSING THE RISE IN INSURANCE FRAUD

B. DESPERATE TIMES, DESPERATE MEASURES

THE DIVE IN PHYSICIAN REIMBURSEMENT

“I got the bill for my surgery. Now I know what those doctors were wearing masks for.”

- James H. Boren

People complain about the rising costs of health care. Doctors are also feeling the pinch. Physician reimbursement has taken a severe dive over the past few years. Governmental cuts in Medicare and Medicaid have hit doctors where it hurts the most – in their pocketbooks.

2016 is the last year physicians have to report performance measure scores to the Centers for Medicare & Medicaid Services (CMS) to avoid up to a 9% reduction in Medicare Physician Fee Schedule (MPFS)

payments under the Physician Quality Reporting System (PQRS), the Value-Based Modifier Program, and the Meaningful Use Program.

A physician's 2017 scores on measures in four weighted performance categories – quality, resource use, advancing care information, and clinical practice improvement activities – will dictate that physician's 2019 composite performance score (CPS) under the new Medicare Incentive Payment System, or MIPS. The CPS, expressed as a number from 1 to 100, will be used by CMS to determine the physician's 2019 MPFS payment rate. CMS also will report the physician's score publicly on Physician Compare.

LAWYER-DIRECTED MEDICAL CARE

“Greed is a bottomless pit which exhausts the person in an endless effort to satisfy the need without ever reaching satisfaction.”

- Erich Fromm, *Escape From Freedom*

Would you trust an MRI report, without seeing the actual images?

Probably not. Double-check their work.

The fact is, three-dimensional imaging studies are read by board certified radiologists at major hospitals who have no skin in the game. Their opinions are far more impactful to a plaintiff's attorney.

What are Plaintiff attorneys doing to stay afloat economically? They form a partnership with certain doctors to ensure that their Plaintiffs will be rubber-stamped with a legitimate injury.

If the lawyer is quarterbacking the care of their client, and benefitting economically in the process, are they really doing what is in the best medical interest of their client?

In Wisconsin, an ethics question was posed: Can an attorney practicing personal injury law suggest various health care providers or other sources of medical care if the injured party does not have a treating physician?

According to the opinion, E-92-4, the lawyer should explain how a referral by the lawyer could affect the representation and, for example, explain:

That the lawyer's involvement in a referral might be used to impeach the testimony of the healthcare provider in question, particularly if there is a pattern of such referrals to the provider; and 2. Any financial interest that the lawyer may have in the health-care provider's business and any other association that the lawyer may have with the healthcare provider that could materially limit the client's representation.

According to the State Bar of Arizona Ethics Opinion 95-10: Referral Fees; Referral to Medical Provider; Conflicts of Interest

Lawyers may not accept referral fees from medical providers for referring a client to the medical practitioner.

Unfortunately, this still goes on, and this is contributing to the rise of insurance fraud. According to the coalition against Insurance Fraud:

- Conservatively, fraud steals \$80 billion a year across all lines of insurance. (Coalition Against Insurance Fraud estimate).
- Fraud comprises about 10 percent of property-casualty insurance losses and loss adjustment expenses each year; and
- Property-casualty fraud thus equals about \$32 billion each year. (Insurance Information Institute, March 2015)

INTENTIONAL OVERREADING OF MRI'S

“Treat the patient, not the X-ray.”

- James M. Hunter

Unfortunately, plaintiffs get taken advantage of by their own attorneys, and the doctors they are directed to see. They are led to believe they have legitimate injuries, and sometimes undergo unnecessary surgeries. This could send medical costs through the roof.

All of this could be avoided if a non-biased radiologist took a second look at the MRI.

You know who they are. There are certain radiologists in every venue, who, every time a read comes back, they magically seem to find a herniated disc, or a tear. They use mixed terminology in order to inflate the injury.

Since the radiologists have a business relationship with the plaintiff's firm, there is pressure to keep diagnosing injuries. If they routinely bring back normal findings, the business relationship will be terminated.

So how does the worker's compensation carrier know whether the MRI reading is legitimate or over read?

Double check their work. Plaintiff's attorneys have been using 3D imaging for years to pad their cases. Why shouldn't you use it to expose illegitimate injuries and lower claim values?

III. HOW 3D IMAGING IS LEVELING THE PLAYING FIELD

C. TECHNOLOGY IS A GAME-CHANGER

BACKGROUND ON 3D IMAGING

“Once a new technology rolls over you, if you're not part of the steamroller, you're part of the road.”

- Stewart Brand

Three-dimensional imaging has been used in the medical community since the late 1990s. The vast majorities of physicians are familiar with, or have even used 3D in medicine. It is routinely utilized by hospitals across the US, and globally to aid in making diagnostic, and life-and-death planning surgical decisions.

3D levels the playing field by automatically putting a series of 2D pictures into a 3D model making it easier for anyone to comprehend.

What makes 3D unique is that companies can juxtapose the image of the plaintiff's MRI with an anonymous database of similarly situated individuals (age and size). By doing this, people can see with their own eyes what a person with a herniated disc looks like, versus a healthy spine.

Images don't lie.

LEVERAGING PRESUIT NEGOTIATIONS

“Everything is negotiable. Whether or not the negotiation is easy is another thing.”

- Carrie Fisher

How many times has this happened to you? The employee goes to an IME, and the doctor tells them they can return to work with certain restrictions. The employee disagrees, and does not feel he can do the job within those restrictions. Then they go to a lawyer's office, who directs them to another doctor, and an MRI. The lawyer sends in the positive MRI results, and will say to the carrier, “I have (John Doe) in my office, and before I file suit, I was trying to see if we could come up with a redemption package figure, and everyone can walk away for good, short of litigation.”

Before you dip into your pocketbook, ask to see the scans, and convert them into 3D. That way, you will know right up front if the injury has been verified or over read.

If it is the latter situation, this is a game-changer. As we pointed out above, plaintiff's attorneys do not want to invest time or money in bad cases. If you send them the MRI, and take a strong posture, they might walk, or settle for peanuts.

Both sides know that life gets expensive if litigation ensues. For worker's compensation carriers, it might take 2-3 months to get an IME, and the Plaintiff might not show. During that time, the Plaintiff could continue to rack up thousands in medical costs.

You should draw a line in the sand: Serve up the images pursuant, and then settlement will be considered.

THE POWER OF VISUAL EVIDENCE IN LITIGATION AND TRIAL

"It's much easier to consume the visual image than to read something."

- Lawrence Ferlinghetti

When doctors from both sides testify at trial, the jury does not usually understand medical jargon. However, if they can see and understand 3D imaging with their own eyes, that can alter the course of a trial.

Think visual evidence is powerful. The statistics bear this out:

- 90% of information transmitted to the brain is visual. (Sources: 3M Corporation and Zabisco)
- 40% of people will respond better to visual information than plain text. (Source: Zabisco)

Seventy percent of the populations are visual learners. Did you know that the brain processes visual information 60,000 times faster than text?

3D imaging carries the same weight as a surveillance video. The pictures don't lie. One can see with their own eyes whether or not an injury is present, and whether or not there was an exacerbation when compared with a pre-injury MRI.

Presenting a compelling three-dimensional reading to the other side during litigation may cause them to think twice about proceeding. At trial, it is usually a battle of the radiology experts, and which one the jury likes better.

If 3D imaging is in play, the popularity contest won't matter.