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CONTROVERSIAL PROPOSED INDEPENDENT MEDICAL EXAMINATION RULE LIKELY TO BE AMENDED

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You might think that only a lawyer could be bothered to be concerned about laws not actually in force, but in the case of the proposed Rules of Court (expected to be in force later this year), the rules and procedures set out in the Rules will have daily effect on practice and the conduct of litigation. As some may be aware, one of the most controversial changes to the proposed Rules concerned procedures surrounding Independent Medical Examinations ("IMEs"). The proposed Rule was seen by some as creating such an unequal situation for specialists conducting IMEs for the defence that the possibility of many experts refusing to conduct IMEs.

The current Rule allowing defendants to have an examination of a plaintiff is Rule 217, which includes a provision allowing the person being examined to "nominate a medical practitioner to be present during the examination".

Cases considering the Rule have assumed that a nominee would be able to take notes (see for example Guitierrez v. Jeske, 2004 ABQB 105), but beyond that was normally considered to be an unfair burden on the IME expert (for example, applications to videotape an examination were dismissed in Crone v. Blue Cross Life Insurance co. of Canada, 2001 ABQB 787 and Trang v. Alberta (Director, Edmonton Remand Centre), 2004 ABQB 432). The problem is that an IME expert could later be subjected to a minute-by-minute critique of their examination at trial, while an expert retained by the plaintiff (also "independent" in the sense of non-treating and retained by one party) would not face this level of inspection into their methods and conclusions. In practice, this Rule can sometimes be used as a tactic by plaintiffs' counsel, since merely notifying defence counsel that a nominee will be present at the IME means that certain experts will refuse to participate.

It was a surprise, then, for defence counsel to see the proposed Rule regarding IMEs increase the problem for defence experts. The proposed Rule allows the person examined the same right to a nominee or videotape the examination or "make a word for word recording of the examination".

For the default Rule to allow videotaping of IMEs was a major concern for many defence counsel. Additionally, the College of Alberta Psychologists (the "College") was particularly disturbed by the prospect of their highly confidential and intrusive examinations being

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videotaped and being influenced by the presence of another party, and made their own submissions to the Rules of Court Committee.

Primarily in response to the College's concerns, in a letter dated March 31, 2010, Justice Slatter on behalf of the Rules of Court Committee has indicated that the Committee will now be recommending an amendment to Rule 5.42, adding the following subsection:

> (2) The Court may
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> (i) define or limit the presence or role of the nominee,
> (ii) direct that any part of the examination, including any standardized or confidential tests or testing, not be recorded, and
> (iii) otherwise provide directions as to the conduct of the examination.

Assuming that the Government incorporates this amendment into the version of the Rules of Court that comes into force, this will at least provide the opportunity to challenge the highly intrusive possibility of a videotape being produced from the IME. Unfortunately, videotaping or recording the examination is expected to remain part of the default Rule, and it will be up to defendants to apply for different conditions. However, the fact will remain that "independent" experts retained by the plaintiff's solicitors face no such similar conditions. We expect that fair consideration of this fact when considering the application of the Rule should limit the circumstances in which defence experts will be subjected to this unequal procedure.

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