

Protect Your Client When They Are Asked to Attend a DME Exam

By Jane E. Barone, BS, RN, LNCC

Have you ever read a Defense Medical Expert (DME) physician's report and found it contradicts what your plaintiff said happened at the examination, or what you know to be true about your client's medical condition? Have you wondered if there was serious bias on the part of the DME physician?

Sending a Legal Nurse Consultant (LNC), as your surrogate, to observe the DME will provide you with a detailed report, often accompanied by an audio recording of the exam. When the examination is being observed by an LNC, the physicians tend to do a more complete exam. This should result in a better report for the plaintiff. However, when it does not, the LNC can testify as to the discrepancies or key omissions in the DME report.

Here are two recent examples of a DME examination observed by an LNC:

(1) A plaintiff attended a DME examination for a temporomandibular joint injury (TMJ). The physician listened to her jaw with a stethoscope and clearly said that he heard clicking, which contradicted his subsequent report. Both the LNC's report and audio recording of the exam documented that the physician heard the clicking. This information helped settle the case.

(2) A plaintiff attended an orthopedic DME examination for reflex sympathetic dystrophy (RSD) of his hand. The DME documented that the plaintiff had good hand circulation; his hand was warm and dry to the touch. In fact, according to the LNC, the hand was cold with poor circulation. This information helped settle the case.

LNCs are medically trained observers who can prepare and instruct your client on what to expect during the DME examination. Although LNCs cannot interfere with the exam itself, they can intervene should the physician ask non-medical or liability questions or attempt to perform unauthorized x-rays or other testing. For most people, physicians are authority figures, so your client may feel compelled to comply with the physician's requests despite your instructions. The LNC will ensure that the exam is appropriately confined.

Relying on the plaintiff or an accompanying family member to recall everything that happened at the examination can be troublesome. The lay person does not understand what should be included in a history or which tests are appropriate for the exam, or how the exam should be performed. For example, omissions in an orthopedic or neurologic examination such as full reflex testing, motor testing and sensory testing can be very important in subsequently refuting the physician's report. In addition, your client's condition at the exam, such as the use of assistive devices or limitation of motion, or inability to tolerate sitting for an extended period of time while waiting will be documented by an LNC. Grimacing and verbal responses to the examination itself will also be recorded. These are some examples of the items often left out of the DME report.

Sending an attorney or in-house paralegal to observe the examination might be considered as being biased by a jury. On a personal level, your client may feel uncomfortable undressing in front of their legal representative.

New Jersey courts have ruled that observers are permitted at DME exams and that audio recordings of the examinations can be made.

So, the next time you are asked to send a plaintiff to a DME, consider sending a LNC to the examination as well. Your client will be happy that there is someone there for them and you will be protecting your client's rights.

Jane E. Barone BS, RN, LNCC, is a principal at Medi-Law Solutions in Short Hills, NJ. She is a board certified Legal Nurse Consultant with more than 25 years of experience in legal nurse consulting, and providing skilled support to both plaintiff and defense attorneys. She can be reached at j.barone@medilawsolutions.com or at 973-376-9037.

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MEDI-LAW SOLUTIONS
784 Morris Turnpike
Suite 221
Short Hills, NJ 07078

WE ARE PROUD TO SHARE WHAT CLIENTS THINK

"I am writing you today to tell you how pleased I was with your services regarding my recently settled case in Essex County....I had you attend with defense counsels permission and audiotape the DME exam with a doctor from ExamWorks. Despite some push back from the doctor at the time of the exam after you told him to "stick to the medicine and not conduct a deposition" he finished the exam in about 13 minutes and it was all recorded. ...After I received the DME report I sent it to you for analysis. Without giving the secrets away on the internet all I can say is that you helped me get an extremely aggressive defense firm who said this case wasn't worth any more than \$225,000.00 before the DME's deposition to \$325,000.00 in a matter of weeks after the deposition of the DME doctor. If the case didn't settle the DME would have been totally unmasked and the defendants knew he was in trouble.

I highly recommend your services to all my NJAJ brethren. If anyone would like more information about this case feel free to contact me and I'll provide additional details. Thanks again Jane, I am a client for life!"

Lloyd Bennett, Esq.,

"I feel that Jane Barone's report documenting the events that occurred at the defense medical examination (DME) was an important factor in helping bring my client's case to a satisfactory conclusion prior to trial. The defendant knew that if the matter went to trial its medical expert was not going to have a free pass when testifying as to what clinical tests he performed, how my client performed on those tests, and what complaints and answers my client voiced in response to the expert's questions."

William Pessel, Esq.

"My partner and I recently settled a fall-down case for 1.35 million dollars in which the Plaintiff suffered from "failed back" syndrome after multiple back injections and fusion surgery. Jane Barone accompanied our client to multiple DMEs including an exam by the defense neurologist who is well known by the Plaintiff's Bar as being "difficult" and abrasive to Plaintiffs. Our client was quite comforted by Ms. Barone's presence and her professionalism while monitoring and taking detailed notes of the exam. The report I received from the defense attorney was quite neutral and didn't include the usual misstatements and selective factual reporting that I have received on other cases from that doctor. Additionally, Ms. Barone prepared a fantastic "pain and suffering report" that painstakingly detailed all my client's complaints and treatment history. The report was placed front and center in our settlement brochure and was used extensively during mediation. I have utilized Nurse Barone on many cases, and I highly recommend her services."

Douglas D. Burgess, Esq.

"As you know, I settled Sam's dog bite case for over \$500,000 and want to thank you for your contribution to that success. Sam was first unconscious in ICU and then heavily sedated due to pain for a long period after the attack, and your chronology really brought home that he was at death's door for while there. It was invaluable. You gave a voice to what was really happening to him – events to which he could not testify himself. Sam's accent, as nice a guy as he is, could have been an encumbrance in relating all the subsequent medical history effectively, so your timeline was always there to back him up.

Also, your attending the defense medical and psychological exams was a huge help and leveled the playing field for Sam. When the defense plastic surgeon agreed with everything our plastic surgeon wrote, it was especially gratifying.

Thanks again for your part in getting Sam properly compensated for this horrendous incident."

Francis M. Smith, Esq.