

## Practice Tips...

# PIP Medical Exams — Are They Discoverable By the Third Party?

**Y**our client has been injured and her PIP carrier asks for a medical exam. The policy provides for such an examination so you agree. The PIP carrier sends your client to a conservative doctor who writes a conservative report. Later, the attorney for the third party demands a copy of that report. Is it discoverable? Probably not. If you are concerned about the release of a PIP medical report to the third-party insurer, here are some strategies to consider.



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### 1. Discourage the PIP Examination in the First Place

Sometimes you can work with PIP adjusters, address the questions they have, and avoid the need for a medical exam. Perhaps your client's treating physicians can answer the PIP adjuster's concerns. You can also ask PIP adjusters, "Doesn't it seem unfair to cut off your insured's benefits without even asking her treating physician why the treatment was reasonable and necessary?"

If an adjuster is adamant that an examination is going to occur, they will often want to send your client to a different type of physician than the treating physician. My response is to let the adjuster know that such a report won't be very persuasive evidence and that a PIP arbitration will be noted.

### 2. Send a Letter to the PIP Carrier Stating Your Concerns

If the PIP examination is going to occur, you might consider a letter to the PIP carrier stating the following: (1) You will agree to an examination with the PIP doctor only on a consulting basis and only on the condition that the PIP physician will not render any treatment whatsoever; (2) Your client is not appearing voluntarily at the PIP examination. Your client will appear only because the PIP policy compels her to do so; (3) The examination shall not be considered an independent medical examination for the purpose of third party litigation; (4) The PIP carrier agrees not to release the report to any third party, or to communicate its contents to others.

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### 3. Object to Production of the PIP Report

When a third-party attorney brings a motion to compel production of a PIP report there are several grounds upon which to object.

#### A. Consulting Expert Opinions Generally Not Discoverable

A consulting expert's opinion is only available under limited circumstances. CR 26(b)(4)(B) provides:

A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The PIP medical examiner does not treat the plaintiff and will not be called to testify at trial. He is a consulting expert. For cases discussing the exceptional circumstances that must be present in order to obtain discovery of the opinions of consulting experts, see *Mothershead v. Adams*, 32 Wn. App. 325 (1982); *Detwiler v. Gall, Landau & Young Co.*, 42 Wn. App. 567 (1986).

There are alternative ways for the third party to obtain information about the plaintiff's medical condition. The defense may obtain a copy of the plaintiff's treating physician's records. The defendants may seek their own CR 35 examination of the plaintiff. Given the third party's access to the treating physician's records, and to a CR 35 exam, it will be very difficult to show the exceptional circumstances necessary to compel production of the opinions of a consulting expert.

#### B. The PIP Exam Occurs "In Anticipation of Litigation"

The insured is contractually obligated to comply with a reasonable PIP examination. The situation is analogous to

the protection afforded by our courts for statements given "in anticipation of litigation." In *Heidebrink v. Moriwaki*, 104 Wn.2d 392 (1985) our Supreme Court held that a statement made by an insured to its insurer constituted work product, and since there was no substantial need shown for discovery, the statement was not discoverable. After an extensive discussion of the case law, the court stated:

An insured is contractually obligated to cooperate with the insurance company. Such an obligation clearly creates a reasonable expectation that the contents of statements made by the insured will not be revealed to the opposing party.

...Without such protection, the insured would bear many of the burdens of the insurance contract without reaping the benefits.

A similar situation is presented by a PIP examination.

#### C. Production of the PIP Report Violates the Collateral Source Rule

Under the collateral source rule, a wrongdoer is not entitled to have damages for which he is liable reduced by proving that the plaintiff will receive compensation from a collateral source. Evidence at trial from a PIP medical examiner is improper since it necessitates an explanation of why the exam took place in the first place. Allowing such evidence to be discovered and used to cross-examine other physicians who may be called as witnesses at trial would likewise inject collateral source issues at trial.

#### 4. You Can Reach an Agreement Regarding Production of the PIP Exam

Although there are good arguments for not producing PIP medical exam reports, there may be times when you want to take a different strategy. You might approach the third-party insurer

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and say that you simply don't want to be "double teamed" by having two defense medical examinations. You might be able to reach an agreement with the third-party carrier that the report will be released to them if they agree to use that same doctor as their defense examiner in the third-party case. While many third-party insurers are reluctant to agree to this, some will.

### 5. Give the PIP Report to the Third Party

Another strategy would be to agree to give the PIP report to the third party. Because you have good arguments for its nonproduction, you might be able to trade that report for something the defense might normally not have to produce. Also, if the report is favorable you might want to release the report to aid in settlement discussions.

### 6. Trial Tactics

If the PIP report somehow ends up in

the third party's hands, give some thought to what arguments you might make at trial. If the report is mentioned at trial, it may be in your interest to go into the circumstances surrounding that examination and how it occurred. You might consider discussing the purpose for which the exam was conducted, the bias of the examiner, which insurance company used the PIP examiner, and what their relationship is to the lawsuit and to the examiner.

I would like to thank Frank Ladenburg and Pat LePley for their thoughts on this issue. When third-party insurers have brought motions to compel production of PIP exams, Frank and Pat have successfully opposed those motions. Their discussions helped crystalize my thinking.

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