

A GUIDE TO THE INDEPENDENT MEDICAL EXAMINATION

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ABSTRACT

Independent medical examinations (IMEs) are physicals conducted at the request of a third party. An example is the physical examination of a workers' compensation claimant or life insurance applicant, but IMEs are common in bodily injury claims. These examinations are very important since they can help decide whether a claimant is entitled to compensation or qualifies for life insurance or a job. Most defense attorneys have relied on medical reports and expert testimony from an independent medical examiner but little is known about the limitations or parameters of this assessment. In fact, there are a multitude of legal issues surrounding the exam from whether the physician can be sued for medical malpractice to whether a representative of the examinee can be present during the physical. Despite the frequent use of an IME and the many legal issues swirling around the examination, little has been written

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on the subject. This article will address the unique issues that arise in an IME context.

TABLE OF CONTENTS

I.	INTRODUCTION	340
II.	THE PHYSICIAN-PATIENT RELATIONSHIP	341
	A. The AMA's Opinion that an IME Creates a Limited Patient-Physician Relationship	342
	B. Jurisdictions That Recognize a Limited Patient- Physician Relationship	343
	C. Jurisdictions That Recognize a Doctor-Patient Relationship	345
	D. Jurisdictions That Do Not Recognize a Doctor- Patient Relationship	348
III.	PARAMETERS OF THE INDEPENDENT MEDICAL EXAM	350
	A. Place of Examination	352
	B. Patient's Representative at the IME	355
	1. Presence of the Patient's Attorney	355
	2. Presence of the Patient's Physician	360
	3. Presence of Other Patient Representatives	361
	4. Recording or Video Taping	364
IV.	FINANCIAL RESTRICTIONS ON IME DOCTORS	367
V.	FURTHER TESTING REQUESTED BY AN IME DOCTOR	367
	A. Ordering an Examinee to Undergo Sedation for an IME Procedure	370
VI.	OBTAINING THE DOCTOR'S TAX RECORDS	371
VII.	DISQUALIFYING A SPECIFIC IME DOCTOR	377
VIII.	DISQUALIFYING A PHYSICIAN BASED ON BIAS	379
XI.	CONCLUSION	380

I. INTRODUCTION

John Smith was involved in an industrial accident and the defense sent him for an orthopedic examination.¹ At the start of the appointment, the physician indicated that she was seeing Mr. Smith at the request of the worker's compensation carrier and noted that the examination did not establish a doctor-patient

¹ This is a hypothetical situation used to illustrate a standard Independent Medical Examination.

2015] INDEPENDENT MEDICAL EXAMINATIONS 341

relationship. The claimant nodded in agreement, and the physician proceeded with the exam during which time she detected a cancerous appearing lesion on the worker's back. The physician said nothing and completed the IME. About one year later, Mr. Smith was diagnosed with advanced melanoma which cancer had spread throughout his body. Did the IME physician have a duty to disclose to the examinee the abnormality she detected during the examination?

Independent medical examinations (IMEs) are physicals conducted at the request of a third party.² An example is the physical examination of a workers' compensation claimant or life insurance applicant, but IMEs are common in bodily injury claims.³ Most defense attorneys have relied on medical reports and expert testimony from an independent medical examiner but little is known about the limitations or parameters of this assessment.

This article will address the unique issues that arise in an IME context including medical malpractice lawsuits brought against the physician administering the examinations and other unique patient rights questions.

II. THE PHYSICIAN-PATIENT RELATIONSHIP

Physicians provide important medical services in a variety of contexts that do not always result in the creation of a doctor/patient relationship. The classic example is the independent medical examination (IME) in which the doctor examines an individual on behalf of an insurance carrier or defense attorney.⁴ They also perform physicals on behalf of employers, certify pilots and truck drivers, and check the health of applicants for life and disability insurance policies.

The duty of care owed by a physician in a traditional doctor/patient relationship has been extensively litigated and clearly established in a variety of decisions.⁵ Generally, that duty

² See, e.g., FED. R. CIV. P. 35(a) (providing for a court-ordered medical examination of "a party whose mental or physical condition... is in controversy").

³ See, e.g., *Clark v. Siara Mgmt., Inc.*, 791 N.Y.S.2d 670, 670 (N.Y. App. Div. 2005); *Harris v. Kreutzer*, 624 S.E.2d 24, 27 (Va. 2006).

⁴ See *Briglia v. Exxon Co., USA*, 708 A.2d 1246, 1248 (N.J. Super. Ct. Law Div. 1997) (discussing underlying rationale for IMEs).

⁵ See, e.g., *McLeod v. Plymouth Court Nursing Home*, 957 F. Supp. 113, 115 (E.D. Mich. 1997).

is to “treat a [patient] professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same of similar locality, in light of the present state of medical science.”⁶

Most courts accept the notion that a doctor-patient relationship is formed when a patient seeks medical assistance from a doctor and the physician accepts that person as a patient.⁷ Whether a doctor-patient relationship exists is an issue for the fact-finder to determine.⁸ The establishment of this connection is important because courts will dismiss a medical malpractice claim if it finds no relationship existed at the time of the alleged harm.⁹

Jurisdictions differ in their approaches to determining whether IME doctors owe a duty of care to IME patients.¹⁰ This is important because it has implications on whether an IME claimant can bring a medical malpractice or other professional negligence suits against their IME examiner.¹¹ Most jurisdictions have adopted one of the following rationales: an IME doctor owes the patient a limited duty, no doctor-patient relationship is formed, or a doctor-patient relationship exists.¹²

A. *The AMA’s Opinion that an IME Creates a Limited Patient-Physician Relationship*

In a traditional doctor-patient relationship, the physician owes the patient a continuing duty to monitor health and anticipate medical issues and needs.¹³ In contrast, an independent medical

⁶ *Id.*

⁷ Childers v. Frye, 158 S.E. 744, 746 (N.C. 1931); *see also* Young v. Crescente, 39 A.2d 449, 451 (N.J. 1944) (holding that the general rule that a doctor-patient relationship triggered by the physician agreeing to treat a patient, was not applicable to the case at bar).

⁸ Garcia v. City of Boston, 115 F. Supp. 2d 74, 78 (D. Mass. 2000).

⁹ *See* Craddock v. Gross, 504 A.2d 1300, 1303 (Pa. Super. Ct. 1986) (holding that summary judgment was appropriate because a doctor-patient relationship did not exist at the time of the alleged malpractice).

¹⁰ *See generally* Ranier v. Frieman, 682 A.2d 1220, 1223 (N.J. Super. Ct. App. Div. 1996) (discussing the differing views of jurisdictions when evaluating the scope of the duty owed to a patient by a physician in an IME).

¹¹ *See Craddock*, 504 A.2d at 1223 (discussing the decisions of other jurisdictions).

¹² *See Ranier*, 682 A.2d at 1224 (finding a IME physician owes a duty of care if the doctor is examining a specific complaint or the patient presents with injuries).

¹³ *See, e.g.,* Weiss v. Rojanasathit, 975 S.W.2d 113, 119–20 (Mo. 1998) (en

2015] INDEPENDENT MEDICAL EXAMINATIONS 343

examiner is only assessing the individual's health or injury at the time of the examination.¹⁴ The American Medical Association (AMA) addressed the issue of an independent medical examination¹⁵ and concluded that when a physician is responsible for performing an isolated assessment of an individual's health or disability for an employer, business, or insurer, a limited patient-physician relationship should be imposed.¹⁶ This relationship is hard to define, as evidenced by its varied application throughout the courts in the United States. It is the AMA view that this limited relationship requires physicians to inform the patient of important health information and suggesting that the patient follow up with their own physician.¹⁷ The independent medical examiner, however, is not required to treat the person like they would normally handle their own patients.¹⁸

The AMA further noted that the health care provider must notify the examinee of irregularities and other significant health findings uncovered as the result of the physical including making sure that the patient comprehends the issue.¹⁹ Despite this clear pronouncement, the courts have not uniformly embraced the AMA's opinion.²⁰

*B. Jurisdictions That Recognize a Limited
Patient-Physician Relationship*

Some jurisdictions do not have a bright-line standard regarding an IME physician's duty to examinees.²¹ Instead, they

banc) (stating that a physician's "duty to attend the patient" continues until the doctor-patient relationship terminates). *But see* Am. Med. Ass'n Council on Ethical & Judicial Affairs, Formal Op. 10.03 (Dec. 1999) [hereinafter AMA Op. 10.03], available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1003.page> (explaining that "isolated assessment[s] of an individual's health" for a third party creates a "limited patient-physician relationship").

¹⁴ See, e.g., *Ranier*, 682 A.2d at 1221.

¹⁵ AMA Op. 10.03, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Smith v. Radecki*, 238 P.3d 111, 115–16 (Alaska 2010) (discussing the various approaches State Courts have taken to the AMA rule).

²¹ See *Harris v. Kreutzer*, 624 S.E.2d 24, 29–30 (Va. 2006) (explaining that

have held that an independent medical examiner owes a limited duty that does not arise to the standard duty assigned to a doctor-patient relationship.²²

For instance, in Virginia, a plaintiff successfully defeated a motion to dismiss a medical malpractice suit against her IME doctor.²³ In *Harris v. Kreutzer*, the plaintiff suffered a brain injury in a car accident and filed suit against the driver.²⁴ The court ordered Harris to undergo an IME to evaluate the extent of her brain injury.²⁵ The doctor was a clinical psychologist and during the exam, the psychologist was alleged to have verbally abused Ms. Harris and accused her of faking her injuries.²⁶ Ms. Harris filed a medical malpractice suit against the psychologist who moved to dismiss the claim.²⁷ The Virginia Supreme Court held that the negligent performance of a physical or mental IME states a viable cause of action.²⁸ The plaintiff claimed that the doctor knew that her psychological condition would be aggravated if she were verbally abused during the exam.²⁹ Her medical malpractice claim alleged that the IME doctor intentionally aggravated her preexisting condition of which he was aware and that, as a result of his behavior during the IME, her health greatly deteriorated.³⁰ The court held that an IME does not create a traditional doctor-patient relationship, but a limited relationship does exist; “[t]he recognition of a limited relationship preserves the principle that the IME physician has undertaken limited duties but that he has done so in a situation where he is expected to exercise reasonable care commensurate with his experience and training.”³¹

Other jurisdictions have expressed a similar view in claims arising from alleged negligence during an IME.³² Texas and

there “has not been [a] uniform” method for determining whether a physician owes a duty to a patient in a court ordered medical examination).

²² *Id.* at 30.

²³ *Id.* at 27.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 27–28.

²⁸ *Id.* at 32.

²⁹ *Id.* at 27.

³⁰ *Id.*

³¹ *Id.* at 31 (quoting *Dyer v. Trachtman*, 679 N.W.2d 311, 316 (Mich. 2004) (internal quotations omitted)).

³² *See Dyer*, 679 N.W.2d at 315–16 (discussing competing state law

2015] INDEPENDENT MEDICAL EXAMINATIONS 345

Minnesota hold that the independent medical examiner owes a limited duty to an IME patient, which is to conduct the examination properly without causing further injury to the patient/plaintiff.³³ New Jersey has also found that an IME physician owes a duty of care to his examinee if the doctor is examining a specific complaint.³⁴ The 5th Circuit has reasoned that a doctor contracted by a third party to perform an examination still has a duty to inform a patient-plaintiff of a potentially life-threatening injury at the physical³⁵ and the 9th Circuit held that an examining physician has a duty under Washington law to inform those examined of abnormal test results, despite the absence of doctor-patient relationship.³⁶

*C. Jurisdictions That Recognize a
Doctor-Patient Relationship*

The Fifth Circuit Court of Appeals interpreted Louisiana law to hold that an IME does create a doctor-patient relationship that is necessary for negligence claims against a physician.³⁷ The estate of a deceased brought the case after the patient died from lung cancer.³⁸ Prior to the person's diagnosis, the deceased underwent an annual physical that was a condition of his employment.³⁹ The doctor gave the deceased a clean bill of health and allowed him to continue working.⁴⁰ A year later, the deceased was diagnosed with lung cancer and subsequently died. The complaint sounded in negligence for the failure to diagnose the deceased's lung cancer at the employee-mandated evaluation.⁴¹ The employer's doctor moved to dismiss the claim because there was no doctor-patient relationship.⁴² The Court of Appeals disagreed and opined:

decisions).

³³ *In re* Certified Question from Fourteenth Dist. Court App. Tex., 740 N.W.2d 206, 211 (Mich. 2007); *Henkemeyer v. Boxall*, 465 N.W.2d 437, 439 (Minn. Ct. App. 1991).

³⁴ *See Reed v. Bojarski*, 764 A.2d 433, 442–43 (N.J. 2001) (holding that pre-employment medical exams created a duty).

³⁵ *Green v. Walker*, 910 F.2d 291, 296 (5th Cir. 1990).

³⁶ *Daly v. United States*, 946 F.2d 1467, 1470 (9th Cir. 1991).

³⁷ *Green*, 910 F.2d at 296.

³⁸ *Id.* at 291.

³⁹ *Id.* at 292.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 292–93.

We therefore now hold that when an individual is required, as a condition of future or continued employment, to submit to a medical examination, that examination creates a relationship between the examining physician and the examinee, at least to the extent of the tests conducted. This relationship imposes upon the examining physician a duty to conduct the requested tests and diagnose the results thereof, exercising the level of care consistent with the doctor's professional training and expertise, and to take reasonable steps to make information available timely to the examinee of any findings that pose an imminent danger to the examinee's physical or mental well-being.⁴³

The courts in Kansas have held that an IME doctor must not cause harm during the examination and must use the physician's best judgment in treatment while relying on their skill and experience.⁴⁴ In Maryland, a plaintiff must show that a doctor-patient relationship existed in order to establish a medical malpractice claim.⁴⁵ The leading case, in that state, held that a doctor-patient relationship is established, "only . . . as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill and the patient will pay for such treatment."⁴⁶

In Montana, the court held that a patient could sue her IME doctor for medical malpractice.⁴⁷ The court phrased the question as "whether a physician who performs a medical examination of an individual at the request of a third party has a duty of care to the examinee and, if so, what is the scope of that duty."⁴⁸ The plaintiff, Ms. Webb, injured her back in a work-related injury.⁴⁹ She treated with a chiropractor and physical therapist.⁵⁰ The only medical doctor she saw, however, was the physician of her employer's insurer.⁵¹ That physician ordered a CT scan in order to determine whether she had a herniated disk.⁵² As a result of the scan, the physician informed the examinee that she did not

⁴³ *Id.* at 296.

⁴⁴ *Smith v. Welch*, 967 P.2d 727, 736 (Kan. 1998).

⁴⁵ *Dingle v. Belin*, 749 A.2d 157, 164 (Md. 2000).

⁴⁶ *Id.* (quoting *Hoover v. Williamson*, 203 A.2d 861, 862 (Md. 1964)).

⁴⁷ *See Webb v. T.D.*, 951 P.2d 1008, 1014 (Mont. 1997) (holding that Montana law imposed a duty on a doctor performing an IME).

⁴⁸ *Id.* at 1009.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1009–10.

⁵² *Id.* at 1010.

2015] INDEPENDENT MEDICAL EXAMINATIONS 347

have a ruptured disk and could return to work.⁵³ Ms. Webb resumed her employment, but severely herniated an intervertebral disc and suffered limitations as a result of the injury.⁵⁴ She filed a malpractice suit against the insurer's physician⁵⁵ who then filed a motion to dismiss.⁵⁶ The doctor argued that he was retained only to evaluate whether Ms. Webb could return to work, that he was not hired to provide any treatment and did not provide any treatment.⁵⁷ Since the doctor was retained by the insurer, he argued that he did not owe Webb a duty because they did not have a doctor-patient relationship.⁵⁸ The Supreme Court of Montana disagreed and held:

When an individual is required, as a condition of future or continued employment, to submit to a medical examination, that examination creates a relationship between the examining physician and the examinee, at least to the extent of the tests conducted. This relationship imposes upon the examining physician a duty to conduct the requested tests and diagnose the results thereof, exercising the level of care consistent with the doctor's professional training and expertise, and to take reasonable steps to make information available timely to the examinee of any findings that pose an imminent danger to the examinee's physical or mental well-being.⁵⁹

The court did not find that all IME physicians automatically owe the same duty of care that a typical treating physician owes to patients.⁶⁰ Instead, the scope of the duty must be determined on a case-by-case basis.⁶¹ The court reasoned that an IME physician, no matter the scope of the examination, has two duties: 1) to exercise ordinary care to discover conditions that pose an imminent danger to the patient's well-being and to take reasonable steps to inform the patient of those conditions; and 2) to exercise ordinary care in advising the patient of their condition after the examination with advice in line with the physician's profession.⁶²

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1009.

⁵⁶ *Id.* at 1010.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1013–14.

⁶⁰ *Id.* at 1014.

⁶¹ *Id.*

⁶² *Id.*

*D. Jurisdictions That Do Not Recognize
a Doctor-Patient Relationship*

Several jurisdictions do not recognize a doctor-patient relationship in an IME-related context.⁶³ In Alaska, a plaintiff could not pursue a medical malpractice case against an IME doctor for an alleged failure to uncover the underlying cause of his back problems.⁶⁴ The plaintiff, Mr. Smith, injured his back while unloading cases of antifreeze from a truck.⁶⁵ As he lifted the cases and twisted his body, he experienced a sharp pain in his back and leg that took his breath away.⁶⁶ Mr. Smith was diagnosed with an acute muscle strain and was placed on temporary disability for two weeks.⁶⁷ The worker's condition did not improve and further testing revealed abnormalities in his back.⁶⁸ After a few months, he was allowed back to work, but was restricted to light-duty work.⁶⁹

Mr. Smith continued to report pain over the next few months and had additional medical treatment.⁷⁰ After two years of treatment, the workers' compensation provider requested an IME.⁷¹ When Mr. Smith arrived at the exam, the IME physician explicitly told Mr. Smith that he was only seeing him to evaluate his work-related injuries and that a doctor-patient relationship did not exist.⁷² The IME doctor found there was no permanent injuries related to the work incident, advised against further medical treatment, and suggested psychological treatment and weight loss.⁷³ A year after that IME, Smith had a MRI that revealed several disc problems and a sacral Tarlov cyst that was compressing the nerves at the base of his spine.⁷⁴ Smith filed a worker's compensation claim and sued the IME doctor for

⁶³ See, e.g., *Smith v. Radecki*, 238 P.3d 111, 112 (Alaska 2010); *Lawliss v. Quellman*, 832 N.Y.S.2d 328, 329 (N.Y. App. Div. 2007); *Joseph v. McCann*, 147 P.3d 547, 551 (Utah Ct. App. 2006); *Hafner v. Beck*, 916 P.2d 1105, 1109 (Ariz. Ct. App. 1995).

⁶⁴ *Radecki*, 238 P.3d at 112.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 112–13.

⁷⁰ *Id.* at 113.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

2015] INDEPENDENT MEDICAL EXAMINATIONS 349

medical malpractice for failing to diagnose and treat his back.⁷⁵ The court dismissed the claim because a doctor-patient relationship was never established and Mr. Smith appealed.⁷⁶

The Supreme Court of Alaska affirmed the lower court's decision and held that the doctor could not be held liable for medical malpractice because there was no doctor-patient relationship and no corresponding duty of care.⁷⁷ The physician expressly told Mr. Smith that no doctor-patient relationship would be formed at the IME because the purpose of the examination was limited to the specific injuries identified by the employer's insurance carrier.⁷⁸

Smith raised two arguments on appeal.⁷⁹ First, he asserted that the IME doctor was a member of the AMA, whose guidelines provide that a limited physician-patient relationship is established when an IME is performed.⁸⁰ Second, he argued that a growing number of jurisdictions recognize a limited duty of care exists when IMEs are performed.⁸¹ The court dismissed the first argument because the AMA guidelines are not binding in Alaska.⁸² The court found against Mr. Smith's second argument, although it recognized the growing number of states that acknowledge a limited doctor-patient relationship at an IME.⁸³ However, the court found that the doctrine was not implicated because the IME doctor did not fail to diagnose any imminently dangerous conditions, did not go beyond the boundaries of a typical IME by offering any medical advice, nor did he injure Mr. Smith during the examination.⁸⁴

New York typically does not find a doctor-patient relationship when a third party has hired an IME doctor unless the medical examiner advises the patient-plaintiff like a normal treating physician would.⁸⁵ In Utah, a workers' compensation plaintiff did not establish a doctor-patient relationship with an IME doctor because he did not seek treatment from the doctor, nor did the

⁷⁵ *Id.*

⁷⁶ *Id.* at 112.

⁷⁷ *Id.* at 117.

⁷⁸ *Id.* at 115.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 115–16

⁸³ *Id.* 116.

⁸⁴ *Id.* at 117.

⁸⁵ *Lawliss v. Quellman*, 832 N.Y.S.2d 328, 329 (N.Y. App. Div. 2007).

doctor treat the plaintiff.⁸⁶

Arizona courts have held that an IME doctor does not owe a duty because the physician only owes a duty to the insurer, not the patient-plaintiff.⁸⁷ The seminal case in Arizona involved a plaintiff injured at her job who filed suit alleging physical and psychological injuries.⁸⁸ The plaintiff, Ms. Hafner, underwent an IME with a psychologist who concluded that she did not require any further psychological treatment.⁸⁹ The IME psychologist had been hired by her employer's insurer.⁹⁰ The IME doctor's opinions stood in opposition to her treating psychologist's impressions.⁹¹ Accordingly, her employer's insurer ceased providing benefits and Ms. Hafner filed a negligence suit against the physician for negligent treatment.⁹²

The Arizona Court adopted the Texas standard and held that the physician only had a "duty to meet the professional standard of care in conducting the IME and in preparing his report ran only to the [insurer], which requested his services, and not to the examinee."⁹³ The court warned that if it recognized a doctor-patient relationship that amounted to a duty of care that no physician would be willing to testify in any legal cases.⁹⁴

III. PARAMETERS OF THE INDEPENDENT MEDICAL EXAM

The scope of an IME is often guided by a statute or court rule.⁹⁵ For instance, Rule 35 of the Federal Rules of Civil Procedure provides:

When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for

⁸⁶ Joseph v. McCann, 147 P.3d 547, 551 (Utah Ct. App. 2006).

⁸⁷ Hafner v. Beck, 916 P.2d 1105, 1106 (Ariz. Ct. App. 1995).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1108.

⁹⁴ *Id.* at 1107–08.

⁹⁵ Heidi Oertle & Shawna Boothe, *How to Correctly Approach Independent Medical Exams*, AM. BAR ASS'N (July 23, 2014), <http://apps.americanbar.org/litigation/committees/products/articles/summer2014-0714-how-to-correctly-approach-independent-medical-exams.html>.

2015] INDEPENDENT MEDICAL EXAMINATIONS 351

examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.⁹⁶

The states have their own statutes that control an IME.⁹⁷ It is not surprising that these laws vary in what they cover in the regulations of independent medical examinations. For instance, Rule 35 of Montana's Rules of Civil Procedure offers an example of the standard scope of independent medical examinations:

(a) Order for Examination.

(1) *In General*. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Motion and Notice; Contents of the Order*. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.⁹⁸

The statute then lays out the processes for the parties exchanging the results of the IME and any other examinations, as well as the waiver of privilege if the examined party continues with legal action that revolves around that party's condition.⁹⁹

Rule 1.360 of the Florida Rules of Civil Procedure follows closely the Montana statute, but also adds that once a party requests an IME, the other party has thirty days for a response, unless the responding party is the defendant, in which case the statute allows for a forty-five day response.¹⁰⁰ This reply must either accept the request or set forth reasons for objecting to the IME; the response must also note who else will accompany the party to the IME and what roll they will be playing during the examination.¹⁰¹

Vermont Statutes Annotated Title 21 § 667 reads that,

⁹⁶ FED. R. CIV. P. 35(a).

⁹⁷ Oertle & Boothe, *supra* note 95.

⁹⁸ MONT. R. CIV. P. 35.

⁹⁹ *Id.*

¹⁰⁰ FLA. R. CIV. P. 1.360(a)(1)(A).

¹⁰¹ *Id.*

regarding work place medical disputes, it is up to a commissioner to decide on which physician will be chosen to perform an IME, and that the finding of the IME will be binding on the parties unless there is fraud, substantial error, or deviation from accepted medical preferences.¹⁰² The commissioner will pick the physician to perform the IME from a list of health care providers, which will be compiled from representatives of both management and labor, preferably from the Governor's Advisory Council on Worker's Compensation.¹⁰³ The names that appear on both lists will be the physicians that the commissioner will select for the examination.¹⁰⁴

Despite the amount of statutes that try to control the process of the independent medical examinations, there are still a large number of issues that the courts must decide. The remaining portion of this article will focus on the areas of controversy that have been the most prominent in litigation.

A. *Place of Examination*

Generally, the defense has the right to designate the doctor and where an IME will take place.¹⁰⁵ Typically, plaintiff and defense counsel will agree on the time, place, and location of the examination.¹⁰⁶ However, if they cannot agree, the judge presiding over the case will make a determination regarding the dispute.¹⁰⁷

For example, would it be reasonable to require a plaintiff to travel seventy-five miles for an IME? At first blush, this distance sounds extreme but the Court of Appeals in Louisiana found that it was allowable.¹⁰⁸ The court reasoned that the IME doctor was the only nearby health care provider specializing in the plaintiff's injury and the defense offered to pay for all costs incurred by the

¹⁰² VT. STAT. ANN. tit. 21, § 667(b) (West 2014).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See William Scott Wyatt & Richard A. Bales, *The Presence of Third Parties at Rule 35 Examinations*, 71 TEMP. L. REV. 103, 106 (1998) ("The examination may be conducted by a suitably licensed or certified expert requested by the defendant.").

¹⁰⁶ See *id.* at 106 n.19 (stating that parties can stipulate to "the setting for examination").

¹⁰⁷ *Id.* at 106–07.

¹⁰⁸ *Weaver v. Mansfield Hardwood Lumber Co.*, 1 So.2d 103, 107 (La. Ct. App. 1941).

2015] INDEPENDENT MEDICAL EXAMINATIONS 353

claimant in traveling to the examination.¹⁰⁹ It is common knowledge the court noted that medical specialists cannot travel to make home visits because it would be impractical and the physician would probably not be able to take the equipment necessary for the IME.¹¹⁰

However, the Montana Supreme Court held that traveling outside of the state to be an unreasonable request.¹¹¹ The lower court sustained the defendant's request to have the plaintiff submit to an IME in Portland, Oregon, 750 miles from the plaintiff's home.¹¹² The Supreme Court of Montana disagreed, finding that the lower court had abused its' discretion.¹¹³ The court held that the location, as well as the nature of the exam was an infringement of the plaintiff's fundamental rights by being overly burdensome.¹¹⁴

Florida courts have held that a non-state resident plaintiff cannot be compelled to attend an IME in that state.¹¹⁵ For instance, a defendant tried to compel the plaintiff to come to Florida for an IME, at his own expense, after he had already been to Florida for a disposition.¹¹⁶ The court found the "reasonable place" standard set by state statute to require the IME to take place in the plaintiff's hometown, or the nearest area where an appropriate physician could be found.¹¹⁷ The court noted that the nonresident plaintiff had to return to Florida for a deposition, but IMEs were different and did not have to follow the rigid rules of depositions.¹¹⁸ The court did find that it would still be the defendant's choice to pick the physician within the area convenient to the plaintiff.¹¹⁹ However, the Florida court modified its earlier decision.¹²⁰ It found that making a nonresident plaintiff submit to a compulsory medical examination (CME) when already coming to Florida for a

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Simms v. Mont. Eighteenth Judicial Dist. Court*, 68 P.3d 678, 684 (Mont. 2003).

¹¹² *Id.* at 682.

¹¹³ *Id.* at 685.

¹¹⁴ *Id.*

¹¹⁵ *Tsutras v. Duhe*, 685 So.2d 979, 981 (Fla. Dist. Ct. App. 1997).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 980–81.

¹¹⁹ *Id.* at 981.

¹²⁰ *Goeddel v. Davis*, 993 So.2d 99, 100–01 (Fla. Dist. Ct. App. 2008).

deposition was reasonable.¹²¹ After all, the defendants were partially responsible for paying for the expense of the trip.¹²²

New York has held that a plaintiff cannot dictate the location of where the IME will take place.¹²³ In that dispute, plaintiff provided a list of five physicians within the city that were practical for the claimant.¹²⁴ The court held that it was the right of the defendant to decide the location and time of the IME.¹²⁵ The defendant had the right to choose a physician that they had faith in not only to perform the examination, but also to appear at the court date to testify.¹²⁶

The federal district courts, however, have generally ruled that plaintiffs should have to submit to an examination in the jurisdiction in which the suit is brought.¹²⁷ What happens, however, when the plaintiff lives in another jurisdiction, far removed from the location of the courthouse, and claims that his health is too poor to travel? The Nevada District Court had to answer this question when the designated place of the IME was in Las Vegas, but the plaintiff lived in Houston, Texas.¹²⁸ The court noted that the location of the IME did not have to be in the jurisdiction of the suit, if the plaintiff could show good cause for why they could not travel to that location.¹²⁹ The court continued by noting that this proof of good cause was very high, and that the plaintiff had to show more than poor health, but instead had to prove why poor health made the litigant incapable of travel or why travel would exacerbate the sickness.¹³⁰ For one plaintiff, the court decided that fusion surgery was not a good cause, since it only kept her from flying and the surgery happened before her accident in Las Vegas, which showed her injury did not impede her ability to travel.¹³¹ For a second plaintiff, the court concluded that severe right heart failure that caused the plaintiff to be

¹²¹ *Id.*

¹²² *Id.* at 101.

¹²³ *Yu Hui Chen v. Chen Li Zhi*, 971 N.Y.S.2d 139, 139–40 (N.Y. App. Div. 2013).

¹²⁴ *Id.* at 139.

¹²⁵ *Id.* at 139–40.

¹²⁶ *Id.* at 140.

¹²⁷ *Levick v. Steiner Transocean Ltd.*, 228 F.R.D. 671, 672 (S.D. Fla. 2005).

¹²⁸ *Mansel v. Celebrity Coaches of Am., Inc.*, No. 2:13-cv-01497-JAD-NJK, 2013 WL 6844720, at *1 (D. Nev. Dec. 20, 2013).

¹²⁹ *Id.* at *2.

¹³⁰ *Id.*

¹³¹ *Id.*

2015] INDEPENDENT MEDICAL EXAMINATIONS 355

hospitalized several times in the last six months was also not good cause, since there was no proof that travel would worsen his condition.¹³² Accordingly, the court held that there was no reason to move the location of the IME to Houston.¹³³

B. Patient's Representative at the IME

Patients often feel more comfortable if someone accompanies them to the IME. This can range from the patient's attorney, a nurse, or his or her own physician. These individuals often accompany the patients not only to comfort them, but also to observe the examination so that they could potentially testify to what occurred at the physical.¹³⁴

1. Presence of the Patient's Attorney

Attorneys are usually allowed to accompany the claimant to the examination.¹³⁵ For instance, the Alaska Supreme Court recognized that a party is generally entitled to have her attorney present during a physical examination.¹³⁶ The court held that an independent medical examination is a crucial part of the civil litigation process.¹³⁷ Because the party being evaluated is entitled to legal representation through all parts of the litigation, the party is entitled to have an attorney present.¹³⁸

Similarly, the Supreme Court of California held that because a physician may ask questions that pertain to liability, the patient is entitled to have counsel present to advise her during the examination.¹³⁹ There are, however, restrictions on what counsel can do during the event.¹⁴⁰ The Supreme Court of New York held

¹³² *Id.*

¹³³ *Id.* at *3.

¹³⁴ See *Langfeldt-Haaland v. Saupé Enters., Inc.*, 768 P.2d 1144, 1146–47 (Alaska 1989) (discussing an attorney's role in an examination).

¹³⁵ See *id.* at 1145 (explaining which States permit attorneys to be present during an IME).

¹³⁶ *Id.* at 1147.

¹³⁷ *Id.* at 1146.

¹³⁸ *Id.*

¹³⁹ *Sharff v. Superior Court of City & Cnty. of San Francisco*, 282 P.2d 896, 897 (Cal. 1955).

¹⁴⁰ See *Jakubowski v. Lengen*, 450 N.Y.S.2d 612, 614 (N.Y. App. Div. 1982) (limiting a lawyer's role at an IME "to the protection of the legal interests of his client apart from the actual physical examination"); see also *Bacallao v. Dauphin*, 963 So.2d 962, 965 (Fla. Dist. Ct. App. 2007) (explaining that an attorney must satisfy a two-prong test in order to exclude a third party observer

that an attorney should not interfere with the doctor's physical examination or raise unreasonable objections to the treatment.¹⁴¹ The court stated that the attorney's role should be limited to the protection of the client's legal interests and should not interfere with the actual physical examination in which the lawyer has no role.¹⁴² If the attorney's actions do interfere with the examination, the trial judge may take appropriate steps, in light of the facts and circumstances of the case, to provide the doctor with a reasonable opportunity to complete his examination.¹⁴³

Florida allows for an attorney to be present during a client's IME, unless the objecting party can meet a two-pronged test to keep the lawyer out of the examination.¹⁴⁴ The first prong is that there has to be case specific facts that would bar the attorney from being present.¹⁴⁵ In this case, the objecting party presented proof that the attorney had been present at a previous IME for the same case, had interrupted the examination, and told the client not to answer questions the physician asked.¹⁴⁶ The court held that this evidence was enough to satisfy the first requirement of the test, but that the objecting party failed to meet the second prong; proof during an evidentiary hearing that there were no other physicians in the area who would perform the IME under those conditions.¹⁴⁷ Without proof that no other physician would do the IME with the petitioner's attorney present, the objecting party could not exclude the attorney from the examination.¹⁴⁸ The court concluded by stating that no third party should interfere with the IME, and if there was such interference, the trial court must take reasonable steps to make sure the examination can be completed.¹⁴⁹

The Florida Supreme Court expanded the right to have an attorney present at an examination that's not yet part of the adversarial process.¹⁵⁰ The court found that a personal injury protection (PIP) examination to decide whether the insured

from an IME).

¹⁴¹ *Jakubowski*, 450 N.Y.S.2d at 614.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Bacallao*, 963 So.2d at 965–66.

¹⁴⁵ *Id.* at 965.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 967–68.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 969.

¹⁵⁰ *U.S. Sec. Ins. Co. v. Cimino*, 754 So.2d 697, 701 (Fla. 2000).

2015] INDEPENDENT MEDICAL EXAMINATIONS 357

would receive benefits from the insurer should have the same protections as a worker's compensation IME.¹⁵¹ The court reasoned that at a PIP examination the insurer and insured are not in agreement at that point, and there is the possibility of a future adversarial process, so the insured should have the protection of having an attorney present.¹⁵²

The Montana Supreme Court held that the patient's attorney was only allowed to be present during the portion of the examination when the medical history is taken or the patient is questioned as to how the injury occurred.¹⁵³ The court held that the attorney could not be present during the actual physical examination because the possibility of the lawyer's interference with the physical examination outweighed any benefit of allowing the attorney's presence.¹⁵⁴

In contrast, several jurisdictions do not allow attorneys to accompany their clients to an independent medical examination.¹⁵⁵ For instance, Delaware generally does not allow attorneys to accompany patients to an IME.¹⁵⁶ The court reasoned that the presence of the plaintiff's attorney would intimidate and disrupt the examination and would not allow the defendant to gather a complete and fair evaluation of the claimants.¹⁵⁷

Similarly, Minnesota courts have held that a personal injury plaintiff does not have a right to have their attorney present during the exam.¹⁵⁸ Ultimately, the judge has broad discretion to allow or disallow an attorney to attend an IME.¹⁵⁹ The Minnesota courts recognize, however, that the physicians are already part of the adversarial process because the defendant has selected them and is paying for their services.¹⁶⁰ The court reasoned that instead of an attorney attending the exam, the physician's report

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Mohr v. Dist. Court of Fourth Judicial Dist.*, 660 P.2d 88, 89 (Mont. 1983).

¹⁵⁴ *Id.*

¹⁵⁵ *See, e.g., Rochen v. Huang*, 558 A.2d 1108, 1111 (Del. Super. Ct. 1988); *Wood v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 353 N.W.2d 195, 198 (Minn. Ct. App. 1984).

¹⁵⁶ *Rochen*, 558 A.2d 1108, 1110 (Del. 1988).

¹⁵⁷ *Id.*

¹⁵⁸ *Wood*, 353 N.W.2d at 198.

¹⁵⁹ *Id.* at 196–97.

¹⁶⁰ *Id.*

should be attacked on cross-examination.¹⁶¹ The defense attorney will have the testimony of his IME doctor and the plaintiff's attorney will rely on the physician with whom the plaintiff has been treating.¹⁶²

The federal courts have been largely uniform in rejecting the right for an attorney to be present at an IME.¹⁶³ For instance, the District Court of Delaware held that allowing the presence of the attorney at an IME would cause the proceeding to become part of the adversarial process, which is unfair, since the physician is acting on the court's behalf as a non-adversarial party.¹⁶⁴ The court also noted that an attorney should be reluctant to be involved in an examination in case the answers given by the plaintiff came into question, where the attorneys may find themselves being called as a witness, which would mean they would have to recuse themselves from the case.¹⁶⁵

The Eastern District Court of Wisconsin, however, has found that counsel may be present during independent medical examinations.¹⁶⁶ The plaintiff alleged that she had extreme emotion distress due to sexual harassment and requested that a third party be present at the IME to insure that the questions did not extend beyond the permissible limits.¹⁶⁷ The court found that the plaintiff's interest in protecting herself during an adversarial process was greater than the defendant's desire to have the most effective use of their expert.¹⁶⁸ The court concluded that regardless of the claim of emotional damage, a defendant might unfairly gain advantages in an unsupervised IME.¹⁶⁹ The court did not believe that the IME process was sufficiently impartial and held that a plaintiff could have a third party, including their attorney, present at the examination.¹⁷⁰ This holding is not followed by any other federal courts.

The federal courts rejection of allowing an attorney to be

¹⁶¹ *Id.* at 197.

¹⁶² *Id.*

¹⁶³ See Wyatt & Bales, *supra* note 105, at 110 (explaining that an "overwhelming majority of courts . . . have denied the examinee's request to have his attorney present during the examination").

¹⁶⁴ Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969).

¹⁶⁵ *Id.*

¹⁶⁶ Zabkowicz v. W. Bend Co., 585 F. Supp. 635, 636 (E.D. Wis. 1984).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

2015] INDEPENDENT MEDICAL EXAMINATIONS 359

present can change based upon state law in the jurisdiction of the court.¹⁷¹ In *Shirsat v. Mutual Pharmaceutical Co., Inc.*,¹⁷² the Eastern District of Pennsylvania, considered whether to allow an observer at a psychiatric IME, and decided not to follow an earlier case in the same district that allowed an independent medical expert to attend the psychiatric exam.¹⁷³ The court found that, “an observer, court reporter, or recording device, would constitute a distraction during the examination and work to diminish the accuracy of the process.”¹⁷⁴ The court made its decision based on the fact that the plaintiff requesting the presence of an observer had not shown any evidence that the defendant’s medical examiner was biased except for the claim that they were hired by the defense.¹⁷⁵ It held that in allowing an observer to be present would turn an objective evaluation into an adversarial event.¹⁷⁶ The Eastern District later reversed this opinion in light of an amendment in state law on the topic.¹⁷⁷ The court decided to disregard *Shirsat* due to the newly amended Rule 4010(a)(4)(i) of the Pennsylvania Rules of Civil Procedure, which expressly gave the right for an attorney or another observer to be present at an IME.¹⁷⁸ The court pointed out that the current case involved a physical examination, while the *Shirsat* dealt with a psychological examination.¹⁷⁹ It also stated that a psychological examination may depend on, “unimpeded one-on-one communication between doctor and patient.”¹⁸⁰ The right for an observer to be present was later extended to psychological examinations by the Eastern District, with the stipulation that the attorney could not interfere with the IME and had to sit where the plaintiff being examined could not see

¹⁷¹ See, e.g., *Gensbauer v. May Dep’t Stores Co.*, 184 F.R.D. 552, 552 (E.D. Pa.1999) (allowing an attorney to be present during a medical examination under Pennsylvania state law).

¹⁷² 169 F.R.D. 68 (E.D. Pa. 1996).

¹⁷³ *Id.* at 72.

¹⁷⁴ *Id.* at 70.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *Gensbauer v. May Dept. Stores Co.*, 184 F.R.D. 552, 553 (E.D. Pa. 1999) (distinguishing its ruling from *Shirsat* on the basis of Pennsylvania’s amended statute allowing attorneys to be present during an IME).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (citing *Neumerski v. Califano*, 513 F.Supp. 1011, 1017 (E.D. Pa. 1981)).

counsel.¹⁸¹ Though the holding in *Shirsat* has been weakened in the Eastern District, its reasoning is still persuasive in other federal jurisdictions.¹⁸² For example, the Northern District of Georgia adopted the *Shirsat* reasoning in not allowing an attorney to be present during the plaintiff's examination.¹⁸³

2. Presence of the Patient's Physician

Interestingly, the same District of Delaware case that determined a patient's attorney may not be present during an IME has held that a patient may bring her own physician to the IME.¹⁸⁴ The court reasoned that an attorney is an adversary in the litigation, but a physician's interest is only to ensure that the patient's rights are protected in the exam.¹⁸⁵ In general, the federal courts are split on whether to allow physicians to accompany patients to an IME.¹⁸⁶ Courts that allow the patient's physician to attend have found that the probable increase of professionalism by the attendance of a second doctor was more important than the disruption caused by the presence of that additional physician.¹⁸⁷

The federal courts that do not allow the patient's physician to be present find that the presence would be an unnecessary burden on the independent examiner and would take the focus away from the examination.¹⁸⁸ These courts have stated that a patient's physician may attend an IME, if evidence can be shown that the independent examiner would use improper or harmful techniques during the physical.¹⁸⁹ Though this reasoning is often cited by courts, no judge has yet to find a case where harmful or improper techniques will be used as to necessitate the presence of the patient's physician.¹⁹⁰

¹⁸¹ *M.S. v. Cedar Bridge Acad.*, No. 1:08-CV-2271, 2011 WL 1838885, at *4 (M.D. Pa. May 13, 2011).

¹⁸² *See, e.g., Bethel v. Dixie Homecrafters, Inc.*, 192 F.R.D. 320, 322 (N.D. Ga. 2000); *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 623 (D. Kan. 1999); *Romano v. II Morrow, Inc.*, 173 F.R.D. 271, 272 (D. Or. 1997); *Douponce v. Drake*, 183 F.R.D. 565, 567 (D. Colo. 1998).

¹⁸³ *Dixie Homecrafters*, 92 F.R.D. at 322 (N.D. Ga. 2000).

¹⁸⁴ *Warrick v. Brode*, 46 F.R.D. 427, 428 (D. Del. 1969).

¹⁸⁵ *Id.*

¹⁸⁶ *Wyatt & Bales*, *supra* note 105, at 111.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 112.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

2015] INDEPENDENT MEDICAL EXAMINATIONS 361

A Delaware state court has also held that while the party undergoing the examination would not be allowed to bring an attorney to the IME, they would be allowed to bring a physician of their choice.¹⁹¹ The court reasoned that a physician's presence could help safeguard the party's emotional state, and to make sure the examination did not become an informal discovery disposition.¹⁹²

Some states have statutes that give a person subjected to an IME the right to have an independent physician with them. For example, Rule 4010(4)(i) of the Pennsylvania Rules of Civil Procedure allows for a party about to undergo an IME to have counsel or another representative present during the examination.¹⁹³ Arizona's statute provides that during an IME for workers related claims, an employee "may have a physician present at the examination if procured and paid for by himself."¹⁹⁴ Michigan and Idaho also have statutes that allow a patient's physician to be present at the examination.¹⁹⁵

3. Presence of Other Patient Representatives

The courts in some states that allow for a person undergoing an IME to have a physician present have come to different conclusions on whether a non-physician representative may attend the examination.¹⁹⁶ The Arizona Court of Appeals found the statute that gives the patient the right to have a physician present, by the language of the statute, takes away the right of the patient to have any other person present at the IME.¹⁹⁷ The court clarified that while the claimant only has the right to have a physician present, an administrative law judge does have the discretion to allow a third party to attend an IME if they feel the claimant has shown good cause that the patient needs protection

¹⁹¹ *Rochen v. Huang*, 558 A.2d 1108, 1110–11 (Del. Super. Ct. 1988).

¹⁹² *Id.* at 1110.

¹⁹³ PA. R. CIV. P. 4010(4)(i).

¹⁹⁴ ARIZ. REV. STAT. ANN. § 23–1026(B) (West 2014).

¹⁹⁵ See MICH. COMP. LAWS ANN. § 418.385 (West 2014); IDAHO CODE ANN. § 72–433(2) (West 2014).

¹⁹⁶ See *Martens v. Indus. Comm'n. of Ariz.*, 121 P.3d 186, 188 (Ariz. 2005) (holding that the statute, which gives the patient the right to have a physician present, takes away the right of the patient to have any other person present at the IME); see also *Feld v. Robert & Charles Beauty Salon*, 459 N.W.2d 279, 283, 285 (Mich. 1990).

¹⁹⁷ *Martens*, 121 P.3d at 188.

from “annoyance, embarrassment, oppression, or undue burden or expense.”¹⁹⁸ Michigan’s Supreme Court also held that the statute allowing for a physician to be present barred anyone else from attending the IME.¹⁹⁹ The court found that the statute’s plain language meant that the complainant did not have the right to have an attorney present during their IME.²⁰⁰ The court was not swayed by the argument that it would be unfair not to have the attorney present, stating that counsel could impeach the physician conducting the IME during cross-examination.²⁰¹

However, the Idaho Supreme Court reached the opposite interpretation of their state’s statute.²⁰² The court stated that the allowance of a physician by statute did not exclude others from being present at the IME.²⁰³ The concurring judge expanded on the reasoning stating it is “plain that there are many other instances in which the presence of a tape recorder or impartial adviser would not adversely affect the interaction and communication between an employer and its employees, and could only serve to enhance the resolution of misunderstandings and disputes.”²⁰⁴

A New Jersey Superior Court held, without statutory guidance, that a party had the right to the presence of a third party at an IME.²⁰⁵ In that case, the insurance carrier wanted to keep the requesting party from bringing a medical nurse (as well as a recording device) to an IME, claiming that the plaintiff had not given a specific reason for the request.²⁰⁶ The court disagreed, stating that it was the burden of the carrier to provide a reason as to why a third party (or recording device) should not be allowed.²⁰⁷

Taken to the extreme, some patients have brought a court reporter to transcribe the exam. In fact, the Florida Court of Appeals held that a patient is generally allowed to take a court

¹⁹⁸ *Id.* at 188.

¹⁹⁹ *Feld*, 459 N.W.2d at 285.

²⁰⁰ *Id.* at 285.

²⁰¹ *Id.* at 284.

²⁰² *Hewson v. Asker’s Thrift Shop*, 814 P.2d 424, 427 (Idaho 1991).

²⁰³ *Id.*

²⁰⁴ *Id.* at 429 (Bistline, J., concurring).

²⁰⁵ *Bouhlas v. Wahby*, No. L-6095-06, 2006 WL 3345057, at *1–*2 (N.J. Super. Ct. App. Div. Nov. 17, 2006).

²⁰⁶ *Id.* at *1.

²⁰⁷ *Id.* (citing *B.D. v. Carley*, 704 A.2d 979, 981 (N.J. Super. Ct. App. Div. 1998)).

2015] INDEPENDENT MEDICAL EXAMINATIONS 363

reporter to an exam.²⁰⁸ It is the challenging party's burden to show why the examinee should not be entitled to the presence of a court reporter at an IME.²⁰⁹ California's Supreme Court held that a reporter could be present if there was a request from either party for the reporter.²¹⁰ The court did not find that justice required having a certified court reporter present, but required the presence of a disinterested party to testify as to what happened at the examination.²¹¹ In a New Jersey Superior Court case, the court held that since this was not a treatment, but a discovery examination, the party undergoing the IME had a right to preserve evidence that overrode the physicians' preference that there be no recording device during the examination.²¹²

The Eastern District of New York did find good cause for the allowance of a court reporter to be present at an IME.²¹³ The plaintiff was not well educated and did not have great control of the English language.²¹⁴ The court found that the potential for the plaintiff not to be able to communicate with his attorneys about what took place during the IME to be a compelling reason to have a court reporter present.²¹⁵

Federal district courts have usually not allowed a third party to be present at an IME, since it would be a distraction and would detract from the proceedings.²¹⁶ However, the courts have allowed the presence of a family member or close friend if the plaintiff can show good cause as to why the third party should be present.²¹⁷ Examples of good cause include there being a potential for the IME to be traumatic or if the third party will be able to deter the physician from using unusual or painful examination methods.²¹⁸ The Southern District Federal Court of Florida found that while a party undergoing an IME may not have counsel at

²⁰⁸ *Thompson v. Awnclean USA, Inc.*, 849 So.2d 1129, 1131 (Fla. 2003).

²⁰⁹ *Id.*

²¹⁰ *Gonzi v. Superior Court of San Francisco*, 335 P.2d 97, 99 (Cal. App. Dep't Super. Ct.1959).

²¹¹ *See id.* (noting the disadvantage a party would be subject to if only the medical examiner of the other party were allowed to testify).

²¹² *Carley*, 704 A.2d at 981.

²¹³ *Di Bari v. Incaica Cia Armadora, S.A.*, 126 F.R.D. 12, 14 (E.D.N.Y. 1989).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Wyatt & Bales*, *supra* note 105, at 113.

²¹⁷ *Id.* at 112–13.

²¹⁸ *Id.* at 113.

the examination, a spouse may attend.²¹⁹ The court held that the spouse's presence would decrease the anxiety of the party and would not subvert the discovery process of the examination.²²⁰

4. Recording or Video Taping

Is it permissible for a claimant to record or videotape an examination? Rule 35 of the Utah Rules of Civil Procedure provides that a party that submits to an IME has the right to tape or video record the procedure, unless doing so would unduly interfere with the examination.²²¹

Those jurisdictions that do not have rules governing the use of a recording device during an IME have largely held that there is a right to record an IME. For instance, courts in Florida have held that a patient may videotape a medical examination even over the examiner's objection.²²² The privacy interest at an independent medical examination is that of the patient's and not the doctor's privacy right.²²³ Therefore, it is the patient's decision to waive their privacy right and allow the exam to be videotaped.²²⁴ The court continued, stating that since it is the patient's privacy right, the party ordering the examination has no right for a third party to be present or to have a recording device when the patient already has brought one.²²⁵ The only way the objecting party may keep a patient from recording an IME is if it meets the same two pronged test that is used to decide if an attorney can be present; case specific facts to why the recording should not be allowed and proof during an evidentiary hearing that no other physician in the area would perform the IME with it being recorded.²²⁶ The court did not consider, "a neuropsychologist's standards of practice, references to text, and general statements that [a] third party, such as [a] videographer, would invalidate the examination results and interfere with [the] examination," as case specific reasons not to have a recording at

²¹⁹ *Davanzo v. Carnival Cruise Lines*, No. 14-20153-CIV, 2014 WL 1385729, at *5 (S.D. Fla. Apr. 9, 2014).

²²⁰ *Id.*

²²¹ UTAH CODE ANN. § 35(a) (West 2014).

²²² *Prince v. Mallari*, 36 So.3d 128, 131 (Fla. Dist. Ct. App. 2010).

²²³ *Id.*

²²⁴ *Id.* at 132.

²²⁵ *Id.* at 130.

²²⁶ *Bacallao v. Dauphin*, 963 So.2d 962, 965–66 (Fla. Dist. Ct. App. 2007).

2015] INDEPENDENT MEDICAL EXAMINATIONS 365

the IME.²²⁷ There was also no proof given at the evidentiary hearing that no other physician would perform an IME while it was being recorded; thus, the objecting party also failed the second prong of the test.²²⁸ The New Jersey Superior Court held that during a mental IME, if the party undergoing the examination requests a recording of the examination, it is the duty of the non-requesting party to show cause to why the recording should not be allowed.²²⁹ The court held that it was not the party requesting the IME right “to dictate the terms” of the examination.²³⁰

The Idaho Supreme Court, in the same case in which it decided that others may accompany a claimant to an IME, also found that recording an IME is permissible.²³¹ The court noted that the party objecting to the recording has the burden to prove that it would be an unreasonable obstruction to the examination.²³² Furthermore, due to the invasive nature of the IME, the presence of a small recording would not be an unreasonable obstruction.²³³ The opinion did note that they could perceive instances where the improper use of a recording would be an unreasonable obstruction, but the court did not specify what those instances would be.²³⁴

Arizona courts have also held that recording an IME does not turn the procedure into an adversarial process, since a recorder, “operates silently, asks no questions, and merely records any audible sounds.”²³⁵ A recording device is a reasonable alternative to having a physician present, which is, as discussed previously, allowed by state statute.²³⁶

Montana’s Supreme Court, however, upheld a lower court’s decision that a request for an IME to be recorded was “overbroad and excessively burdensome.”²³⁷ The court found that a claim

²²⁷ *Id.* at 968.

²²⁸ *Id.* at 967–68.

²²⁹ *B.D. v. Carley*, 704 A.2d 979, 981 (N.J. Super. Ct. App. Div. 1998).

²³⁰ *Id.*

²³¹ *Hewson v. Asker’s Thrift Shop*, 814 P.2d 424, 427 (Idaho 1991).

²³² *Id.* at 428.

²³³ *Id.*

²³⁴ *Id.* at 429.

²³⁵ *Burton v. Indus. Comm’n of Ariz.*, 801 P.2d 473, 477 (Ariz. Ct. App. 1990).

²³⁶ ARIZ. REV. STAT. ANN. § 23-1026(B) (West 2014); *see also id.* (noting the insignificant impact of having a tape recorder during the examination).

²³⁷ *Hegwood v. Mont. Fourth Judicial Dist. Court*, 75 P.3d 308, 310 (Mont. 2003).

that the physician performing the examination worked full time performing IME's for insurance companies and defense counsel was not a sufficient reason to justify the recording of an IME.²³⁸ The court pointed to another case where it decided the IME physician was found to be too biased.²³⁹ In this case, not only did the doctor work exclusively for insurance companies and defense counsel, but he also was well known for his bias against the medical condition that was the reason for the IME, talked about himself as a "hired gun", and was sought out by defense counsel to refute claims for the syndrome.²⁴⁰ The court held that a physician who simply performed IME's for insurance companies and defense attorneys did not have the same probability of inconvenience or prejudice as the doctor mentioned, and therefore, a recording was not needed to protect the petitioner's interests.²⁴¹

The federal district courts generally hold that recording devices will not be allowed unless good cause for its use is shown.²⁴² A court will allow the recording of an IME when the requesting party can show good cause for the recording, based on the facts of the case.²⁴³ For instance, a court in the District of Columbia held that an unfounded assertion was not a showing of good cause to allow for the recording of the IME.²⁴⁴ The court also agreed with the expert performing the IME, in that the IME was a psychiatric examination, instead of a physical examination, and the presence of a recording device would disrupt the openness and spontaneity of the interview.²⁴⁵ The District of Columbia has held that video recording would be allowed at an IME when the person undergoing the procedure is a ten-year-old boy who had allegedly experienced sexual abuse.²⁴⁶ The court found that allowing a tape recorder would insure that the IME was done in a proper and tactful manner, and would serve as documentation

²³⁸ *Id.* at 309–310.

²³⁹ *Id.* at 311 (citing *Simms v. Mont. Eighteenth Judicial Dist. Court*, 68 P.3d 678 (Mont. 2003)).

²⁴⁰ *Simms*, 68 P.3d at 680.

²⁴¹ *Id.* at 684–85.

²⁴² *Wyatt & Bales*, *supra* note 105, at 114.

²⁴³ *Id.* at 114–15.

²⁴⁴ *Abdulwali v. Wash. Metro Area Transit Auth.*, 193 F.R.D. 10, 12, 14 (D.C. Cir. 2000).

²⁴⁵ *Id.*

²⁴⁶ *Doe v. D.C.*, No. Civ.A.03-1789(GKJMF), 2005 WL 3828731, at *1 (D.C. Cir. Aug. 15, 2005).

2015] INDEPENDENT MEDICAL EXAMINATIONS 367

of the examination.²⁴⁷ The same jurisdiction, in a different case, held that the court was not required to issue a protective order allowing for a recording if the doctor performing the IME requested the presence of a recording device during the examination.²⁴⁸

IV. FINANCIAL RESTRICTIONS ON IME DOCTORS

In an attempt to maintain objectivity in independent medical examinations, at least one jurisdiction has implemented financial restrictions on what IME doctors may be paid.²⁴⁹ Florida has instituted fee caps for physicians that will testify in a case.²⁵⁰ The maximum fee to be paid to the doctor conducting the IME is \$200 per hour for a maximum of two hours, which yields a total maximum payment of \$400.²⁵¹ If the doctor is paid more than \$400, the expert cannot testify in that matter.²⁵² This is an attempt to reduce the phenomenon of “buying” medical testimony, where a doctor has a financial incentive to issue a medical report that is favorable to the party that hired him or her.²⁵³

V. FURTHER TESTING REQUESTED BY AN IME DOCTOR

With the advances in medical technology, physicians place great reliance on diagnostic studies in arriving at a diagnosis.²⁵⁴ This raises the issue as to what tests an IME doctor can force a claimant to undergo.²⁵⁵ This issue dates back to the advent of the x-ray.²⁵⁶ In the early 20th century, the court held that “X-ray is in common use and that the science and art thereof have been

²⁴⁷ *Id.*

²⁴⁸ *Convertino v. U.S. Dep’t of Justice*, 669 F. Supp. 2d 8, 11 (D.C. Cir. 2009).

²⁴⁹ *Riviera Beach v. Napier*, 791 So.2d 1160, 1161 (Fla. Dist. Ct. App. 2001).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 1160, 1161.

²⁵³ *See* Am. Med. Ass’n Council on Ethical & Judicial Affairs, Formal Op. 9.07 (Dec. 2004), *available at* <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page> (stating that all physicians must accurately testify and not be influenced by financial compensation).

²⁵⁴ *See Gilbert v. Klar*, 228 N.Y.S. 183, 184 (N.Y. App. Div. 1928).

²⁵⁵ *Id.* (noting that a physician or surgeon assigned by the court may conduct examinations and procedures as he/she deems proper).

²⁵⁶ *Id.*

developed to a point where, in the hands of specialists, there is little or no danger.”²⁵⁷ The ordering of tests, including such things as blood grouping that requires the drawing of blood with a needle, is within the court’s purview.²⁵⁸

Courts will consider the amount of pain and suffering a procedure will inflict on the patient in determining whether to grant a request to order a test.²⁵⁹ In *Cardinal*,²⁶⁰ the defendant sought an order forcing the plaintiff to undergo an x-ray, removal of food contents from the stomach to permit gastric analysis, and to undergo a bone marrow biopsy.²⁶¹ The court granted the defendant’s request pertaining to the x-ray and the gastric analysis because the procedures would not cause pain or injury to the plaintiff.²⁶² The court, however, denied the request for a bone marrow biopsy because it required an incision that would result in pain.²⁶³

Similarly, New York has found that testing will not be permitted if it is dangerous or invasive.²⁶⁴ The defense requested that the plaintiff undergo an urodynamic study to test the bladder, which was denied.²⁶⁵ The court decided that the risk of infection and the invasive nature of the procedure were too great for the plaintiff to be compelled to undergo the test.²⁶⁶

New Jersey balances the potential risk to the plaintiff’s health and safety against the defendant’s need for the examination and whether the procedure will put the parties on equal footing concerning a critical issue in the case.²⁶⁷ The plaintiff brought a medical malpractice action after a caesarean section, claiming that permanent damage was done to her bladder and urinary tract.²⁶⁸ The IME physician requested that the plaintiff undergo both a cystoscopic and a videotape urodynamic study and the

²⁵⁷ *Id.*

²⁵⁸ See *Yee Szet Foo v. Dulles*, 18 F.R.D. 237, 239 (S.D.N.Y. 1955).

²⁵⁹ *Cardinal v. Univ. of Rochester*, 71 N.Y.S.2d 614, 616, 617 (N.Y. Sup. Ct. 1946).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 615.

²⁶² *Id.* at 616.

²⁶³ *Id.* at 616–17.

²⁶⁴ *Bobka v. Mann*, 764 N.Y.S.2d 847, 848 (N.Y. App. Div. 2003).

²⁶⁵ *Id.* at 847–48.

²⁶⁶ *Id.* at 848.

²⁶⁷ *Il Grande v. DiBenedetto*, 841 A.2d 974, 977 (N.J. Sup. Ct. App. Div. 2004).

²⁶⁸ *Id.* at 978.

2015] INDEPENDENT MEDICAL EXAMINATIONS 369

claimant filed a motion for protective order against the defendant's request.²⁶⁹ The plaintiff asserted that undergoing the procedures would cause great harm and would have limited probative value.²⁷⁰ Further, the plaintiff stated that the anxiety and pain the procedures would cause would lead to the need for general anesthesia, which would increase the risk of the tests, and the procedure could lead to urinary tract bleeding.²⁷¹ The defense responded that the plaintiff only pointed to subjective complaints for not undergoing the procedure and did not assert any medical or physical reasons.²⁷²

The court first considered the pain and health concerns that came along with the test.²⁷³ It took note that the first time the plaintiff went through a cystoscopic exam there were complications and the procedure couldn't be performed, and the physician who administered the procedure stated that the problems in completing the exam were psychological and not physical.²⁷⁴ It was also noted that the procedure was routine when a patient had urinary and bladder issues, and that in the event that it would have to be performed after giving general anesthesia, the plaintiff had been given general anesthesia six times with no adverse effects.²⁷⁵ Based on this analysis the court noted that there were little, if any, actual health risks to the plaintiff.²⁷⁶ The court next considered whether these procedures were necessary to put the defendant on equal footing with the plaintiff.²⁷⁷ The defendant asserted that the procedures performed by the plaintiff's physician were inadequate to determine the cause and extent of the claimant's injury.²⁷⁸ The court determined that these facts established the need for the defense to be allowed to perform the procedures.²⁷⁹

The court remanded the case to be decided on the weighing test

²⁶⁹ *Id.* at 979.

²⁷⁰ *Id.* at 984.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 978.

²⁷⁵ *Id.* at 985.

²⁷⁶ *See id.* (holding that based on the evidence presented, the trial judge could have concluded that plaintiff's pain was merely psychogenic).

²⁷⁷ *Id.* at 984.

²⁷⁸ *Id.* at 986.

²⁷⁹ *Id.* at 987.

that it had laid out.²⁸⁰ The balance to be sought was between the risk/legitimacy of the procedure and the results produced by the test.²⁸¹ The court also noted that if the defense could not prove the need for the procedure, then the plaintiff would not have to undergo it, no matter how small the risk of pain or detriment to health.²⁸²

A. Ordering an Examinee to Undergo Sedation for an IME Procedure

To obtain a quality image for many diagnostic scans, the patient must remain still. Some patients are unwilling or physically unable to not move for the duration of the scan. In that case, can the patient be forced to undergo the test if it means she must be sedated? Typically, the party requesting the sedation has the burden of establishing that sedation is permissible.²⁸³ Most statutes governing IMEs are silent on this issue, so the courts must make rulings on a case-by-case basis.²⁸⁴

Sedation and other invasive procedures pose a problem because they carry a risk to the patient.²⁸⁵ The leading case on this issue held that a test would not be ordered if it presents the possibility of danger to the plaintiff's life or health.²⁸⁶ In *Lefkowitz v. Nassau County Medical Center*, the plaintiff alleged that she became infertile as a result of the defendant's negligence.²⁸⁷ The defense requested that the plaintiff undergo a hysterosalpingogram in order to determine the condition of the plaintiff's reproductive organs.²⁸⁸ A hysterosalpingogram is a fertility test consisting of an x-ray examination of the uterus and fallopian tubes after injecting a radiated opaque medium.²⁸⁹

²⁸⁰ *Id.* at 990.

²⁸¹ *Id.* at 987.

²⁸² *Id.* at 983.

²⁸³ *Thomas v. John T. Mather Mem'l Hosp.*, 556 N.Y.S.2d 720, 721 (N.Y. App. Div. 1990).

²⁸⁴ *See Lefkowitz v. Nassau Cnty. Med. Ctr.*, 462 N.Y.S.2d 903, 906 (N.Y. App. Div. 1983) (listing factors to be considered on a case by case basis; the necessity of the procedure, details of the procedure, frequency with which it has been done in the past, and physician observations and opinions of harm and results).

²⁸⁵ *Id.* at 905–06.

²⁸⁶ *Id.* at 906.

²⁸⁷ *Id.* at 904–05.

²⁸⁸ *Id.* at 905.

²⁸⁹ *Id.*

2015] INDEPENDENT MEDICAL EXAMINATIONS 371

The court established a burden-shifting test to determine whether an invasive procedure could be ordered in a medical malpractice case.²⁹⁰ If the plaintiff opposes the procedure, he must establish that the test is dangerous.²⁹¹ If the plaintiff meets this burden, it then shifts to the defendant who must establish that the test is safe.²⁹² This is a case-by-case analysis and requires the information presented to include “the details of the procedure employed in making it, the frequency with which it has been done, together with the experience and observations which have been made by physicians as to pain, harm, or after results of any nature, occurring to persons so examined.”²⁹³

Several jurisdictions have since adopted the *Lefkowitz* burden-shifting analysis when ruling on a request for an invasive procedure.²⁹⁴ Generally, if a procedure is accepted as safe in the medical community or if the party requesting the procedure can demonstrate its safety and necessity, the courts will grant the party’s request to order the procedure.²⁹⁵

VI. OBTAINING THE DOCTOR’S TAX RECORDS

The courts usually deny a request by plaintiffs’ counsel to force a physician who performs an independent medical examination to turn over their tax records to show a bias against the plaintiff.²⁹⁶ The Florida Supreme Court understood that compelling a doctor to turn over tax records could have a significant chilling effect on physicians willing to be involved in an IME, as well as distracting from the trial.²⁹⁷ The court recognized the need of plaintiffs to show the potential bias of defense physicians and understood that the percentage of a physician’s time spent doing IMEs, and how much money is

²⁹⁰ *Id.* at 906.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* (quoting *Cardinal v. Univ. of Rochester*, 69 N.Y.S.2d 355, 355 (N.Y. App. Div. 1947)).

²⁹⁴ See *Thomas v. John T. Mather Mem’l Hosp.*, 556 N.Y.S.2d 720, 721 (App. Div. 1990); *Stasiak v. Ill. Valley Cmty. Hosp.*, 590 N.E.2d 974, 978 (Ill. App. Ct. 1992).

²⁹⁵ See *Pena ex rel. v. Troup*, 163 F.R.D. 352, 356 (D. Colo. 1995); *Stasiak*, 590 N.E.2d at 979; *St. Clair v. Hatch*, 62 P.3d 382, 384 (Okla. 2002).

²⁹⁶ *Elkins v. Syken*, 672 So.2d 517, 518 (Fla. 1996).

²⁹⁷ *Id.* at 519.

made during the IMEs, could show the physician's bias.²⁹⁸ The court found, however, that any discovery that would prove a physician's bias must be balanced against the expert's right to be free from overly burdensome and intrusive production.²⁹⁹ The court stated that compulsion of handing over tax records would be overly burdensome,³⁰⁰ and it upheld the district court's parameters for discovery concerning IME physicians, which included:

1. The medical expert may be deposed either orally or by written deposition.
2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each?
4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.
5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.
6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.
7. The patient's privacy must be observed.
8. An expert may not be compelled to compile or produce nonexistent documents.³⁰¹

The court also agreed with the trial judge's holding that if a physician was found to be lying during the deposition then the moving party could request the physician's testimony to be stricken or keep the physician from testifying, as well as levying

²⁹⁸ *Id.* at 522.

²⁹⁹ *Id.* at 522; Neal v. Nelson, 198 P.3d 819, 827 (Mont. 2008).

³⁰⁰ *Elkins*, 672 So.2d at 518.

³⁰¹ *Id.* at 521; *see also* State *ex rel.* Acme Rug Cleaner, Inc. v. Likes, 588 N.W.2d 783, 790 (Neb. 1999) (noting Nebraska's similar guidelines).

2015] INDEPENDENT MEDICAL EXAMINATIONS 373

any costs for exposing the lie against the offending physician.³⁰² The court noted that the protections given in its opinion were available to physicians who worked for both the plaintiffs and the defendants.³⁰³ In the case of an evasive or untruthful physician, the witness' testimony could be thrown out at the trial court discretion in light of the proof of the doctor not being truthful and that any costs incurred by shining a light on the lying expert could be imposed on the party that called the physician.³⁰⁴ The court believed that these measures would put trial counsel on notice to only use reputable witnesses.³⁰⁵

Florida in a subsequent decision held that discovery of the records concerning the frequency of use and amount paid to an expert can be sought from a party in a case.³⁰⁶ Allstate, the defendant, was ordered to show documentation that would note how many times the carrier used an accident reconstruction expert's company, and how much they had paid that company over the past three years.³⁰⁷ Allstate objected to the request citing *Elkins*, but the court distinguished the litigation.³⁰⁸ The court found that the public policy of not allowing the discovery of physician's tax records did not exist when the discovery is directed at a party to the litigation.³⁰⁹ A party in a proceeding does not have the same protections as that of the expert witness' right to privacy which protected their tax records.³¹⁰ The court concluded that Allstate had to provide information on how often it hired a particular expert witness and how much it paid that expert, because it would be probative to prove the bias of that witness, where the discovery of an expert's tax returns had little probative value.³¹¹ After all, the financial connection between the party and the witness would help the jury determine whether the opinion of the expert was slanted by their relationship.³¹²

The Kentucky Supreme Court, citing the Florida Supreme

³⁰² *Elkins*, 672 So.2d at 521.

³⁰³ *Id.* at 522.

³⁰⁴ *Id.* at 521 (citing to the district court's explanation for seeking financial information from opposing medical experts).

³⁰⁵ *Id.* at 519.

³⁰⁶ Allstate Ins. Co. v. Boecher, 733 So.2d 993, 997 (Fla. 1999).

³⁰⁷ *Id.* at 994, 997.

³⁰⁸ *Id.* at 997.

³⁰⁹ *Id.* at 998.

³¹⁰ *Id.* at 997.

³¹¹ *Id.* at 998.

³¹² *Id.* at 997-98.

Court liberally, also found that a physician could not be forced to turn over tax records.³¹³ It held that any information that could show bias could simply be found during the deposition of the physician.³¹⁴ The court, however, diverged from Florida and held that questions concerning the percentage of a physician's income and the actual amount of income made from defense physicals would be allowed in deposition.³¹⁵ The court stated that, "[t]here is no need for the expert to produce tax returns if the party seeking discovery has accurate information regarding the percentage of income earned as an expert."³¹⁶ The court did recognize that there are circumstances where a physician may be compelled to turn over their tax returns.³¹⁷ If during a deposition, a physician is not being forthcoming or is being untruthful about the amount of money made from litigation related activities, then it is the trial courts discretion to allow additional discovery, including the production of that physician's tax records.³¹⁸ The court then echoed the Florida District Court's holding that if the trial court finds that the physician has been evasive or untruthful, the expert may be barred from testifying and the cost of discovery to expose the physician will be on the party calling the physician.³¹⁹ In closing, the court agreed with the Florida Supreme Court, holding that its opinion is equally applicable to both plaintiff and defendant expert witnesses.³²⁰

The Pennsylvania Supreme Court has held that judicial compulsion of a physician's tax records would be overly intrusive for the purposes of showing bias.³²¹ The facts showed that the defense physician had admitted to conducting 200 IMEs in recent years, which the court stated was proof enough that the physician was a professional witness, and there was a reasonable inference that the expert would color his testimony for financial gain.³²² The court held that the least intrusive means to obtain information that would prove the physician's bias would be

³¹³ *Primm v. Isaac*, 127 S.W.3d 630, 639 (Ky. 2004).

³¹⁴ *Id.*

³¹⁵ *Id.* at 637.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* at 639.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Cooper v. Schoffstall*, 905 A.2d 482, 498 (Pa. 2006).

³²² *Id.* at 495.

2015] INDEPENDENT MEDICAL EXAMINATIONS 375

written interrogatories during a deposition under Rule 4004 of the Pennsylvania Rules of Civil Procedure.³²³ The court's guidelines for what information could be gathered during the deposition largely mirrored those espoused by the Florida Supreme Court.³²⁴ The Pennsylvania court, however, decided that it would allow questions as to an estimated amount of income a physician has made during the last three years performing independent medical examinations.³²⁵ The court noted that this information was found to be overly broad by the Florida Court, but that when a witness is categorized as a professional witness, a party can inquire as to the income made by such an expert.³²⁶ The court stated that it was not tying the hands of the trial courts from being able to dispense more intrusive means of discovery against the physician.³²⁷ If there is a strong showing that the physician is being evasive or untruthful during disposition, the court can subpoena financial records from that physician.³²⁸ Unlike the Florida Supreme Court, this court did not expressly state whether its holding applied only to defense medical examiners, or if it was equally applicable to plaintiffs' physicians.³²⁹ There do not appear to be any subsequent Pennsylvania cases that have answered this question.

The District Court of Maryland, applying Rules 26(b)(1) and (2) of the Federal Rules of Civil Procedure, also found that there was no reason for an independent medical examiner to produce their tax records.³³⁰ The court found that, "no intellectually honest argument can be made that the information sought by plaintiff regarding Dr. Keehn's activities as a defense expert witness is not relevant to bias/prejudice impeachment, and, therefore, within the scope of discovery permitted by Rule 26(b)(1)."³³¹ It was noted, however, that the discovery had to be within the scope of 26(b)(2), which protects an entity from overly burdensome

³²³ *Id.*

³²⁴ *Id.* at 495; *see also* Allstate Ins. Co. v. Boecher, 733 So.2d 993, 996 n.5 (Fla. 1999).

³²⁵ *Cooper*, 905 A.2d at 495.

³²⁶ *Id.*; *see also* Wroblewski v. Nora de Lara, 727 A.2d 930, 938 (Md. 1999).

³²⁷ *Cooper*, 905 A.2d at 487–88 (quoting *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 643 (Mo. 1994)).

³²⁸ *Id.*

³²⁹ *Id.* at 495–96; *see also* Elkins v. Syken, 672 So.2d 517, 522 (Fla. 1996).

³³⁰ *Behler v. Hanlon*, 199 F.R.D. 553, 561–62 (D. Md. 2001).

³³¹ *Id.* at 561.

discovery requests.³³² The court held that the plaintiff's discovery requests, including the expert's tax records, a listing of all insurance companies the expert has worked for, and the total income the expert has made over the last five years was overkill.³³³ The court found that Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, which requires the expert witness to disclose compensation on the current case, would give sufficient information for the plaintiff's attorney to show that expert's bias.³³⁴ The introduction of an expert's total income would do little to provide a correct view of that expert's bias, but would greatly increase the chance of confusion or prejudice among the jury.³³⁵ The court then stated that, before the expert's deposition, they should gather information to be able to answer the following:

- (1) The percentage of his gross income earned for each of the preceding five years attributable to performing expert witness services on behalf of insurance companies, and/or attorneys defending personal injury cases; (2) a list of cases in which he has provided such services during the last five years, in sufficient detail to enable the plaintiff to locate the court file, and/or issue a subpoena for it. At a minimum, the name, address and telephone number of the attorney and/or insurance claims representative that engaged Dr. Keehn will be provided; (3) the name of each insurance company for which Dr. Keehn has provided services as an expert witness in personal injury cases, for the preceding ten years.³³⁶

The court did state that, if after the deposition, the plaintiff can prove that more information is needed for impeachment, the court may order it, and that if it is found that the expert had not been forthcoming with the information for the deposition, appropriate sanctions, including not allowing the expert to testify at trial, may be imposed.³³⁷

The federal courts have consistently held that, while information concerning the income of an independent medical examiner is allowed to show bias, there is no need for the examiner to produce their tax records.³³⁸

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 562.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 562–63.

³³⁸ *Id.* at 562.

VII. DISQUALIFYING A SPECIFIC IME DOCTOR

Counsel for claimants have attempted to ban specific types of physicians from performing medical examinations.³³⁹ The Supreme Court of New Hampshire has held that state law requiring physicians conducting IMEs to be board certified by a board recognized by the American Board of Medical Specialties (ABMS), did not violate the equal protection rights of the State Constitution.³⁴⁰ The plaintiff was a physician who had been performing IMEs since 1963 for worker's compensation claims.³⁴¹ By way of background, the plaintiff was a licensed orthopedic surgeon and was certified by the American Board of Neurological and Orthopedic Surgery and the National Association of Disability Evaluating Physicians, neither of which are boards recognized by the ABMS.³⁴² In 1996, the Worker's Compensation Law was amended to require all physicians conducting IMEs to be board certified by a board recognized by the ABMS or to gain approval from the commissioner to continue performing IMEs.³⁴³ The plaintiff qualified for certification by a recognized board, but instead chose to seek approval from the commissioner, in which permission was refused.³⁴⁴ The plaintiff then brought suit claiming that the new worker's compensation law was unconstitutional.³⁴⁵ The trial court dismissed the suit and the plaintiff appealed, claiming the law violated his equal protection rights.³⁴⁶ The New Hampshire Supreme Court held that there was no equal protection argument because the plaintiff, and other physicians able to be board certified by a board that would be recognized by the ABMS, were not 'similarly situated' to those physicians who were unable to be certified by a board recognized by the ABMS.³⁴⁷ The court noted that even if the plaintiff was

³³⁹ See, e.g., *Allstate Soc. Work & Psychological Servs. PLLC v. Utica Mut. Ins. Co.*, 869 N.Y.S.2d 303, 306–07 (N.Y. Civ. Ct. 2008), *aff'd*, 918 N.Y.S.2d 821 (N.Y. App. Term 2011) (arguing that a psychologist was not within the definition of a "physician" pursuant to applicable state law; therefore, the IME conducted by a psychologist was improper).

³⁴⁰ *Emond v. New Hampshire Dep't of Labor*, 769 A.2d 394, 396–97 (N.H. Dep't 2001).

³⁴¹ *Id.* at 395.

³⁴² *Id.*

³⁴³ *Id.* (quoting N.H. REV. STAT. ANN. § 281-A:38(II) (West 2014)).

³⁴⁴ *Id.* at 396.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

similarly situated with physicians unable to be board certified there would be no equal protection claim because the new law only regulated economic rights, which would be reviewed with a rational basis test.³⁴⁸ Any law under this test would be valid if it served a legitimate state interest, and it is the burden of the plaintiff to prove that the law is arbitrary.³⁴⁹ The court agreed with the trial court that this law was a reasonable way of protecting the state's interest of ensuring that only competent physicians were performing IMEs, and it did not violate the physician's equal protection rights.³⁵⁰

In New York, a court found that any health care provider may perform an IME and that the examination did not need to be performed by a physician.³⁵¹ The defendants (the insurers) denied the plaintiff's claim because of his failure to appear at two scheduled IME.³⁵² In response, the plaintiff stated that the IME was to be performed by a psychologist and, by the terms of the insurance agreement, the insured only had an obligation to appear at medical examinations conducted by a physician.³⁵³ The Mandatory Personal Injury Protection Endorsement, which is a part of every motor vehicle insurance policy issued in New York, stated that the insured must submit to an IME performed by a physician that is acceptable to the insurance company.³⁵⁴ The term physician was not defined in the endorsement, and the plaintiff argued that a physician was defined as, "only a person licensed or otherwise authorized under this article shall practice medicine or use the title physician."³⁵⁵ The defendant conceded that the psychologist was not a physician, but argued that since the endorsement qualified "medical expense" as an expense from all professional health services, not just those from a physician, the legislature intended that IMEs be performed by any health care professional.³⁵⁶ The court looked to an opinion letter written by the State Insurance Department that stated "there is no

³⁴⁸ *Id.* (citing *In re Abbott*, 653 A.2d 1113, 1117 (N.H. 1995)).

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 396–97.

³⁵¹ *Allstate Soc. Work & Psychological Servs. PLLC v. Utica Mut. Ins. Co.*, 869 N.Y.S.2d 303, 306–07 (N.Y. Civ. Ct. 2008), *aff'd*, 918 N.Y.S.2d 821 (N.Y. App. Term 2011).

³⁵² *Id.* at 305.

³⁵³ *Id.*

³⁵⁴ *Id.* at 305–07.

³⁵⁵ *Id.* at 306 (quoting N.Y. EDUC. LAW § 6522 (McKinney 2014)).

³⁵⁶ *Id.* at 305–06.

2015] INDEPENDENT MEDICAL EXAMINATIONS 379

requirement in the regulation that a claim denial must be based upon a medical examination conducted by a health provider of the same specialty area as the treating healthcare provider.”³⁵⁷ The court held that this interpretation implicitly held that an IME could be performed by either a physician, as defined by the Education Law and the endorsement, or another health care provider selected by the provider.³⁵⁸ The trial court, or arbitrator, had the duty to review the qualifications of the medical professional performing the IME, and that the other interpretation would greatly slow down the processing of no fault claims.³⁵⁹ Therefore, the plaintiff failed to appear at a properly scheduled IME and, his claims were denied.³⁶⁰

VIII. DISQUALIFYING A PHYSICIAN BASED ON BIAS

Physicians who perform IMEs may find themselves working with a particular insurance carrier or defense counsel regularly.³⁶¹ Can the physician be disqualified from performing an IME due to the potential bias the physician may have due to those industry connections? For example, the Supreme Court of Maine held that disqualifying a physician from an IME for a conflict of interest does not have to be case specific, but can be based on any connections that would cause the physician to be partial.³⁶² The plaintiff was injured while working for the defendant, and on the request of the employer, Dr. Russell was appointed to perform the IME.³⁶³ Dr. Russell found that the plaintiff's inability to work was unrelated to his work injury.³⁶⁴ The plaintiff contended that Dr. Russell had a conflict of interest and the hearing officer ordered a deposition of the physician to decide whether there was a problem.³⁶⁵ During his deposition, Dr.

³⁵⁷ *Id.* at 306.

³⁵⁸ *Id.* at 306–07.

³⁵⁹ *Id.* at 307.

³⁶⁰ *Id.*

³⁶¹ See Robert E. Rains, *The Advocate's Conflicting Obligations Vis-à-vis Adverse Medical Evidence in Social Security Proceedings*, 1995 BYU L. REV. 99, 131 (1995) (explaining that IME's in social security proceedings are regularly “performed by physicians who are under contract to the worker's compensation insurance carriers and who understand full well the economic interests of the party who pays the bill”).

³⁶² *Laskey v. S.D. Warren Co.*, 774 A.2d 358, 360–61 (Me. 2001).

³⁶³ *Id.* at 361.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

Russell admitted that in the past fifty-two weeks he had performed about ten to twelve IMEs a week, that ninety to ninety-five percent were section 207 examinations³⁶⁶ (which control medical examinations of employees³⁶⁷), and that ninety-five of those IMEs were for insurance companies, employers, or defense council.³⁶⁸ Dr. Russell also stated that he charged \$850 per examinations, made roughly \$90,000 at an occupational health clinic, and was a consultant for five Maine employers.³⁶⁹ The hearing officer decided that due to his connections with the industry and the amount of money gained from those connections, the doctor had a conflict of interest and should not have been appointed as the physician for the IME.³⁷⁰ On appeal, the court concluded that the hearing officer was within his power to decide that Dr. Russell had a conflict of interest and was properly disqualified.³⁷¹

XI. CONCLUSION

Independent medical exams are an important part of the claims process. However, many legal issues exist in this setting from whether the physician can be sued for malpractice to whether the doctor can be forced to turn over his or her tax records. Some states have settled case law regarding the duty owed by, and regulations controlling, IME physicians, while others do not. Therefore, it is important for counsel to stay updated regarding the case law in their particular jurisdiction.

³⁶⁶ *Id.*

³⁶⁷ *See generally* ME. REV. STAT. ANN. tit. 39-A, § 207 (West 2014) (mandating that after an injury, an employee will submit to an examination by a physician, surgeon or chiropractor to be selected and paid for by the employer).

³⁶⁸ *Laskey*, 774 A.2d at 361–62.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 362.

³⁷¹ *Id.* at 365.