

Recovery & Resolution

A LEGAL NEWSLETTER FOR
HEALTH CARE PROFESSIONALS



Graham Lundberg & Peschel *Founded 1979*

What You Need to Know About IME's – Preparation is the Key

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Insurance Medical Examinations (IME) can be the most misunderstood and potentially abusive proceeding used by the insurance industry. Difficulties often arise because of the circumstances under which they are conducted, the chosen examiners, or the resulting opinions, all of which can have devastating consequences to an injured victim's ability to receive much-needed medical care or to recover fair compensation on his or her claim. Whether an IME is conducted under the purview of the Department of Labor and Industries, Personal Injury Protection or Civil Rule 35 in third-party litigation, preparation is the key. While the rights and obligations of the parties, as well as the parameters of the IME, may be vague and uncertain, proper preparation, participation and timely action is paramount to protecting the best interests of the client, in either securing a supportive result or contesting an adverse finding. A brief case study is best illustrative.

In a recent case, our client had sustained serious injuries as a result of a motor vehicle collision. His health care, all at the direction of his primary care provider (an orthopedic physician), included chiropractic, massage therapy, acupuncture, physical therapy and occupational therapy. An MRI revealed multiple level intervertebral disk bulging. The

client's condition was not surgical, but he did require extensive treatment. Fortunately, he had a PIP endorsement that provided up to \$25,000 in coverage for reasonable and necessary medical expenses. Not surprisingly, the insurance carrier demanded an IME when the bills approached \$10,000. However, because of the variety of treatment involved, the carrier required a panel exam with an orthopedist, a chiropractor, and an acupuncturist.

Since our client continued to need treatment, and his policy required his cooperation in order to continue his PIP benefits, we had no choice but to acquiesce to the insurance company's request.

Our office took immediate action to address all of the pre-IME issues. We coordinated the date, time and location of the IME in order to assure that our client would

minimize time away from work. We also were successful in having the insurance company substitute one of its chosen examiners with another who has a reputation for fairness. A representative from our office was to be present with our client through all portions of the examinations and would audiotape the proceedings. We then scheduled our pre-IME meeting with our client.

At the pre-IME conference, which took place about one week before the examination,

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Plan to Attend Our Legal Educational Seminar...

What You Need to Know About... Independent Medical Exams

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Case Law Spotlight: PIP IME Exams

A personal injury protection (PIP) insurance carrier in Washington has the ability, under typical contract language in its policy with its insured, to demand that its insured see a doctor of the insurance carrier's choosing in order to determine if treatment provided is "reasonable and necessary" for the automobile accident in question. Such a demand results in a PIP "independent" medical examination (IME) that more likely than not results in a written report stating that the injured person is at maximum medical improvement and needs no more treatment. PIP benefits are then terminated. The vast majority of the time, the injured person is not recovered from their injuries and continues to need treatment. But the harm from an adverse IME report does not stop at just the termination of PIP medical benefits.

A PIP IME doctor's report is often used against the injured person by the at-fault driver's insurance carrier and attorneys. Once an injured person files a lawsuit, the PIP IME exam report often becomes discoverable, meaning available for review and use by the opposing party in de-

veloping the defense case. Because PIP IME reports are typically critical of a patient's continued need for medical care, the reports are often used against the injured person to attack their claimed damages.

For years Plaintiff attorneys have fought to block use of PIP IME reports against injured persons, especially once a lawsuit has been filed. In 1995, the Washington Court of Appeals, Division Three, issued an opinion in the case *Johnson v. McCay*, 77 Wn.App. 603 (1995), that stated PIP IME reports were discoverable by defense attorneys, and that defense attorneys could even call the IME doctor to testify against the injured person at trial. Plaintiff attorneys have had to be creative in order to determine how best to block use of these reports when they harm an injured person's case.

Washington's evidence rules allow attorneys to block disclosure of any work done by an attorney or party "in anticipation of litigation." This would block production and use by an opposing party of another attorney's internal notes, memos, summaries and case strategy. This rule also blocks production of opinions held by experts, including doctors, used by a party "in anticipation of litigation," but that are not going to be called by that party at trial. The problem has been that a PIP IME exam is ordered by an injured person's auto insurance carrier, not the Plaintiff attorney, and debate has raged over whether such a report could be considered "work product" made "in anticipation of litigation."

On March 18, 2003, Washington's Court of Appeals, Division Two, issued an opinion in the case *Harris v. Drake*, 116 Wn.App. 261 (2003). This case stated that, among other things, the work product privilege extended to PIP

IME examinations, and that an injured party could claim this privilege even though his or her own insurance carrier, rather than the Plaintiff attorney, ordered the examination. The Court reasoned that the insurance carrier ordered the IME examination for purposes of determining continuation of PIP benefits and, because the insured (injured) person could sue (or arbitrate) against his or her insurance carrier in opposition to the termination of PIP benefits, such a report was made "in anticipation of litigation" and therefore "work product." The Court then went on to reason that as long as a PIP carrier does not make any indication to the contrary, the "work product" designation and subsequent protection of PIP IME examinations from disclosure extends to lawsuits against at-fault parties and third-party insurance carriers.

The *Harris* case does not guarantee that PIP IME examinations will always be excluded in all personal injury cases. The case does, however, give careful analysis to Washington's recent developments in the area of an injured person's right to be made whole under Washington law, and it gives Plaintiff attorneys additional ammunition to better represent your injured patients.

A PIP IME examination should still be avoided, if possible. But even if an injured person is required to undergo such an examination, the fight must continue in order to make sure the examination does not cause harm beyond the mere termination of PIP medical benefits. Graham Lundberg & Peschel is always available to help you and your patients explore the many ways to maximize recovery under Washington law and avoid pitfalls posed by IME's.





IME's – Preparation, continued from page 1

our client was provided with copies of pertinent documents to review. A videotape demonstration of an IME was shown, and then our client met with his attorney to discuss the specifics of his case and issues that might arise during the examinations.

It had been previously pointed out to the client that the doctors might be observing the client upon his arrival and entry to the office, so the client was cognizant that his physical movements might be monitored and he knew to avoid any discussions about his case or condition before meeting with the insurance doctors. The paperwork to be completed before the examination was carefully reviewed by the representative before the client was allowed to respond.

Once in the examination room, the representative activated the audio recorder in order to document all discussions between the doctors and the client. Although the client's representative was generally prohibited from interfering with the examination, copious notes were taken and, in fact, there were several instances where the representative was compelled to correct the doctors when it was clear that their understanding of the facts of the accident and injuries were inaccurate or incomplete. From this, it became evident that the examiners had not been provided with complete records by the insurance company, which is not an unusual event in insurance medical examinations. The question and answer portion of the exam took about 45 minutes, which was a little bit longer than usual because there were three physicians interrogating the client.

Each examiner performed tests specific to his or her own specialty, although there was some duplication. Typical tricks were used by all three examiners, to include mul-

iple distractions and very light touch palpation. The client was prepared for these tactics because of the pre-IME meeting with his attorney. Not only did the client respond appropriately to the examiner, he also verbalized what the doctor was doing so that it was recorded. For example, when one of the physicians did a distraction test for the third time, our client responded, "I feel the same way I did the first time you did that test." Similarly, when asked whether he felt any pain on palpation, our client responded, "No, but I do notice that you are barely touching me; if you really pushed I would probably go through the roof."

After about 30 minutes, which is all the time it took for the three physicians to conduct their examinations, the proceedings were over. The client and his representative promptly left the facility, again without discussion. The client, as he had been previously instructed, returned home and wrote a narrative description of everything he could recall from the insurance medical exam. This was provided to his attorney to incorporate into the representative's notes, along with a transcription of the tape-recorded proceedings.

Somewhat surprisingly, the reports yielded favorable results, which we believe were attributed to proper preparation before the examination, appropriate action during the examination, and a thorough summary following the examination. Of course, the majority of IME's do not result in favorable outcomes for our clients. However, by taking appropriate steps to prepare and document the IME, the results can be successfully challenged, either in a PIP arbitration proceeding or in a jury trial through cross examination of the IME physician. The key is preparation.

FREE SEMINARS

Graham Lundberg & Peschel welcome you and your office staff to attend a **FREE** Educational Seminar.

Join us in a discussion regarding:

What You Need to Know About... Independent Medical Exams

This is one seminar you cannot afford to miss! Sign up today.

Thursday, April 1
Everett – Howard Johnson Hotel

Wednesday, April 7
Olympia – Mercato's Restaurant

Thursday, April 8
Bellevue – Red Lion Bellevue Inn

Wednesday, April 14
Tacoma – Cliff House Restaurant

Thursday, April 15
Federal Way – Verrazano's Restaurant

Thursday, April 22
Renton – Holiday Inn

Wednesday, April 28
Steilacoom – E.R. Rogers Mansion

Thursday, April 29
Port Orchard – McCormick Woods Country Club

Thursday, May 6
Seattle – Best Western Executive

Enclosed is an RSVP form. Plan to attend this informative seminar!

- All Seminars: 12:30 – 2 pm
- Complimentary Lunch Will be Served
- This Seminar is for Doctors, Therapists and their staff!
- Doctors of Chiropractic, Massage Therapists, Physical Therapists will earn 1.5 CE credits





We are a team of legal professionals working together to advocate for the injured while being recognized in the community for providing the highest level of service.

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 Sean A. Ayres
 Angela L. DeWig
 Kenneth Barry Dore
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Our Paralegals

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 Patricia Clanton
 Patti Cryder
 Judy Hanson
 Grace Stephens
 Diana Tennison
 Sandi Wandler
 Heather Webb

Our Administration

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 Jill Hanson
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 Martha McDonald
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 Lucinda Pieczatkowski
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CONVENIENTLY LOCATED

For the convenience of your personal injury patients, we offer several meeting locations throughout Puget Sound and Peninsula communities. Attorney consultations are encouraged and always free.

- Auburn 253-931- 1111**
- Bellevue 425-827- 1111**
- Burien 206-241- 1708**
- Everett 425-252- 1111**
- Federal Way 253-946- 1111**
- Gig Harbor 253-853- 5005**
- Lakewood 253-274- 1111**
- Lynnwood 425-775- 1111**
- Marysville 360-658- 1111**
- Olympia 360-786- 1717**
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- Puyallup 253-845- 1112**
- Renton 425-235- 1111**
- Seattle 206-448- 1992**
- Tacoma 253-627- 7701**

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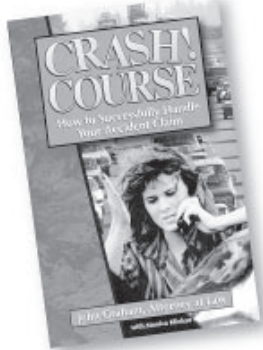
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