

PLAINTIFF'S ATTORNEY'S RIGHT TO BE PRESENT AT  
PHYSICAL EXAMINATION

By Ted Babbitt

Absent extraordinary circumstances, the plaintiff's attorney has the right to be present during compulsory medical examinations ordered pursuant to R.C.P. 1.360. Virtually all of the District Courts have ruled on this issue in favor of the plaintiff. See e.g. Touchet v Big Bend Moving & Storage, Inc., 581 So.2d 952 (Fla. 1<sup>st</sup> DCA 1991); Stakley v Allstate Insurance Co., 547 So.2d 275 (Fla. 2<sup>nd</sup> DCA 1989). A party opposing the attorney's presence has the burden to show why the presence should be denied. Bartell v McCarrick, 498 So.2d 1378 (Fla. 4<sup>th</sup> DCA 1986). The plaintiff may, instead, have a videographer present to record the examination. Broyles v Reilly, 695 So.2d 832 (Fla. 2<sup>nd</sup> DCA 1997). To the same effect, the plaintiff may choose to have a court reporter present during a compulsory physical examination. Wilkins v Palumbo, 617 So.2d 850 (Fla. 2<sup>d</sup> DCA 1993); Collins v Skinner, 576 So.2d 1377 (Fla. 2<sup>nd</sup> DCA 1991). The same rule applies in workers' compensation litigation. McClennan v American Building Maintenance, 648 So.2d 1214 (Fla. 1<sup>st</sup> DCA 1995).

Until now, there has been no definitive ruling as to whether the law applicable to compulsory physical examinations in the litigation setting also applies to examinations required under the PIP statute. Fla. Stat. 627.736(7)(a) (1997) requires a claimant under a personal injury

protection policy to submit to a physical examination by a doctor chosen by the carrier. Section (b) of the same statute provides that unreasonable refusal to submit to that examination is grounds for termination of benefits.

In the case of Klipper v Government Employees Insurance Co., 571 So.2d 26 (Fla. 2<sup>nd</sup> DCA 1990), the District Court held that a plaintiff's attorney was not entitled to be present during a physical examination under this statute. The reasoning of the Klipper Court was that the law applicable in a litigation context was not applicable with respect to a PIP examination. The theoretical reason for this was that the parties in litigation are in an adversarial situation whereas the purpose of an examination under the statute is simply to assist the insurer in evaluating the claim and that the cases supporting the right of an attorney to be present during such an examination are, therefore, distinguishable.

A contrary ruling was rendered by the First District in Cimino v U.S. Security Insurance Co., 715 So.2d 1092 (Fla. 1<sup>st</sup> DCA 1998). The Cimino Court, contrary to the Court in Klipper, relied upon the cases interpreting Rule 1.360 and the workers' compensation law to support an insured's right to have an attorney present during a PIP examination.

Th conflicting decisions in Klipper and Cimino, supra, have now been reconciled by the Supreme Court in U.S. Security Insurance Co. v

Cimino, 25 F.L.W. S186 (Fla. March 9, 2000). In that case, Justice Quince, writing for a unanimous Court, holds that absent a valid reason for denial, an insured is entitled to have an attorney be present at a physical examination. The opinion disapproves Klipper and adopts the underlying First District opinion in Cimino. The reasoning of the Supreme Court parallels that of the First District.

It is well established that Florida follows a liberal view when determining whether attorneys may attend examinations. See *Bartell v McCarrick*, 498 So.2d 1378 (Fla. 4<sup>th</sup> DCA 1986). As a result, the First District concluded the burden should fall on the insurer to exclude an observer. See *Broyles v Reilly*, 695 So.2d 832, 834 (Fla. 2d DCA 1997). We agree with this approach. Given Florida's liberal posture with regard to rule 1.360 and workers' compensation examinations, there is no valid reason to require the trial court to apply a different standard for PIP examinations. A PIP examination is a potential step in the direction of litigation. The insured is claiming an entitlement to continued benefits and the insurer is questioning the necessity for same. In order to continue receiving benefits the insured must comply with the requirements of the insurance contract and section 627.736. The insured is required to comply with a PIP examination in order to continue to receive the contractual benefits. The insured and the insurer are certainly not in agreement at this point. Because the potential is there for an adversarial contest, the insured should be afforded the same protections as are afforded to plaintiffs for rule 1.360 and workers' compensation examinations.

This case confirms the law established by the District Courts that a plaintiff in a personal injury or workers' compensation claim has a right to have an attorney present during a compulsory physical examination or, alternatively, have a videographer present. In addition, the court decides a case of first impression extending that right to personal injury protection examinations.