PERSONAL INJURY LITIGATION

Propriety of Conduct at Independent Medical Examinations

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In personal injury and medical malpractice cases, independent medical examinations are essential discovery tools. In fact, often times, an independent medical examination is a defendant's most powerful discovery tool. CPLR §3121 provides that when the mental or physical condition of a party is in controversy, any party, usually the defendant, may serve notice and direct that the injured party submit to a physical and/or mental examination by a designated provider, and Uniform Rule 202.17 permits a defendant to have a plaintiff examined by a doctor selected to evaluate the plaintiff's medical condition. The language in standard pretrial stipulations and orders usually sets forth that the independent medical examination(s) must be held within 30 to 45 days after the plaintiff's deposition. The statute and rules, however, are silent on the issue of whether or not the injured party is entitled to representation at the examination and, if permitted, what, if anything, can be done with the firsthand information, audio recording and video footage obtained by the representative during the exam.

Because they are performed in the course of litigation by a defense expert, plaintiffs' attorneys view them as an adversarial process and assert that they can, and should, attend the independent medical examinations of their clients. While the civil rules do not explicitly grant a party the right to have their attorney present during the examination, New York courts have generally permitted an attorney to attend, provided that he/she does not interfere with the examination. *Jakubowski v. Lengen*, 86 A.D.2d 398 (4th Dep't 1982); *Ramsey v. New York University Hosp. Center*, 14 A.D.3d 349 (1st Dep't 2005).

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An independent medical examination surely is not an adversarial process in the same respect as a deposition or hearing. Defense counsel very rarely attends. The independent medical examination consists of objective medical tests identical to those performed during a typical medical examination, and involves standard inquiries relating to the mechanism of injury and to the nature and extent of the plaintiff's treatment and symptomatology. Pre-accident medical history and past medical procedures are discussed and clinical observations are taken. And, while there are unquestionably some exceptions, the vast majority of medical examiners uphold high standards of professionalism, recognizing that they will face rigorous scrutiny under cross examination at trial and that they are not immune in their capacity as an independent medical examiner from disciplinary action by licensing boards and/or criminal tribunals.

Of course, it is a plaintiff's attorney's responsibility to explore during discovery, and to exploit during trial, the manner in which the independent medical examination was performed, its efficacy and the independent medical examiner's purported bias towards the defense. So, following the independent medical examination, a copy of a report detailing the examination process, which specifies with particularity the questions asked and the tests performed as well as the injured party's responses and the examiner's findings, along with a recitation of the examiner's credentials, is provided to plaintiff's attorney. This is typically done within 30 days of the examination but certainly well in advance of trial. And, as if all of that information is not enough, the plaintiff's attorney also has the benefit of obtaining from their client his/her own account of exactly what transpired during the examination. Of course, the point is that the examination is not conducted in a defense bubble. Virtually every aspect of the examination is disclosed and can be used by an adept trial attorney to discredit the medical examiner during cross examination at trial. Nevertheless, some plaintiffs' attorneys are eager to attend the examination because they want more. They want to document it, either simply by observing or by taking notes or through the use of audio and/or audio/visual recording devices, with the hopes of obtaining even more information which can be used to successfully oppose a threshold motion or to bolster cross examination at trial.

Since defense counsel cannot appear at examinations of plaintiffs by their treating physicians, and since the rules do not require that plaintiff provide expert disclosures for treating physicians, independent medical examiner's objective medical findings and opinions play a key role in the defense counsel's evaluation of a case. Further, although *Arons v. Jutkowitz*, 9 N.Y.3d 393 (2007) permits defense counsel to

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interview a plaintiff's treating physician ex parte, it does not compel the physician to cooperate. Given this not-so-level playing field, it is imperative that defense counsel pay particular attention to attempts by plaintiffs' attorneys to overstep the bounds of permissible conduct at these examinations.

The presence of a plaintiff's attorney, or representative, at the independent medical examination, particularly one who is recording or videotaping, is an interference and the practice should be vehemently opposed by defense counsel on that basis. This is because it not only introduces an adversarial element, turning the examining room into a hearing room (*see Mertz v. Bradford*, 152 Ad2d 962 (4th Dep't 1989), but also because it hinders the candid exchange of information between the allegedly injured plaintiff and the examiner. Further, in addition to interfering with the examination, documentation of the examination by the plaintiff's attorney may turn the plaintiff's attorney into a witness in contravention of Rule 3.7 of the Rules of Professional Conduct, which specifically prohibits lawyers from acting as advocates at a trial in which the lawyer is likely to be a necessary witness, with limited exceptions.

The independent medical examination is a defense counsel's opportunity to thoroughly evaluate those injuries that are in controversy in the action. At the very least, defense counsel should object to the presence of a plaintiff's attorney, or representative, at the examination. Defense counsel should, as a matter of course, always object to any audio and/or video recording of the examination. There is no statutory authority for the practice and there is a body of case law disfavoring or prohibiting it absent a showing of "special or unusual circumstances." *See Savarese v. Yonkers Motors,* 205 A.D.2d 463 (1st Dep't 1994); *Lamendola v. Slocum*, 148 A.D.2d 781 (3rd Dep't 1989); *Parsons v. Hytech Tool & Die,* 241 A.D.2d. 936 (4th Dep't 1997); *Mosel v. Brookhaven Mem. Hosp.,* 134 Misc.2d 73 (Sup. Ct. Suffolk County 1986). If footage has been taken by, or on behalf of, a plaintiff at an independent medical examination, defense counsel should immediately demand copies of all recordings, regardless of format. And if a plaintiff's attorney appears at an independent medical examination and then seeks to utilize his/her own observations to attack the credibility of the independent medical examiner, either in opposition to a motion or during cross examination, thereby turning himself/herself as a witness, defense counsel must consider the submission of a motion to disqualify that attorney. The disqualification of an attorney is addressed to the sound discretion of the court, and any doubts are to be resolved in favor of disqualification. *See Stober v. Gaba & Stober, P.C.,* 259 A.D.2d 554 (2nd Dep't 1999).

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