

April 1, 2019

## IME Watchdog's Notes Deemed not Discoverable by First Department

On March 19, 2019, the Appellate Division First Department determined that the notes taken during a plaintiff's IME by an IME observer or "watchdog" are privileged as material prepared in anticipation of litigation or trial and therefore not discoverable. It was established by plaintiff's counsel that defense counsel could obtain "substantially equivalent" information from their own IME doctor and there was no "substantial need" for the notes as the observer would not be testifying at trial.

In the case *Markel v. Pure Power Boot Camp, Inc.*, 2019 Slip Op 02049 (1st Dep't 2019), defense counsel served a subpoena duces tecum upon the IME observer for the production of her notes, reports, memoranda, photographs and any other relevant material in her possession. Plaintiff's counsel filed a motion seeking a protective order and to quash the subpoena duces tecum.

The Supreme Court, New York County denied plaintiff's motion and defendants filed an appeal to the First Department. The Appellate Division reversed the holding from the Supreme Court, New York County and granted the plaintiff's motion. The specific question that was addressed was whether an IME observer's notes are discoverable or whether they are subject to a privilege.

In *Markel*, the IME observer was retained by plaintiff's counsel. Her function was to serve as the attorney's "eyes and ears", observing what occurred during the IME and then reporting that information back to plaintiff's attorney. The defendants did not identify any information related to the IME that they could not obtain on their own from the examining doctor. Plaintiff's counsel represented that the IME observer would not be testifying at the time of trial.

The Court determined that the IME observer's notes would generally be considered material and necessary for the prosecution or defense of the underlying action pursuant to CPLR 3101(a). The dispute came down to whether the material is protected by any privilege.

The Court held that the information contained in the IME observer's notes and other materials would not be protected by either the attorney-client privilege or work product privileges (CPLR 3101(a)(4)). The IME observer, however, would be considered an agent of the plaintiff's attorney. Consequently, the requested notes and materials constituted materials prepared for trial, bringing them within the conditional or qualified privileged protections of CPLR 3101(d)(2). With that being said, the Court noted that materials that are prepared in anticipation of litigation and preparation for trial may be obtained only upon a showing that the requesting party has a "substantial need" for them in the preparation of the case and that

without "undue hardship" the requesting party is unable to obtain the substantial equivalent by other means (CPLR 3101(d)(2)).

The defendants had not shown a "substantial need" for the IME observer's notes or why they were unable, without undue hardship, to obtain the "substantial equivalent" of the materials by other means. The defendants' doctor conducted plaintiff's IME and could provide defendants with any information concerning what generally occurred and what he did at the IME.

An important consideration by the Court was plaintiff's representation that the IME observer would not testify at trial. The Court did not indicate whether a different result would have been obtained if the IME observer was called as a witness at the time of trial, however, it did seem through dicta that the Court might have held differently if presented with those facts. *See e.g. Sheehan v. 30 Park Place Residential, LLC* 2019 Slip Op 30026 (New York County 2019) (holding that because the IME watchdog observer was expected to testify at trial, this would present a substantial need for the notes so that defense counsel can prepare for cross examination of the witness). Accordingly, it is our belief that if the observer was testifying at trial, defense counsel would have presumably been able to get the notes.

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