
Debate Over Third-Party Presence and Recording Devices at Defense Medical Examinations

In product liability and other personal injury cases where the plaintiff's physical or mental condition is at issue, the defense typically seeks to have the plaintiff examined by a defense medical expert in order to evaluate plaintiff's alleged injuries. Under New Jersey Court Rule 4:19, a defendant may require the plaintiff to undergo a physical or mental defense medical examination (DME) with an expert of the defendant's choosing. Aside from some procedural and timing requirements, Rule 4:19 does not dictate how the DME should be conducted.

Disputes often arise regarding whether the plaintiff may be accompanied by a third party at the DME, or whether the DME may be recorded by audio and/or visual means. Some plaintiffs' counsel seek to impose these requirements because of concerns that their clients, especially those with cognitive and psychological limitations, will not be in a position to rebut the examiner's version of what was said or occurred during the DME. Defendants and their examiners, on the other hand, typically resist the presence of a third party or recording device because it may distract the plaintiff and/or the examiner, or otherwise interfere with the DME. Because the applicable rule is silent on how DMEs should proceed, it has been left to the courts to address these disputes. The New Jersey Supreme Court recently clarified the parameters for third party presence at and recording of DMEs in *DiFiore v. Pezic*, 254 N.J. 212 (2023).

The court's opinion relied heavily on the Appellate Division's published decision in *DiFiore v. Pezic*, 472 N.J. Super. 100 (App. Div. 2022), which provided a framework for evaluating whether a plaintiff should be permitted to bring a third party or a recording device to a DME. *DiFiore* involved three unrelated personal injury cases—*DiFiore v. Pezic*; *Remache-Robalino v. Boulos*; and *DeLeon v. The Achilles Foot and Ankle Group*. In all three cases, the plaintiffs had cognitive limitations, psychological impairments, or language barriers, and plaintiffs' counsel, over defense objections, requested that their clients be accompanied by a third party and/or be permitted to record the DME by audio or visual means. In all



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three cases, the trial courts issued different rulings on how the DME should proceed. In *DiFiore*, the trial court precluded plaintiff from bringing a third party or recording the DME by video, but allowed her to make an audio recording of the DME. In *Remache-Robalino*, the trial court denied plaintiff's request to record the DME by audio means. Lastly, in *DeLeon*, the trial court denied plaintiff's request to have a third party at the DME and issued an order requiring plaintiff's DME to proceed unmonitored and unrecorded. All three decisions were appealed and consolidated by the Appellate Division.

In addressing the issue, the Appellate Division noted that the presence of third parties or recording devices at DMEs present competing concerns. Given the significance of DMEs to resolving and adjudicating personal injury claims, the court pointed out the importance of preserving evidence related to the DME, including what the plaintiff may have said to the examiner and what the examiner may have observed during the examination. In most cases, the Appellate Division noted that the plaintiff would ordinarily be in a position to refute the examiner's account of what was said or occurred at the DME. However, in cases where the plaintiff has cognitive impairments, psychological difficulties, or language barriers, a third party or recording device may be the best method of preserving such evidence. On the other hand, the court observed that a 2016 policy statement of the American Board of Neuropsychology (ABN) identified numerous drawbacks to third-party observations of DMEs. For example, the presence of a third party or recording device could distract the examiner or the examinee, skew the results, or negatively impact the DME.

In the absence of changes to Rule 4:19, the Appellate Division developed several guiding principles on the presence of third parties and recording devices at DMEs:

1. There is no per se entitlement to or prohibition on the presence of third parties or recording devices at DMEs. Any disagreements over the use of such devices must be evaluated by the trial court on a case-by-case basis, based on an evaluation of the competing advantages and disadvantages tailored to the particular case.
2. When there is an objection, the burden is on the plaintiff to establish that "special conditions" justify the presence of a third party or recording device at the DME in a particular case.
3. Given technological advances, the use of video recording devices that is fixed and captures audio and video should be considered.
4. Parties should enter into confidentiality orders to alleviate any concerns raised by examiners that recording the DME might reveal proprietary information.
5. In the event a third party is permitted to attend the DME, the trial court should impose reasonable restrictions against the third party interacting with the plaintiff or otherwise interfering with the examination.
6. If a foreign language or sign language interpreter is required for the DME, a neutral interpreter should be agreed upon or selected by the trial court.

Although the court agreed with and adopted the Appellate Division's core holding that courts should determine what conditions to place on a DME on a case-by-case basis, the court departed from the Appellate Division's holding in one significant respect, specifically, which party has the burden with respect to the presence of a third party or recording device. Unlike the Appellate Division, the court determined that Rule 4:19 does not require a plaintiff to move for a protective order if he/she opposes the conditions that a defendant has imposed on a DME. Rather, a plaintiff need only move for a protective order if he/she refuses to submit to the DME, thereby placing the burden on the defendant to oppose the presence of a third party or recording device. A defendant must now show why a third party or unobtrusive recording should not be permitted in a particular case. Once defendant notices a DME, the plaintiff must inform the defendant if he or she intends to bring a third party to the DME and

whether it will be recorded. If the defendant objects, the parties must meet and confer to resolve the issue. If the parties cannot reach an agreement, defendant, not plaintiff, must move for a protective order seeking to prevent a third party from attending or having the examination recorded. By placing the burden on a defendant to move for a protective order, the court's decision suggests that the use of such measures will be the norm for a DME involving a plaintiff with cognitive limitations, psychological impairments, or language barriers.

The court found that when considering a defense application for a protective order, the trial court should consider the plaintiff's age, ability to communicate, cognitive limitations, psychological impairments, experience with the legal system, language barriers, and the degree of negative impact the presence of a third party or recording device might cause. The court noted that the type of observer is a relevant consideration, stating that "[a] licensed nurse silently taking notes is different in kind from an attorney interjecting on behalf of their client." The court emphasized that its holding was limited to third-party observers, not third parties who seek to interfere or disrupt the exam, such as attorneys.

The court also responded to arguments by defendants and the attorney general that psychologists, relying on the ABN, would refuse to perform DMEs if ordered to permit the presence of a third party or recording device. The ABN does not prohibit psychologists from allowing a third party or recording, but does require that the testing be conducted in a distraction- and interference-free environment. The ABN notes that "[t]he psychologist cannot provide opinions or evaluative statements when a third-party observer is present, because 'TPO presence yields [an] evaluation of questionable validity.'" On the other hand, the court noted that the ABN recognized that a third party may be necessary to proceed with a psychological assessment for certain patients including certain children, elderly adults, and others with specific disabilities. The court ultimately left it to the trial courts to address the ABN if it is raised by a psychologist during a particular case.

Finally, the court referred the following two issues to the Civil Practice Committee for consideration: (1) whether Rule 4:19 or Rule 4:10-3 should be amended to reflect the *DiFiore* ruling; and (2) whether there should be a provision to allow a defendant to record or observe examinations conducted by non-treating doctors that are arranged by plaintiff's counsel solely for the purposes of litigation, as the *DiFiore* decision applied only to DMEs conducted solely for the purposes of litigation. Application of the *DiFiore* holding will be important for product liability practitioners to monitor in the years to come.