

## News Briefs

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### Plaintiffs' bar seeks presence during clients' medical exams

#### Debate over Rule 35 exams continues

By Noah Schaffer

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From brain-injury cases to emotional-distress claims, some plaintiffs' lawyers are complaining that they are not given an opportunity to attend medical exams requested by defense counsel.

Massachusetts Rule of Civil Procedure 35 allows a defendant to compel the plaintiff to submit to a medical examination during discovery, but whether a plaintiff's lawyer can accompany his client to the exam is a matter of discretion for the judge.

Lawyers say that a dearth of appellate law on the subject has resulted in inconsistent rulings on counsel-attendance during Rule 35 exams. Similar complaints were reported in *Lawyers Weekly* more than five years ago.

"Different judges handle it differently, and that can create a lot of confusion," said plaintiffs' lawyer Marilyn A. Beck of Dedham.

Kenneth I. Kolpan of Boston, a plaintiffs' attorney who is waiting to find out the status of a disputed Rule 35 request in a pending case, said that "it's a matter of a right — the defense has to show good cause for conducting the exam. Once you show good cause, the court sets the condition of the exam, not the examiner."

But, he said, "the court has the discretion to decide whether an observer can be present or not, and the decisions vary."

In seeking blanket approval to attend or send an observer to clients' Rule 35 exams, members of the plaintiffs' bar have long argued that that would allow them to monitor



**KENNETH I. KOLPAN**  
Judges' decisions vary on whether observer can be present

any inappropriate questioning. (See sidebar, page 14.)

But defense attorneys, who often object to their opponents' requests to attend the exams, counter that the very presence of an observer can threaten the validity of the exam.

"Rule 35 exams take place under conditions that allow examiners to make scientific

valid observations," said David T. Mitrou of Boston, who is representing the defense in the brain-injury case Kolpan is handling. "From our perspective, which is supported by the literature, examinations by a neuropsychologist and a psychiatrist should not have the presence of a third-party observer."

#### Bus accident

In the Suffolk Superior Court case involving Kolpan and Mitrou, *Mortimer v. MBTA*, the plaintiff sued over brain injuries she claimed to have suffered after being struck by a bus operated by the defendant transit agency.

The plaintiff claims she is having memory and concentration problems and that she has developed significant psychological and emotional issues as a result. Those issues, she claims, have prevented her from returning to work and resuming a normal life.

The defense filed a Rule 35 motion seeking to have a psychiatrist, neuropsychologist and neurologist examine the plaintiff, a motion Kolpan opposed.

"I opposed it on the basis that an observer ought to be present to ensure that an accurate recollection of what goes on could be reported back to me," the plaintiff's lawyer said. "The plaintiff could not — because of her memory problems — ensure the exams were properly conducted. Otherwise, it is only the examiner's version of what occurred that may be known. It would also ensure that testing is done according to the professional requirements."

Kolpan said a Rule 35 exam that is not observed or recorded could turn into "an opportunity for the defense to discover information through use of questions that may not be proper. For example, they may

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ask questions about the facts of the incident and then report it back to counsel and say, "That's inconsistent with how she testified before."

But Mitrou, who is in the process of filing a response to the plaintiff's objection, said two of the exams would be compromised if the plaintiff sent an observer to attend or record them.

From the defendant's perspective, he explained, "that type of request for an observer depends upon the nature of the examination. With the neurologist exam, [the request for an observer] is not something we object to."

However, the neuropsychologist exam is compared against standardized test results, "which are based upon the one-on-one administration between the neuropsychologist and the examinee," he said. "If there's a third party present, you're no longer comparing apples to apples. The defense expert would be in the position of trying to make assessments or evaluations that you could not scientifically validate against the standardized tests or results."

Mitrou said his side also opposes recording the session because "there's research in the Journal of Forensic Neuropsychology that suggests the factor of the observer doesn't

need to be physical, but can be shown when someone is either audiotaped or videotaped. It just presents a confounding variable in the process."

But Boston attorney Jonathan J. Margolis, a plaintiffs' lawyer not involved in the *Mortimer* case, said that claims by defense lawyers that an exam could be impacted is "absolute pap, although some judges buy it."

Margolis said it is important to remember that the defense expert or examiner has no professional relationship with the plaintiff.

"The expert is hired by the defendant, and they know from the outset that the individual or company or law firm that hired them wants them to knock down part of the plaintiff's case. So to pretend that there's some professional relationship ... is ludicrous," Margolis said.

#### 'No blanket rule'

What little caselaw exists on the issue suggests that there is no blanket rule, according to Mitrou, although he pointed to several Superior Court cases in which observers were not allowed.

In the 2003 Middlesex Superior Court case *Kutner v. Urban, et al.*, for example, the defendant in a dog-bite case received a protective order barring the plaintiff's attorney from at-

tending a medical exam. The judge found the plaintiff had "provided no evidence establishing good cause for the presence of her attorney during the Rule 35 exam."

The reason more appellate cases are not available, said plaintiffs' attorney J. Michael Conley of Braintree, is that "the legal issues are all about abuse of discretion, so it never goes up on appeal."

Conley said in many instances he tries to send a representative to Rule 35 exams. The two sides can usually work things out without a court order, he said, although brain-injury cases tend to be especially thorny.

"I don't see how our presence impacts it," he said. "With some experts, it's like a second deposition of our client. You should be there. If not, it's like being kept out of your own client's deposition."

When such a dispute arises, Kolpan said a plaintiff's attorney must "demonstrate to the judge that there's a risk that the integrity of the process" will be undermined without an observer.

"One thing I've sensed is that courts do not like to be told by the examiners what the conditions should be. Judges are thoughtful and try to strike a balance," he said. MLW

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