PERSONAL INJURY

The Value of An IME: To Hold or not to Hold

By Rebecca K. Devlin

We are all too familiar with the same horror story: Your independent expert physician's face is on the cover of the newspaper. He lied, he violated his oath as a physician, he is a despicable human being and he is supposed to testify as a damages expert at your trial next week. You are appalled by his bad judgment and poor character and, just as you pick up the phone to speak to the client with settlement in mind, you think: Did his findings really help my case anyway? Are his conclusions that the plaintiff sustained no causally related injury, suffered, at most, sprains/strains, and can return to work without restriction really going to hold any weight with the jury after being presented with evidence from his numerous treating physicians and photographs showing his vehicle squished into the shape of an accordion?

Rebecca K. Devlin

It's no secret to the defense or the plaintiff's bar that many of the independent expert physicians we routinely see in our cases are completely shot. We all know of those *career* independent expert physicians — the ones who indeed are "impaired by their age and frailties" ("A World of Hurt: The Examination," New York Times, 2009). Many are set up by third-party companies that schedule independent medical examination appointments at 20 minute intervals without sending treatment records or communicating any case-specific information. Recently, I attended a mediation where my adversary's "*ammo*" was that the IME physician, who had been assigned to conduct an examination prior to my firm's retention as counsel and who had found that the plaintiff wasn't injured or in need of future medical treatment, also happened to be the no-fault examiner who concluded, four weeks earlier, that plaintiff was suffering from a causally related disability and required additional physical therapy. Unfortunately, in addition to being unsurprising, the foregoing is rather banal, considering recent events. Nonetheless, this type of behavior has become all too common. In most cases, a defense attorney faced with the prospect of calling a *disreputable* independent expert physician or assuming the risk of the jury hearing a missing witness charge will easily choose the latter. The sting of the jury charge pales in comparison to that of the destruction that will ensue when the expert is cross examined.

We focus our attention as attorneys on the specific details of our individual cases. Each is unique, each presents a new set of facts and obstacles, and each begs of us the ability to provide a novel and thorough defense. We spend much of our time researching liability experts such as accident reconstructionists and engineers, looking over their credentials, qualifications and training and meticulously sifting through their prior testimonial history. So why then do some have almost a knee-jerk tendency to designate or, worse, permit a third-party company to designate, an independent physician to examine a plaintiff in almost every single instance? The use of independent medical examiners as experts for the defense in personal injury litigation is extremely prevalent despite the fact that these IME experts are not always beneficial. Obviously, in many cases, particularly in cases where there is a

(Continued on page 25)

The Value of An IME: To Hold or not to Hold (Continued from page 17)

question of whether a plaintiff sustained a "serious injury" as defined by the Insurance Law Section 5102(d), an IME is an extraordinarily powerful and, often necessary, tool for a defense attorney. It is essential if the intention is to move for summary judgment on threshold grounds. However, we do not need an IME physician to tell us that a limb is missing in a case where the plaintiff's leg was amputated in the accident. We also do not need an IME physician to tell us that plaintiff has limitations in his neck after a multi-level cervical fusion surgery. And we certainly don't need an IME physician to tell us that the plaintiff's injuries are causally related to the subject accident because he wasn't informed about the plaintiff's 10 prior accidents or provided with the plaintiff's voluminous pre-accident medical treatment records.

Of course, the impropriety of conduct at these examinations can be seen on both sides. On one hand, there can be the shifty, career IME physician. On the other hand, there can be the obstructionist, opportunistic IME watchdog. In addition to carefully choosing an independent expert physician in only those cases where one deems it beneficial and necessary to do so, the appearance of, and the recording by, IME watchdogs, i.e. non-legal representatives of plaintiffs, at the IME should also be closely scrutinized and objected to. Recently, the Appellate Division, First Department, in the case of *Kattaria v. Rosado*, 2017 N.Y. Slip Op 00091, affirmed the trial's court's decision which granted defendant's motion directing that the plaintiff resubmit to a medical examination by defendant's designated physician, post-note of issue, without the presence of a non-legal representative. The court held that the plaintiff failed to demonstrate "special and unusual circumstances" warranting the non-legal representative's presence at the examination (*Id*). A formal, written objection to the appearance of a non-party representative at the IME, and to the recording of the IME, should be served with every Answer so that it will be no surprise to his attorney that the watchdog and his camera are not welcome at the examination.

An IME can make or break the defense of a case. Just keep in mind that in several cases, it breaks the defense. It is ill advised to reflexively conduct an IME in every case. This should be a calculated decision. If you decide to go forward with an IME, be selective about your physician, and keep in mind there are good arguments against allowing a non-legal representative to monitor or record the examination. In his article entitled "A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts," Ladd A. Hirsch, Esq. put it best when he compared the decision about whether to retain an expert to the "refrain heard with some frequency when sports fans and commentators discuss their teams during the off season." ("A Pragmatic Approach to Retaining and Presenting Expert Witnesses: Picking All-Stars and Avoiding Busts," by Ladd A. Hirsch [2012]). Often, "[t]he best trades are those that are never made" (*Id*).

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Why You Shouldn't Sue That Broker (Continued from page 14)

a third party, the Richmond County Civil Court in *McDermott v. Related Assets, LLC*[iii] held that RPL §443 imposed a duty upon the broker to conduct a search of New York City's public record to determine if a property had sewer hookup instead of relying on the representations of the seller. That standard of reasonable care, however, has not found broad support in the Supreme Court.

With respect to third parties, negligence and fraudulent misrepresentation intersect due to RPL §443's duty to "disclose all facts known to the agent materially affecting the value or desirability of the property." On its face, this statute appears to derogate the common law doctrine of *caveat emptor*, which imposes liability in an arm's length transaction only in the event of active concealment, by expanding the circumstances in which a broker must actively disclose information to third parties. However, in *Ader v. Guzman*,[iv] the Second Department held that the duties established in RPL §443 do not "alter the application of the common law of agency."

If a specific duty is important to a consumer, the lesson is clear. They are best served by memorializing their expectations in a written agreement or risk a legal reality which may be different than their own. Buyer beware.

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[i] 96 NY2d 369 (2001).
[ii] 20 NY3d 875 (2012).
[iii] 45 Misc3d 1205(A) (Civil Court, Richmond Cnty., Sept. 16, 2004).
[iv] 135 AD3d 668 (2nd Dept. 2016).

Before E-Discovery Begins: Interrogatories or Depositions? (Continued from page 8)

Require the custodian to submit the interrogatory responses online using a commercial system which permits you to integrate the interrogatory responses with your case management system.

Social media

Social media are web-based and mobile technologies that enable interactive online dialogue. They include the nearly infinite variety of internet forums, blogs and websites permitting users to post and access content including text, music, photographs, and recorded or live-streamed videos. Facebook, launched in 2004, is the most ubiquitous of the social networking platforms, which include MySpace, LinkedIn, and many similar services in the United States and overseas.

The basic features common to all social media are a visible profile for each user, a list of "friends," sections containing "postings," and some kind of privacy controls that allow users to choose who may view their profiles or contact them.

Twitter, started in 2006, is a real-time social networking and microblogging service that lets users broadcast to selected persons, or to the world, what they are doing and thinking at any moment — within a 140-character limit for each "tweet."[i]

Social media in litigation

Since the purpose of social media is to share personal information about activities, lifestyle, and state of mind, courts are regularly allowing parties access to social media accounts in cases which those factors are relevant such as matrimonial actions, personal injury claims, and employment litigation.[ii]

While there can be no reasonable expectation of privacy in information voluntarily posted online and available to anyone with a computer, where a Facebook public profile showed nothing inconsistent with the claims of a party, at least one federal court has held that there is no general right to information restricted from public view by the party. [iii]

You will have to evaluate on a case-by-case basis whether gaining access to online content justifies the cost and effort. Just remember that it may be considered prima facie evidence of professional incompetence not to serve a Litigation Hold Notice[iv] together with the summons and complaint in any civil action.

More on the specifics of social media discovery next issue.

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[i] See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d), _ F.Supp.2d _, 2011 WL 5508991 (E.D.Va. Nov. 10, 2011).
[ii] Romano v. Steelcase Inc., 30 Misc.3d 426, 428, 907 N.Y.S.2d 650, 652 (S.Ct.Suff.Cty. 2010)
[iii] *Tominspk* v. *Detroit Metropolitan Airport*, Slip Copy, 2012 WL 179320 (E.D.Mich. Jan. 18, 2012).
[iv] See, "E-Discovery: The litigation hold notice", *The Suffolk Lawyer*, www.scba.org, Vol 32 No. 3, November 2016, pp. 20, 27