knowingly entering into." *Id.* at 1348. The Court found that because the St. Paul policy defined "personal injury" in a similar fashion as the policy at issue in *Innovak*, the established case law of *Innovak* was persuasive. Furthermore, the Court again looked to the language of the subject policies, noting that they required covered personal injuries to "result from [the insured's] business activities." The Court concluded that RHR's alleged injuries did not result from Millennium's business activities but rather the actions of third parties, *i.e.* the hackers. Therefore, the Court found that RHR's personal injury claim was not covered under the Policy. Because Millennium and RHR had not asserted any claim that was subject to coverage under the Policy, St. Paul had no duty to defend. Therefore, the Court granted St. Paul's Motion for Summary Judgment in part.

Although the Court did not find its authority persuasive, RHR and Millennium cited to multiple Florida cases in which courts found insurers had a duty to defend in cases involving data breaches. The Court dismissed these cases because none of them involved data breaches perpetrated by third parties. However, on appeal the 11th Circuit could find differently. Furthermore, the 11th Circuit might not find *Innovak* as persuasive as the district court found. The insured in *Innovak* provided software systems to its clients, not cyber security services as Millennium did. Millennium and RHR could argue that because St. Paul issued a policy to Millennium, a company that was specifically contracted to provide cyber security services, presumably including the prevention of outside hacking, St. Paul should have expected the policy to cover the acts of third-party hackers.

As of the date of this publication, Millennium and RHR have appealed the District Court's ruling to the 11th Circuit. It remains to be seen whether the court will uphold the grant of summary judgment on the basis that third-party hackers, not the insured, dispersed the information or whether it will agree with Millennium and RHR that Florida law differs regarding liability coverage for injuries caused by third parties.

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Three's a Crowd

The Detrimental Presence of Third Parties at Rule 35 Examinations

By Danielle Malaty

Physical and mental examinations play a critical role in the evaluation of damages and the development of a defense attorney's strategy in a wide range of substantive cases which may trigger a defense under personal lines of coverage. Whether these claims are predicated on allegations of automobile or homeowner negligence, assault, intentional conduct, etc., a defense attorney should investigate these claims as thoroughly as possible. Non-Economic damages are quantifiable and verifiable to a certain extent, but the same does not apply to those of the non-economic variety, such as emotional distress, cognitive impairment, depression, or trauma. These less tangible damages are customarily based upon subjective evidence, and thus may require an expert to effectively rebut.

Overview of Rule 35 Examinations

The Federal Rules of Civil Procedure provides that when a physical or mental condition is placed at the center of litigation as a question in controversy, the court, upon notice and on motion within a reasonable time before trial, may order a party to submit to an examination by a licensed professional in a discipline related to the physical or mental condition which is involved.[1] The Rule requires a movant to meet two prerequisites: (1) the party must first demonstrate that the relevant physical or mental condition is in fact in controversy; and (2) the movant must also demonstrate that the proposed examinee has alleged or pled the existence of a mental or physical condition that was allegedly caused by, or resulted from, the defendant's

[1] Fed. R. Civ. P. 35.

conduct. A defendant may not place a condition in controversy merely by asserting unsubstantiated allegations about the condition.[2] Plaintiffs are somewhat protected by the Rule, in that it obviates the moving party from over-arguing the controversial conditions thereby subjecting them to extraneous mental or physical examinations.[3]

The second prerequisite is a showing of good cause for conducting the examination by providing the trial court with specific facts, which justify the need for the examination. This is accomplished by the following demonstrations made by the movant: 1) the need for the information sought; and 2) the defendant is otherwise unable to obtain the information from other sources than the examination.

There is no inherent right to examine the mental or physical health of an adversary.[4] As such, the party seeking such an examination must submit sufficient information by affidavits, by other usual methods short of hearing, or by hearing, so that trial judge can fulfill her function of determining whether the movant has adequately demonstrated existence of the Rule's requirements of "in controversy" and "good cause," which are necessarily related.[5] These examinations are subject to strict parameters, in that the court order allowing them must fix the time, place, conditions, and scope of examination, in addition to designating a qualified examiner.

While these examinations are intended to be neutral, the presence of a third party is frequently requested for a variety of reasons. The requests are denied more often than not, as the success of a Rule 35 examination hinges on "unimpeded one-on-one communication" between the examiner and the examinee."[6] Neither the United States Supreme Court nor the Federal Rules of Civil Procedure provide definitive guidance on the issue of whether third parties should be permitted at these examinations. The question is typically addressed by a factually specific evaluation undertaken by the court, on a case-by-case basis. Most District courts oppose third party attendance; however, they nonetheless remind us that the trial courts are vested with the discretion to make such an allowance, in addition to the discretion to set the precise parameters and conditions of the examination.[7] In making these decisions, the trial court is expected to take into consideration the requirements of justice, compared against the risk of exposing the examinee to embarrassment, annoyance, oppression, or undue burdens or expenses.[8]

If an examinee requests the attendance of a third party to their examination, "good cause" must also be shown. The examinee can show good cause by providing the court with "special circumstances" which are believed to be present and for which a protective order, specifically tailored to the problems presented, is necessary to facilitate their attendance.[9] The following is a discussion on arguments customarily raised by examinees requesting the attendance of third parties at these examinations, positions taken by the District courts, policy considerations, and practical applications of the standards set by case precedent.

Customary Arguments Raised by Examinees

Before discussing which arguments prevailed in court when examinees seek third party attendance at their Rule 35 examinations, it is important to first begin the analysis by looking to the concerns that underpin these requests. Examinees customarily argue the following three issues in support of their desire to have a third party present: 1) the examination may devolve into a *de facto* deposition; 2) the examination may conjure up emotions with connections to sensitive subject matters [which justifies the need for emotional support]; and 3) the examiner may utilize "harmful" tactics in conducting the examination.

De Facto Deposition

A Plaintiff's concern that a Rule 35 examination will devolve into a *de facto* deposition is usually supported by the fact that the examiner is both compensated by an adversary of the examinee and has the power to elicit answers that can unravel a plaintiff's case—specifically in the context of a psychiatric examinations.[10] When conditions supported by subjective findings are claimed as damages in a cause of action, that causative nexus between the injury and the tortious conduct alleged in the pleadings can be hobbled by an impulsive examinee's answer given out of fear or pressure imposed by the adverse, examining expert.[11] Further, the questions themselves can elicit answers that cast doubt on the truthfulness of the pleadings. As in the case of any deposition, witnesses under pressure tend to

2 See *Schlagenhauf v. Holder*, 379 US 104, 85 S Ct 234, 13 L Ed 2d 152 (1964)

3 *Id.*

4 *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 FRD 620, 80 Fair Empl Prac Cas (BNA) 355, 45 Fed R Serv 3d (Callaghan) 844 (D. Kan. 1999)

5 *Schlagenhauf*, 379 U.S. at 118–21

6 *Brandenberg v. El Al Israel Airlines*, 79 F.R.D. 543, 546 (S.D.N.Y. 1978)

7 See, e.g., *Wheat v. Biesecker*, 125 F.R.D. 479, 480 (N.D. Ind. 1989)

8 *Tirado v. Erosa*, 158 F.R.D. 294, 295 (S.D.N.Y. 1994).

9 *Cline v. Firestone Tire & Rubber Co.*, 118 F.R.D. 588, 589 (S.D. W.Va. 1988)

10 *Zabkowicz v. West Bend Co.*, 585 F. Supp. 635, 636 (D. Wis. 1984)

11 *Dziwanoski v. Ocean Carriers Corp.*, 26 F.R.D. 595, 598 (D. Md. 1960)

"over-answer" in the interest of persuading the examiner of their claims; however, in doing so, they can divulge certain traumatic life experiences or injuries that can undercut a plaintiff's theory of causation. This testimony is both powerful and potentially fatal to a plaintiff's case.

When this concern arises, a plaintiff can contend that her attorney's presence is necessary to make legal objections to questions that, in the attorney's perception, fall outside the province of the examining expert's discipline, or are designed to undermine the plaintiff's case.[12] In the context of a request for counsel to attend a Rule 35 examination, Defendants usually argue that attorneys undermine the inherent neutrality and scientific purity of the examination itself, and/or inject the biases of litigation into the process.

Sensitive Subject Matter

Rule 35 examinations often seek answers to difficult questions, such as those presented during a psychiatric examination of a sexual harassment victim, or a physical examination of a sexual assault victim. Because the answers to these questions are so fundamentally sensitive, it is difficult to paint with a broad stroke when justifying the presence of a third party during these examinations.[13] On the one hand, a defendant may contend that a friend, relative, or attorney may be corrosive to the neutrality of a Rule 35 examination. On the other hand, a plaintiff may contend that a friend or relative is necessary to provide moral support or comfort, or the presence of an attorney is crucial to the process, so as to prevent undue harassment and obviate a line of questioning that impermissibly intrudes on the privacy of the examinee.[14]

Harmful Methodology

Perhaps the most reaching argument in favor of the presence of third parties at Rule 35 examinations is the notion that a licensed, qualified expert would implement harmful methods of examination, so as to further advance the theory of the retaining adversary. This argument is usually raised when a plaintiff contends that counsel must be present to prevent any overreaching. While Rule 35 is silent on the issue of whether an examinee's attorney may be present during an examination, the courts do not extend an absolute right to counsel at a Rule 35 examination.[15] Moreover, the vast majority of courts presented with this particular argument have squarely rejected it. Those courts have consistently reasoned that if an attorney is present during a Rule 35 examination, she thereby subjects herself to a deposition because she is now a post-occurrence witness. In this respect, courts further hold that the consequences to the attorney's presence far outweigh the benefits.

For example, the U.S. District Court sitting in Minnesota's Fifth Division held that the presence of third party "would lend a degree of artificiality to the interview that would be inconsistent with applicable professional standards."[16] In so holding, the Court declined Plaintiff's "mere suspicion" that the examiner's evaluation techniques either unreasonably jeopardized plaintiff's well-being, or were discredited by the psychological community, so as to render the examination futile.[17] In the Northern District of Indiana, the Court held that the mere fact that an examiner was retained by defendants was an insufficient basis to question the trustworthiness of the examiner or her ability to conduct a fair examination.[18]

A Court sitting in the Eastern District of Pennsylvania went so far as to support the complete denial of disability benefits to a plaintiff who refused to submit to an examination without his counsel present, even in the absence of substantial evidence to support the denial in the first instance.[19] Courts have entertained two primary exceptions in this respect. First, the courts entertain arguments in support of the presence of an attorney during a Rule 35 examination when the party seeking the examination raises no objections to the presence of the examinee's attorney (which is rarely the case). In order to maintain the sanctity of the testing yet preserve the right of claimant's attorney to object, Courts have occasionally held if an examinee makes statements at the exam that are not germane to a Rule 35 examination in response to allegedly inappropriate questions, subsequent objections can be made on that ground at the trial of the case, at which time an appropriate ruling can be made.[20]

The second exception turns to the question of good cause. Specifically, in the presence of an objection raised by defendant to the presence of counsel, an examinee must show that her interests in protection against unsupervised interrogation by "an agent" of the opponent outweigh the defendants' interest in "making the most

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12 Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d 2236 (1994)

13 See *Sanden v. Mayo Clinic,* 495 F.2d 221, 225 (8th Cir. 1974)

14 *Klein v. Yellow Cab Co.,* 7 F.R.D. 169, 170 (D.C. Ohio 1944)

15 *Tirado v. Erosa,* 158 F.R.D. 294, 295 (S.D.N.Y. 1994)

16 *Tomlin v. Holececk,* 150 F.R.D. 628, 631 (D. Minn. 1993)

17 *Id.*

18 *Wheat v. Biesecker,* 125 F.R.D. 479, 480 (N.D. Ind. 1989)

19 *Neumerski v. Califano,* 513 F. Supp. 1011, 1016–17 (E.D. Pa. 1981)

20 *Warrick,* 46 F.R.D. at 427

effective use of their expert."[21] To date, only one court has entertained this argument as being viable. In *Zabkowicz v. West Bend Co.,* the court held that defendant's retained expert could ostensibly conduct an adversarial examination that could then devolve into an adversarial deposition. The court noted that a forensic examination is essentially an adversarial proceeding.[22] Consequently, the plaintiff's interest in protection from unsupervised adversarial interrogation outweighed the defendant's interest in unfettered discovery. Most courts presented with the same argument caution against the decision in *Zabkowicz.* The *Zabkowicz* court set itself apart from other courts, which require an examinee to show more than broad allegations of potential harm, non-specific harm, unsubstantiated by facts and circumstances.

In distinguishing itself from the *Zabkowicz* court, the *Tirador* court sided with the Rule 35 examiner, who stated in an affirmation that the presence of counsel "could jeopardize the clinical purpose of the examination to a great degree… create stressors that increase a patient's self-consciousness, both on a conscious and unconscious level…[and inhibit] a patient's ability to discuss sensitive issues.[23]

More recently, in *Vreeland v. Ethan Allen, Inc.,* an employment discrimination case in the District Court for the Southern District of New York, permitted plaintiffs' attorney to attend psychological examinations, further reasoning that "the presence of the attorney is more likely to produce a higher quality of justice and fairness in the ensuing trial." [24] In addition, numerous state courts have held that an examinee may have her attorney present unless the examining party can show good cause to exclude counsel. In *Langfeldt-Haaland v. Saupe Enters.*, the court curiously compares the "compelled" nature of a Rule 35 examination to a criminal interrogation; however, it nonetheless acknowledged that the right to counsel in civil cases is not co-extensive with the right to counsel in a criminal prosecution.[25] The majority of courts hold that the presence of counsel invades the province of the physician and subjects the attendee to cross-examination of his or her observations, thereby converting counsel to a witness and likely resulting in disqualification as counsel.[26]

Physicians: Neutral or Not?

The District courts remain split as to whether a Rule 35 examinee may be accompanied by her own physician. While most courts oppose these requests, some do not.[27] The courts take very different positions between these two categories of requested attendees: the courts viewed the attendance of a physician as less harmful to the process than that of counsel, as counsel is considered to be more likely to interrupt the examiner or prevent them from asking otherwise permissible questions. Courts have nonetheless found that the possibility of a physician interrupting the process exists. Specifically, courts have held that an examinee's physician is more likely to intimidate the examiner so as to protect her patient or voice her concerns that the examiner is asking questions outside the scope of the court order during the examination proper.[28] Here, a physician also runs the risk of inadvertently making herself a witness to the litigation by failing to remain an impartial observer.

When the courts have denied a Plaintiff's request to be accompanied by her physician during a Rule 35 examination, they have given two primary reasons: 1) a physician's attendance may serve as an unnecessary burden;[29] or 2) it may inhibit the examinee from truly focusing on or being present at the examination.[30] Conversely, some District courts allow an examinee's physician to attend because, while the presence of the examinee's doctor may inject partisanship into an otherwise neutral process, a physician may increase the likelihood of the examiner adhering to court ordered parameters, apply accepted methods of examination within her profession, and/or exercise a heightened degree of professionalism. [31]

As an example of this jurisdictional split, in *Lowe v. Philadelphia Newspapers, Inc.*, the Court permitted the attendance of plaintiff's psychiatrist or other medical expert of her own choosing to attend the Rule 35 examination; however, the court permitted that the third party may only attend as an observer and not for the purpose of advising plaintiff during the examinations."[32] Conversely, in *Galieti v. State Farm Mutual Automobile Insurance Company*, the court denied plaintiff's request to have a medical professional of examinee's choosing silently attend, holding that defendant's expert did not "propose

[21] *Zabkowicz v. West Bend Co.,* 585 F. Supp. 635 (E.D. Wis. 1984)

[22] Id.

[23] 158 F.R.D. 294, 295 (S.D.N.Y. 1994)

[24] 151 F.R.D. 551 (S.D.N.Y. 1993)

[25] 768 P.2d 1144, 1147 (Alaska 1989)

[26] Canon 19 of the Canons of Professional Ethics, adopted by the American Bar Association in 1908 and by the Maryland State Bar Association in 1948

[27] *Cline,* 118 F.R.D. at 589; *Brandenberg,* 79 F.R.D. at 546

[28] *In re Certain Asbestos Cases,* 113 F.R.D. at *615; Lowe,* 101 F.R.D. at 299.

[29] *Sanden*, 495 F.2d at 225

[30] *Id.*

[31] *Dziwanoski,* 26 F.R.D. at 598

[32] 101 F.R.D. 296 (E.D. Pa. 1983)

to use unorthodox or potentially harmful techniques in his examination," warranting no need for any of plaintiff's physicians to attend as a safeguard.[33] In so holding, the Court found it telling that plaintiff failed to present any indication that the examiner proffered by defendant would be less than impartial, other than the simple fact that he had been retained by defendants.[34]

Moral Support or Unnecessary Distraction?

Examinees often request that a family member or close friend attend their Rule 35 examination for purposes of providing moral support or comfort during what may be an uncomfortable experience for them. Often, examinees will seek court-approval for the attendance of a spouse, a friend, children, or their parents. Again, an examinee must show good cause for such attendance, though most courts have declined to entertain these requests when brought in support of a request for the attendance of a friend or family member. While the courts consistently explain in *dicta* that good cause can overcome the presumption against third party attendees, there are no authoritative cases on this category of attendees, as most courts consider such attendees to be unnecessary distractions that corrode the scientific purpose of a Rule 35 examination.[35]

Policy Considerations and Practical Application

Objections to the presence of third parties at Rule 35 examinations are typically predicated on the belief that in granting such a request, the court would compromise the inherently neutral, scientific, impartial, and non-adversarial character of the examination.[36] Rule 35 examinations serve as a mechanism for the parties to obtain evidence of the existence, extent or cause of an alleged condition or injury (or lack thereof), rather than a device used by one side to prove or disprove a theory of liability.[37]

Courts have all but construed the examiners as officers of the court, fulfilling delineated duties pursuant to a court order in performing an impartial, non-adversarial examination of a plaintiff so as to further the interests of justice.[38] Perhaps more fundamental is the view that, far from being adversarial in nature, these examinations should be "divested as far as possible of any adversary character."[39] "The *Warrick* court held that the very presence of a lawyer "injects a partisan character into what should otherwise be a wholly objective inquiry."[40]

Courts are also concerned with the ethical quandary presented when an attorney interjects during the examination in order to protect the interests of the examinee, while simultaneously making herself a potential witness in the action.[41] While objections raised during a Rule 35 examination are typically motivated by a desire to protect the examinee, plaintiff's counsel's participation in the examination can be quite harmful in the eyes of a trier of fact to her client's potential for recovery.

Precedent has shown that plaintiffs are quick to vilify experts retained by defendants, further characterizing them as "hired guns" retained solely for the purpose of seeking findings that are favorable to the defense, rather than for purposes of facilitating discovery. While courts perceive the examiner as a neutral officer of the court sought for her expertise, plaintiffs counter that the absence of counsel would certainly result in an unchecked examiner extracting information outside the permissible scope of examination. The way in which this argument is made begins with attacking your retained expert. Thus, the battle begins with the selection of your expert. It is important to ensure that your expert possesses a solid set of qualifications in the relevant medical or psychological discipline to conduct such an examination.

Your expert must be prepared to remain professional and indifferent to the conflicting interests of the parties, so as to moot the arguments expected from plaintiff that he or she would take a partisan stance. Most courts have held that the following arguments are of insufficient importance to set aside a notice of an examination: bias, interest, prejudice, personality conflict, or frequency with which an expert provides expert services to defendants.[42] Nonetheless, defense counsel should still be vigilant of these arguments and prepared to argue them before they are raised. If plaintiff argues on the basis of fees dispensed to your expert, courts agree with the counter-argument that, if fees demonstrated partiality, nearly ever expert would be disqualified.

The dissent in *Langfeldt* provides guidance on arguments typically relied upon by plaintiffs in seeking court

[33] 154 F.R.D. 262, 265 (D. Colo. 1994)

[34] *Id.*

[35] *Schempp v. Reniker,* 809 F.2d 541, 542 (8th Cir. 1987)

[36] *Warrick,* 46 F.R.D. at 428

[37] See *Dziwanoski,* 26 F.R.D. at 597

[38] *Pitcairn v. Perry,* 122 F.2d 881, 886 (8th Cir.)

[39] *McDaniel v. Toledo, Peoria and Western Railroad Co.,* 97 F.R.D. 525, 526 (C.D. Ill. 1983)

[40] *Warrick,* supra 428

[41] See *Dziwanoski,* 26 F.R.D. at 598

[42] *Black v. Bisgier*, 248 N.Y.S. 555 (1931)

approval of third party attendance to Rule 35 examination. For example, the *Langfeldt* court explains that presuming all examiners in the context of a Rule 35 examination are "hired guns" is a flawed position to take, and paints with too broad of a stroke.[43] The dissent goes on to criticize the lack of respect and cooperation between two very different professions, particularly coming from the direction of the legal community, constantly encroaching upon the provinces of the medical profession.[44] These types of arguments must be characterized by defense counsel as speculative and presumptuous, and an attempt to interject an adversarial, partisan atmosphere into what should otherwise be an objective process. Defense counsels are encouraged to remind the court of the stated independence of the examination in the Rule, and the court's power to ensure that independence by excluding third parties.

While the impeachment of an expert based on her credentials and propensity to assist the defense is customary at play, defense counsels should argue the distinguishing characteristics held by a Rule 35 examination. Specifically, when a plaintiff puts her medical or psychological condition at issue in a lawsuit, the Rule allows for a defendant to evaluate that claim via an examination by a qualified medical professional. Indeed, defense counsel would argue at trial that the Court granted defendant's request pursuant to the Rule, and the Court ordered that plaintiff undergo the exam and approved that [the physician retained by the defense] conduct it.

In the event plaintiff appears to be succeeding in her request for third party attendance at the examination, defense counsel can make additional arguments to attempt to preserve her objections to the third party's presence and to clue plaintiff's counsel in to the "be careful what you wish for" notion.

For example, if an attorney is allowed to appear for the examinee, defense counsel should clearly state in open court that such an attendance by counsel would render that attorney unable to continue in her representation of plaintiff since she would now be a material witness in the lawsuit. Assert your intention to take the deposition of any third party who attends the Rule 35 examination. This, in and of itself, may singlehandedly deter their attendance. By virtue of attending the examination, the third party obtains personal, first-hand knowledge of the examination and may very well form their own opinions regarding the method and means through which the examination is conducted.

[43] *Id*. at 1147.

[44] *Id*. citing Lebang, Professionalism and Interprofessional Cooperation Between Physicians and Attorneys, 12 S. Ill. U.L.J. 507 (1988)

With respect to attorneys seeking court-approved attendance, cite to the Model Rules of Professional Conduct, which state that "if, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial."[45] It would behoove plaintiff's counsel to step back and realize that this extreme measure becomes more accessible to defendants if they insist on attending, and may completely compromise their client's potential for recovery.

Another argument that has been successful in precedent is the idea of judicial economy. With this argument, defense counsel should draw the court's attention to the preference for symmetry between the parties, in that allowing the presence of plaintiff's counsel would require the courts to afford the defendant the same opportunities for a third party's attendance (not the actual defense attorney) during the examination.[46] Emphasize your client's right to gather facts as to the nature and extent of plaintiff's purported injury through conditions similar to those enjoyed by plaintiff, unimpeded and without the toxic effect of partisanship.

The strongest argument relied upon by defendants is that a third party attendee would materially alter the outcome of the examination and divulge protected aspects of testing. This is particularly true in the case of a neuropsychological testing. Patients confide in their physicians on a level that is unmatchable when others are present, much less attorneys. An examinee may be much less inclined to share intimate, embarrassing details, otherwise kept secret, even from the examinee's own attorney, if others are permitted to attend. To compromise the free-flow of information from the examinee to the examiner flies in the face of the statutory intent behind Rule 35. Moreover, the presence of a family member or friend may be even *more* disruptive than that of the examinee's attorney. It is not uncommon for individuals who claim psychiatric trauma to withhold embarrassing, sensitive details from their family members or friends. Focus the court's attention on the irreparable harm that this can cause to the fact-finding process and the prejudicial impact it can have on defendants.

Particularly within the context of a psychiatric/neuropsychological examination, a Rule 35 examination generates highly sensitive information for the examinee, probing for information and basing findings on both verbal

[45] Model Code of Professional Responsibility DR 5-102 (1981)

[46] See *Tirado,* 158 F.R.D. at 300 (examinee's one party's entitlement to present psychiatrist's expert testimony requires reciprocity)

and non-verbal responses. In these cases, defense counsel is urged to vehemently object to the presence of any third party on the basis that the testing is automatically and in a de-facto sense altered, skewed, and spoiled by the presence of anyone else other than examinee and examiner. Trust, confidence, and comfort are crucial to these responses. Point toward the disruptive and distracting impact of having a third party present at the examination and rely on their statutory purpose. Accurate, reliable findings can become an impossibility if anyone other than the examiner and examinee are permitted to attend.

Moreover, the testing process generates raw data which can only be transferred between mental healthcare practitioners—to expose the data to a third party (lawyer or layperson) runs completely contrary to the law and cannot be allowed.[47] Counsel should support her objections with a signed affidavit of a neuropsychological expert.

Conclusion

In summary, the spirit of independent **e**xaminations pursuant to Rule is to allow the defendant to test the plaintiff's claims via a medical/mental health examination performed by a competent practitioner. It is, put simply, a "level playing field" discovery rule. And, as such, a plaintiff should not be allowed the "comfort" of a third party for moral support, let alone the legal or medical support of someone on her behalf when the Defendant is merely evaluating her claims via a discovery tool. Further, a plaintiff cannot be allowed to render the entire examination moot by 'injecting' a third party into the process. You are encouraged to object to the presence of third parties at any such examinations on the basis of the Rule itself, the practicalities and consequences of a third party's attendance to the plaintiff's own case, the spoiled affect the third party's presence has on the examination, and/or the illegality (in the case of a neuropsychological exam) of another person's presence. Finally, all of these arguments apply to the "presence" by way of recording or videotaping these examinations, two-way mirror observations, etc. Three truly is a crowd in these examinations.

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[47] U.S. Congress. United States Code: Mental Health Systems, 42 U.S.C. §§ -9511 Suppl. 4 1982. 1982. Periodical. Retrieved from the Library of Congress, <www.loc.gov/item/uscode1982-043042102/>.

Recent Cases of Interest

Second Circuit

Coverage B/Advertising (NY)

The U.S. Court of Appeals for the Second Circuit has ruled in *High Point Design, LLC v. LM Ins. Corp.*, No. 16-1446 (2d Cir. Dec. 19, 2018) that allegations that the insured infringed a competitor's design patent by "offering" knock-off goods for sale triggered a duty to defend under Coverage B. In rejecting Liberty Mutual's argument that such claims solely sought recovery for trade dress infringement, the Court of Appeals ruled that "offering for sale" could be construed as a form of advertisement so as to bring the trade dress infringement claims within the exception to Coverage B's exclusion for intellectual property claims. Further, the court found that even if the allegations in the counter-claim against the insurer failed to put LM on notice of an "advertising injury," a duty to defend was triggered by discovery that the insured subsequently received concerting its advertisements for the offending Snoozie slipper products. As a result, the court only required LM to reimburse High Point for costs incurred after the insured provided copies of this discovery to it. In a concurring opinion, Judge Newman disagreed that "offering for sale" connoted an "advertising" injury but agreed that a duty to defend arose from the point in time that discovery against