



## Gotcha! When Malpractice Plaintiffs Fake or Exaggerate Injuries

Mark E. Crane | July 08, 2011

### Introduction

A video presented at a malpractice trial showed a pitiful 56-year-old man grimacing in pain, hobbling on crutches, unable to even brush his teeth without his wife's assistance. His sex life was over. His disabilities were caused by a botched back operation, he testified.

The defendant neurosurgeon and his insurer were convinced the man was lying. But how to prove it? Investigators with video cameras staked out his house for 3 days, but the man stayed inside. The investigators were about to quit the surveillance when the man finally emerged, jauntily carrying a hydraulic jack and cinder blocks to prop up his car. He then changed the shock absorbers and performed other tasks with the dexterity of a pit crew at the Indianapolis 500.

The surgeon's attorney presented the video to a judge who promptly dismissed the malpractice case. Prosecutors then charged the man with perjury. He was convicted and sentenced to 30 days in jail.

In malpractice cases, it's almost expected that plaintiffs will "gild the lily" by exaggerating their disabilities. However, even the most egregious examples of fraud generally go unpunished -- unlike the case mentioned.

In many cases, searching through public records and databases can turn up phony claims without the expense and uncertainty of video surveillance. A check of motor vehicle records showed that one plaintiff had several speeding tickets issued 90 miles from the home he claimed he couldn't leave because of his "injury."

When his employment records were subpoenaed, it turned out he worked as a long-haul trucker, shifting gears in an 18-wheeler all the while claiming that his left leg was immobile as a result of a physician's negligence. In a case that involved a claim for loss of consortium, a check of divorce records found that the couple had broken up several years earlier but supplied false information about their marital status to boost the value of the lawsuit.

### Finding the Fakes

How can doctors and their attorneys confirm suspicions that a plaintiff is faking? "The first tip often comes from the doctor who says the patient is acting or moving in ways that are inconsistent with the allegations," says James Lewis Griffith Sr., an attorney in Philadelphia who represents both patients and physicians. "A careful reading of the medical record can lead you to investigate further. At depositions, you develop a sixth sense about whether someone is telling the truth, often when they act too smart for their own good. Outright fraud may occur in 1% of cases and it's difficult to prove. But exaggeration is pretty common."

"We look for red flags, especially if the claimed injury doesn't follow the typical pattern," says Peter Leone, New Jersey program director for Academic Insurance in New York, which insures almost 3000 physicians. "Whenever the plaintiff says there's something he can't ever do again, especially if he's a young man, that's suspicious and we dig deeper."

### How Insurers Hunt for Information



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Once a lawsuit is filed, liability carriers check an industry database of all insurance claims to learn about the plaintiff's car accidents, workers' compensation cases, and other claims. That can turn up previous injuries and treatments that some plaintiffs may conceal, says Thomas Connolly, director of the special investigations unit of Princeton Insurance Company.

Is the plaintiff who he or she claims to be? A records search can reveal significant discrepancies. Dennis L. DeMey, a former police officer and president of Adam Safeguard in Toms River, New Jersey, came up with a "Forensic Abstract" program to screen malpractice complaints. It verifies vital statistics including phone numbers, Social Security information, driving records, liens and judgments, workers' compensation claims, and criminal background. It also discloses injuries, accidents, medical treatments, lawsuits, and suspicious claims activity.

The program can detect professional litigants adept at hiding their identities and job and health histories. "We've found that some claimants who swore they'd never been injured before the alleged negligence had been treated for existing conditions for years, but under different identities," says DeMey.

"We've studied thousands of claims and found something amiss in about 20% of them," he said. "Phony Social Security numbers or numbers that belong to someone else occur in almost 10% of claims. High percentages of claimants had motor vehicle accidents they'd failed to disclose."

Any inconsistency prompts investigators to keep asking questions. Exaggeration or fraud crosses socioeconomic lines. "It's a mistake to assume that someone with a solid middle class background can't possibly be lying," DeMay said. "Anyone is capable of exaggerating when money is involved."

"If we find the plaintiff is lying about one thing that may seem unimportant, it raises a red flag," says DeMey. "What else might he or she be lying about? One little inconsistency can lead us to the next fact."

#### Ferretting Out Other Signs of Fakery

After verifying the plaintiff's identity, the next step might involve seeking documents, court records, bankruptcy filings, and motor vehicle and criminal records. The defense may then subpoena employment records and applications and records of treatment by other health providers.

Records from small claims courts might reveal, for example, that a chiropractor may have sued the claimant for nonpayment. "We had one case where a plaintiff had sued 11 healthcare providers regarding an injury she claimed the doctor she was now suing for malpractice caused," says DeMey.

Employment records can provide a wealth of information. In one case, a man sued his doctor for causing blindness in one eye. However, on an employment application he had completed 18 months before the alleged injury, there was the question, 'Is there any medical condition we should know about?' In his own handwriting, he had replied, 'I am blind in my right eye.'"



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In another case, a woman who had breast augmentation surgery claimed the procedure had created open sores with constant discharge caused by infection. The woman said she couldn't work and was embarrassed that her clothes were constantly stained. Her employment records were subpoenaed. They showed that she had been working steadily. Pre-employment physical examinations were required for 3 jobs. None of the doctors or nurses ever noticed any such condition. Neither did coworkers or supervisors.

The plaintiff's medical history should be exhaustively explored, says Michael J. Schoppmann, an attorney with Kern Augustine Conroy & Schoppmann in Bridgewater, New Jersey. "I handled a case where the plaintiff claimed a surgeon left packing in his nose, which later became infected and caused a condition requiring further surgery. Studying his medical history, we found a claim for medical benefits that the plaintiff hadn't mentioned in answers to interrogatories.

"Then we uncovered an emergency room record. The plaintiff had been involved in a bar fight, received packing for his nose, and was instructed to return for further care, which he never did. The lawsuit was dismissed shortly thereafter," Schoppmann said.

#### Low-Tech Ways to Spot Fakers

Investigators sometimes come up with ingenious ways to ferret out the truth. "A man had a vasectomy. He claimed that an electric cauterizer ignited alcohol used to swab his genitals," says attorney James Griffith. "He said he was severely burned and rendered impotent.

"My investigator put up a sign in the man's garden apartment complex laundry room. He was conducting a sex survey, similar to Kinsey or Masters and Johnson. He interviewed several people, including the wife of the plaintiff, who bragged at great length about how wonderful their sex life was. He told her the information was terrific for his survey and had her write it down and sign it, along with permission to use the anecdotes. As she was finishing up her direct testimony at the trial, the investigator walked into the courtroom. She noticed him and asked for a recess. The case was settled for a nominal amount that afternoon," says Griffith.

When a plaintiff is scheduled to give a deposition, it is a good idea to have someone observe the person as he or she walks into the office or leaves the office. "The mobility is usually far better when the plaintiff thinks he or she isn't being observed," says Griffith.

Check out social networking sites as well. "The supposedly disabled plaintiff may be chatting away on Facebook about a recent skiing trip, sometimes including photos," he adds.

#### Surveillance vs Data Mining

Video surveillance can be invaluable in exposing fraudulent claims, but it has its drawbacks and should be used only as a last resort. One case where it succeeded involved a man who claimed he was permanently disabled and unable to work because of a back injury. "A records check found that he owned a gas station," says Griffith. "We put it under surveillance and recorded him bending over to lift tires, then pushing a Cadillac into the garage. A judge quickly dismissed the case."



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DeMey insists that searching databases can be more effective than surveillance. "We didn't need videotape to win a case against a plaintiff who claimed he could no longer work or drive a car," he says. "This guy came into court in a wheelchair. We showed the jury poster-sized blowups of his speeding tickets, workers' compensation records, employment applications, and office records of the chiropractor who'd been treating his bad back for years before the alleged malpractice. You could actually hear jurors gasp when they realized what a liar this plaintiff was."

Surveillance is expensive and time-consuming. It can cost up to \$7000 a day for a 2-person team. "You sit in a van for 8 hours waiting for the subject to leave the house," says Princeton's Thomas Connolly. "It's really boring. You're at the mercy of what the person decides to do that day. There's a lot of luck involved."

Unless the video clearly shows the subject doing things the person swore he or she couldn't do, juries are not impressed. They also resent the intrusion into the subject's privacy. "Juries often see it as a breach of privacy and put themselves in the position of the subject," says Peter Leone of Academic Insurance. "If the jury likes the plaintiff, they may disregard what they see on the video. They rationalize by saying, 'Well, maybe he's just having a good day.'"

Even after a damning video is shown to a jury, the plaintiff may argue that he did things "so I can feel like a man again, but I was laid up for weeks after that." "We've lost cases even though the video clearly proved the claimant was engaged in fraud," say Peter Leone. "A lot depends on the given jury."

Getting sued for malpractice is traumatic enough for doctors without having to worry about plaintiffs faking a disability so they can cash in. Although only a small percentage of cases involve blatant fraud, there are enough fraudulent cases that physicians should demand that their insurance carriers and attorneys perform due diligence to verify the facts and weed out the fakers.

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