

Suggested Protocol For Defense Medical Examinations During Covid-19 Pandemic

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In our practice in Philadelphia, New York and New Jersey, we have a number of cases where, post-COVID19, there has been a request for a defense medical examination (DME). The statutory authority for such an examination is found in Federal Rule of Civil Procedure 35, Physical and Mental Examinations. Subpart (a) of said rule requires that if the physical or mental condition of a party is "in controversy" then the party shall submit to an examination by a "suitably licensed or certified examiner." That is the rule which governs all federal courts in the United States. However, each state court has its own set of rules and procedures, which usually, but not always, parallel the Federal Rules. For example, my primary jurisdiction is Pennsylvania. Pennsylvania Rule of Civil Procedure 4010, Physical and Mental Examination of Persons, is quite similar to the federal rule and it governs all state court cases in Pennsylvania. It too requires that the condition be "in controversy" and that the examiner be a "licensed physician, licensed dentist or licensed psychologist."

With that regulatory background in mind, I have developed a several point protocol to help protect the safety of my client and any personnel from my law firm who attend the DME to represent the client at the examination. (The Rules permit representation at these examinations as they are part of the litigation process and deemed adversarial in nature.)

My initial action is to determine if the case raises issues encompassed by the examiner's specialty. An example would be if a psychiatrist seeks to examine a plaintiff who is claiming only orthopedic injury. If the issues joined do not support the examination sought, then I will oppose the examination and let defense counsel know that if he insists on the examination by this particular physician, a court order will be required.

If I believe that the examination itself is justified, I then ask if an in person examination is truly required or if simply a record review will suffice.

If more than a record review is deemed necessary by the defense, I then ask that it be conducted by telemedicine, using as my argument that many treating doctors are now doing examinations by telemedicine, so if appropriate for treatment, it should certainly be good enough for a DME.

The foregoing arguments have many times been enough to get an acceptable agreement in my cases, and I usually need not go further.

However, if there is insistence on an in person examination, then I ask that the following safety protocols be addressed and agreed to, or I will again force the defense to get an order compelling the examination:

1. I want to know the cleaning protocols used by the doctor for the office, waiting room and examination room.
2. I want to know how many other people will be in the waiting room while my client is there, what are the dimensions of the room and its seating capacity, as well as whether there are individual chairs, sofas, etc, so that I can determine if proper social distancing can be observed.
3. I want to know if the doctor and anyone assisting her in the examination will be gloved and masked at all times.
4. I want to know if all office personnel and any other examinees/patients will be wearing masks at all times.

5. I want assurance that my client will be seen within 15 minutes of arrival to minimize the time in the waiting room.

6. I want to know whether the temperature will be taken of all people before they enter the office.

7. Are there different ways to enter and exit the office?

I have found that these requests have been treated seriously and with courtesy by defense counsel and the doctors whom they have retained for litigation examinations. This protocol, while admittedly not perfect, should go a long way toward helping to protect the health and safety of our clients should a defense examination be deemed necessary.

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Comment from Editor: *Can other members let us know what Protocols they have encountered or have been put in place during the pandemic? In England & Wales, medical experts must now state in their reports, or by covering letter, that the examination was conducted remotely, that legal advice had been given prior to agreeing to the remote examination and that informed consent had been obtained.*