Third-Party Observation of Independent Medical Examinations

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THE observer effect in physics states that the act of observation changes what is being observed. Many neuro-psychologists suggest that the same phenomenon occurs when a third-party observer or recording device placed in the examination room in an independent neuro-psychological examination. The New Jersey Supreme Court recently weighed in on this "Schrodinger's Cat" of personal injury litigation. Its reasoning is instructive in any jurisdiction where third-party observation and recording of medical examinations is contentious.[1]

Many firms representing plaintiffs routinely insist that a paralegal or nurse, either employed directly by the firm or retained as a vendor supplying such services, be present in the examination room during an independent medical examination demanded by defendants. Plaintiffs offer many reasons for recording. Most commonly, counsel will say the observer is there to ensure accuracy and prevent over-reach by the medical expert retained by defendant. This argument appears

[1] DiFiore v. Pezic, No. A-58-21, 2023 N.J. Lexis 647 (N.J. 2023).

where the plaintiff is allegedly cognitively impaired, a minor, or is not an English-language speaker and therefore may not be able to communicate with the examining doctor. Unfortunately, it is not uncommon for the observer to interject himself into the proceeding, such as by objecting to the plaintiff completing intake forms or even verbally answering the doctor's questions. Even the circumspect observer, however, will be attentively noting the duration of the examination, what was and what was not examined or tested, and other aspects of the examination that could be used for cross-examination of the expert at trial.

The defense usually objects that the observers interfere with the examination. Even if the observer restricts himself to observation, some people do not perform well under scrutiny, a particular problem in neuro-psychological testing where the results are only valid if the subject is using best efforts under optimal circumstances. Neuro-psychological testing also presents a different issue. Beyond the issue of whether the presence of the observer distracts or otherwise influences the test, professional guidelines also require that the test be administered under conditions that protect testing materials from dissemination. "Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance."[2]

Against this background, on June 15, 2023, the New Jersey Supreme Court addressed this issue in *DiFiore v. Pezic*.

I. *DiFiore v. Pezic*

The court in *DiFiore* consolidated three cases on appeal, each presenting issues of third-party observation of an independent medical examination. The first case was presented by a woman in her seventies who claimed to have suffered a traumatic brain injury ("TBI") as the result of a motor vehicle accident. The TBI allegedly caused amnesia and expressive aphasia—an inability to express thoughts in speech or to understand what is said to her. Counsel argued that plaintiff needed both her "medical

[2] Alan Lewandoski *et al.*, *Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the Recording of Psychological Test Administration in Neuropsychological Evaluations*, 23 APPL. NEUROPSYCH. ADULT. 391, 395 (2016).

care proxy", who assisted her in activities of daily life, and a nurse consultant as observers of the examination, since plaintiff "would have no memory of the [examination] and would be unable to assist her attorneys in preparing for trial."[3]

The second case involved a middle-aged man who was blinded in one eye in a construction accident and alleged major depression and post-traumatic stress disorder as a result. The psychological overlay purportedly caused impaired concentration and gaps in short-term memory. Compounding his difficulties, plaintiff was a native Spanish-speaker not fluent in English. Plaintiff's counsel argued that plaintiff needed a third-party observer in his neuro-psychological evaluation, since he would struggle in identifying discrepancies between his examination and the report of the defense medical expert.

The third case involved a Spanish-speaker over seventy years of age who alleged only orthopedic injuries sustained in an accident but insisted on an observer due to a language barrier with the examining physician.

The court held that court rules compelled a defense medical examination different from an examination of a plaintiff by plaintiff's own doctor or a doctor of plaintiff's choosing. Further, "A [defense medical examination] is also unique in our adversarial system. It is the only instance in which a defense expert may conduct discovery on a plaintiff without plaintiff's counsel present."[4] Although ostensibly cloaked in objectivity, the examination is adversarial in the sense that the defense has retained its physician to further the defense's litigation interests.

In weighing these arguments, the New Jersey Supreme Court established the following guidelines:[5]

> 1. Trial courts shall consider the presence of third-party observation on a case-by-case basis, "with no absolute prohibitions or entitlements."
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> 2. Plaintiffs shall notify defendants of their intention to introduce a third-party observer to the examination. If opposed, the parties must meet and confer to attempt to resolve any dispute. If an agreement cannot be reached, the court places on defendant the burden of moving for a protective order or other relief.

[3] *DiFiore*, No. A-58-21 at *8.

[4] *Id.* at *26.

[5] *Id.* at *5-*6.

3. Third-party observation can be by any one of a variety of means, ranging from the physical presence of an actual observer to audio recording to use of an unattended fixed camera.

4. Protective orders can be fashioned to protect proprietary information in copyrighted or other protected testing materials, restricting dissemination of materials beyond its use in the litigation.

5. Reasonable conditions can be placed on third-party observation so as not to interfere with the examination.

6. If an interviewee needs a foreign language or sign language interpreter and the parties cannot reach an agreement, all parties or the court, shall select a neutral interpreter.

Third-party observers at IME's are coming into increased use nationwide. That the New Jersey Supreme Court shifted the burden to defendants to object to their presence is a sign of their acceptance. However, this development has potentially problematic ramifications.

II. Discovery Issues Raised by the Third-Party Observers

The use of a third-party observer raises interesting issues on related discovery. For example, are defendants entitled to obtain the notes, memorandum and other materials generated by the observer? And can the observer be deposed? Does the scope of discovery depend on whether or not the observer will be offered as a witness at trial?

The courts in New York have begun to wrestle with these issues. In *Markel v. Pure Power Boot Camp*,[6] plaintiff alleged knee injuries sustained during exercise at defendant's "boot camp-style gym." Defendant demanded an independent orthopedic examination. At the IME, a representative of a vendor, IME Watchdogs, was present at the request of plaintiff's attorney. New York law is very tolerant of third-party IME observers. As the court noted, "It is well established that a plaintiff is entitled to have a representative of her choice present during the IME, provided that the individual does not interfere with the IME or prevent the defendant's doctor from

[6] 171 A.D.3d 28, 96 N.Y.S. 2d 189 (N.Y. App. Div. 2019).

conducting a 'meaningful examination.'"[7] Further, the court said, "the categories of representation that plaintiff is entitled to have present during the IME are broad," and can include plaintiff's attorney, law clerk, paralegal, an interpreter, or a nurse.[8]

Following the IME, defendant served a subpoena *duces tecum* on IME Watchdog, seeking all "notes, reports, memoranda, photographs and any other relevant materials relating to the IME." The trial court denied plaintiff's motion for a protective order seeking to quash the subpoena. The Appellate Division reversed.

In its analysis, the Appellate Division found as a threshold matter that the requested materials were relevant to the lawsuit. It also summarily disposed of plaintiff's claim that the materials were protected as attorney work product, since the materials were not generated by the attorneys or used in communicating with the client or to give legal advice.

However, the court then considered the qualified privilege given materials prepared for trial under New York Civil Practice Law & Rules Section 3101(d)(2).[9] The court performed the balancing test required by the statute, weighing the need of the party for the disclosure and the party's ability to secure the materials or their "substantial equivalent" from other sources. The court ultimately

[7] *Id*. at 29 (citing Santana v. Johnson, 154 A.D.3d 452 (N.Y. App. Div. 2017)).
[8] *Id.*

[9] C.P.L.R. §3101(d) (2) states in pertinent part:
Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

concluded that the defense could rely on its own medical expert's testimony as to what occurred during the examination and had no need of the documentation made by the third-party observer. The trial court was therefore reversed and the subpoena quashed. The possibility that the recollection of the doctor and the third-party would be divergent was not a consideration under the statute.

A critical factor in the Appellate Division's analysis in *Markel* was the representation of plaintiff's counsel that the third-party observer from Watchdog IME would not testify at trial: "We are not deciding whether a different result would obtain were the IME observer expected to be, or actually is, called as a witness at any time during the case."[10]

The unanswered question posed by the third-party observer as a witness at trial has been addressed on several occasions since the 2019 *Markel* decision. In *Carlson v. Tappan Zee Constructors, LLC*,[11] a trial court quashed a document subpoena directed to IME Watchdogs after its observer attended an IME, citing *Markel*. However, the plaintiff in *Carlson* explicitly reserved the right to call the observer as a witness at trial. The court allowed defendant to revisit the issue once plaintiff clarifies his intentions, reasoning:

> Reserving the right to call a witness is not tantamount to stating an intent to call a witness. Plaintiff's position may amount to no more than an understandable litigation strategy that if the physician makes statements found to be untenable, plaintiff may seek to call IME Watchdog—which is clearly part of the reason why IME Watchdog was retained in the first instance. If this issue is raised at trial, it can be addressed by the trial judge.
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> This court declines to consider at this time whether the determination would be different if any of the IME observers, or the documents and materials at issue, will be produced at trial by plaintiff on plaintiff's direct case. Of course, under

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[10] *Markel*, 171 A.D.3d at 32.

[11] 75 Misc.3d 259, 167 N.Y.S. 2d 300 (N.Y. Sup. Ct. 2022).

> those circumstances, it would hardly seem to accord with notions of fairness that the defendants should not be permitted to see the underlying documents. In the event that plaintiff intends to or does call a witness from IME Watchdog at trial, or seeks to introduce any documents or materials prepared by IME Watchdog, plaintiff is directed to advise the defendant and the Court without delay so that the Court can fashion an appropriate remedy, if warranted.[12]

New York courts have not squarely addressed the issue of whether the IME observer, designated as a witness, may be deposed. In *Santana v. Johnson*,[13] the Appellate Division affirmed a trial court Order precluding the IME observer (again from the ubiquitous IME Watchdogs) from testifying at trial unless the observers appeared for deposition within 60 days of the Order. In *Gelvez v. Tower 111, LLC*,[14] the court did not bar the observers from plaintiff's examination but ended its opinion saying that, "In fairness, however, Defendants are given leave to depose the specific IME Watchdog(s) who accompanied Plaintiff to his IME's and vocational rehabilitation assessment."[15]

There are also special issues raised by the role of the observer in relation to the lawsuit— the trial attorney, a member of the attorney's staff, or a third-party such as nurse of an IME Watchdog representative. Courts tend to portray the observer as something less than an active member of the plaintiff's team. Rather, the observer is sometimes called the "eyes and ears" of plaintiff's counsel, retained as an arm's length guardian against any over-reach by the IME doctor such as by unnecessary questioning of plaintiff on matters of liability, or even to assist the process by circumventing language barriers and preventing misunderstandings.

As a practical matter, the utility of the observer to plaintiff is not in guarding the integrity of the IME, but in developing lines of cross-examination. The observer generally notes how long the examination took to complete, what

[12] *Id.* at 268.

[13] 154 A.D.3d 452, 60 NY.S. 3d 831 (N.Y. App. Div. 2017).

[14] 2018 N.Y. Misc. LEXIS 203 (N.Y. Sup. Ct. 2018).

[15] *Id.* at 211 (citing *Santana*, 154 A.D.3d at 452).

active or passive movements elicited complaints of pain and at what point in the testing, and what testing did or did not take place. All these are subjects for the defense medical expert's cross-examination, but the question for plaintiff is what can be done if the observer has only notes and the doctor disputes their content. Plaintiff can testify to events at the examination, but likely with less credibility than the ostensibly-disinterested neutral third-party observer. As a result, plaintiff may need the actual testimony of the observer. But if the plaintiff's trial attorney is the observer, consideration must be given to the prohibition against the lawyers being simultaneously trial counsel and a witness in the trial.

American Bar Association Model Rules of Professional Conduct, Rule 3.7 states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
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> (1) the testimony relates to an uncontested issue;
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> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
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> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9. (relating to duties owed to current and former clients).

The question of attorney-as-observer/witness was considered by the court in *Domingo v. 541 Operating Corp.*[16] Its facts were hardly ideal for establishing future guidance. In *Domingo,* defendants sought to disqualify plaintiff's counsel, who was present at plaintiff's independent medical examination and charged with interfering with the examination. Defendant sought disqualification as a sanction. Additionally, defendants represented that plaintiff's counsel would be called as a witness on defendant's case-in-chief (and one can only imagine counsel's conduct at the IME that suggested this strategy) and cannot serve as trial counsel under New York's adoption of RPC 3.7.

The trial court granted the motion. The Appellate Division reversed.

[16] 215 A.D.3d 586, 187 N.Y.S. 2d 621 (N.Y. App. Div. 2023).

On appeal, the court noted that the IME resulted in a report that reflected a "meaningful examination" of the plaintiff was completed. As to disqualification due to being a witness, the court said, "Although defendants maintain that they have a right to call plaintiff's counsel as a witness based on the knowledge she obtained at the IME, and therefore her disqualification under Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.7 is required, defendants have not established that counsel's testimony would be necessary to their defense and not cumulative of the testimony that could be provided by the examining physician and plaintiff herself. Because there is no basis for defendants to call counsel as a witness in these circumstances, rule 3.7(b) (1) of the Rules of Professional Conduct is not implicated, and counsel's firm should not have been disqualified. Contrary to defendants' contention, rule 3.4(d)(2), prohibiting an attorney from asserting personal knowledge of facts when appearing before a tribunal, does not apply here."[17]

Overall, the attorney as an observer may suggest to trial counsel some avenues of cross-examination but would not allow for more potent testimony of the independent third-party observer at trial. We also suspect that as third-party observers come into greater use, the courts will be more open to discovery, including depositions, effectively precluding an attorney's role in the examination room.

III. Other Jurisdictions

Some States have addressed the issue of third-party observers by statute or court rule. For example, Florida has Guidelines for Counsel Regarding Compulsory Medical Examinations (CME) Conducted Pursuant to Florida Rule of Civil Procedure 1.360(A) (1). These Guidelines provide:

> Persons Who May be Present at the Examination
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> One of Plaintiff's counsel, or a representative thereof, a videographer, a court reporter, an interpreter, if necessary, and/or, if a minor, a parent or guardian may attend the compulsory medical examination. *See Broyles v. Reilley*, 695 So. 2d 832 (Fla. 2d DCA 1997). Audio tape recordings are also permitted by the plaintiff. See *Palank v. CSX Transp. Inc.*, 657 So. 2d 48 (Fla. 4th DCA 1995). No other persons may attend without specific order of the Court. The

[17] *Id.* at 587 (internal citations omitted).

> plaintiff's counsel will notify, in writing, the names, position relative to the plaintiff, and number of persons who will be present so that an examining room of sufficient size can be reserved. The presence of these third parties is premised upon a requirement that they will not interfere with the doctor's examination. See *Bacallao v. Dauphin*, 963 So. 2d 962 (Fla. 3d DCA 2007). To that end, no person present may interrupt, enter or leave the examining room during the examination, or vocalize in any matter. No communication vocally, in writing, or in any other manner may occur between or amongst the party being examined and anybody else in the examining room except the examiner or individuals that she/he deems necessary for the examination.[18]

California Code of Civil Procedure §2032.510 addresses the same issue:

> § 2032.510. Attendance of attorney for examinee or attorney's representative at physical examination; Recording and monitoring; Right to suspend examination pending motion for protective order; Monetary sanction
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> (a) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination.
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> (b) The observer under subdivision (a) may monitor the examination, but shall not participate in or disrupt it.

[18] Each Florida Judicial Circuit has adopted a variant of the State's *Guidelines*. The Fourth Judicial Circuit's Guidelines, quoted above, are available at https://www.jud4.org/Ex-Parte-Dates-Judge-s-Procedures/CIRCUIT-CIVIL-DIVISION-JUDGE/CV-E-JUDGE-BRUCE-ANDERSON/Guidelines-Regarding-Compulsory-Medical-Examinatio.aspx (last visited December 12, 2023).

(c) If an attorney's representative is to serve as the observer, the representative shall be authorized to so act by a writing subscribed by the attorney which identifies the representative.

(d) If in the judgment of the observer the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend it to enable the party being examined or producing the examinee to make a motion for a protective order.

(e) If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order.

(f) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order under this section, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

These laudable efforts to provide guidance to counsel obviously fall short in addressing issues of discovery raised by the observers, leaving ample room for the courts to expand upon the procedures.

IV. Defense Observers at Examinations of Plaintiff by Non-Treating Medical Experts

We end where we began, with the New Jersey Supreme Court. *DiFiore v. Pezic* deferred an issue not raised in the briefing of the parties for future determination; whether the defense can place a third-party observer in an examination of the plaintiff by plaintiff's non-treating medical expert. As we see it, what is sauce for the goose is sauce for the gander, and the same considerations arguing for the presence of an observer for one side creates an opportunity for the other side in the same circumstances. Defense counsel should be able to observe and possibly cross-examine plaintiff's medical expert on the thoroughness in which the exam is conducted and on any discrepancy between what occurs in the examining room and what is contained on the report.
We see no reason that a demand for an observer at any medical examination of plaintiff by a non-treating medical expert should not be made in an appropriate case.

V. Conclusion

The New Jersey Supreme Court's intention was undoubtedly to provide both the litigants and trial courts a framework to resolve disputes as to third-party observers and allow a more orderly path to complete the medical examination phase of discovery. It remains to be seen if its validation of third-party observers and the shift of the burden in objecting to their presence to defendants will accomplish the latter goal in New Jersey, or if this approach will be widely adopted in other jurisdictions. The decision also does not squarely address what is frequently the most troublesome aspect of a third party's presence; the limitation on the examining doctor in directing questions to the plaintiff either verbally or by written questionnaire. It also does not explore vexatious issues of what discovery can occur based on the third-party observers or how the observers will be used at trial. Nevertheless, the court crystallized the issues presented by third-party observers and its reasoning furnishes guidance to litigants beyond the State of New Jersey.