STOUT AND WASCHUK'S ARTICLE, "WHAT IS A "LIKE REPORT" UNDER RULE 35(D)(2) AND EXACTLY WHAT MUST BE PRODUCED?" PUBLISHED IN ARIZONA ASSOCIATION OF DEFENSE COUNSEL

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The independent medical examination (IME), governed by Ariz. R. Civ. P. 35, is a staple of personal injury defense. Under the well-known rule, a defendant can compel a medical examination of the plaintiff who is claiming physical or psychological injuries. Most defense attorneys quickly learn that this discovery tool is often critical to defend against a plaintiff's allegations of injuries and damages.

As of late, plaintiff attorneys have argued that Rule 35(d)(2) obligates opposing counsel to produce "the examiner's report, like reports of the same condition, and written or recorded notes from the examination."[1] In other words, plaintiff attorneys are requesting production of the examiner's "like reports" from earlier examinations of *other* litigants. Such a request begs a number of questions. For instance, who pays for the examiner to perform a review of previous reports? And what exactly constitutes a "like report"? Is an examiner compelled to look for "like reports" of all lower back injuries? Or just lower back injuries involving compression fractures? Finally, if "like reports" are produced, is discovery allowed regarding the previous examinee's medical records and related documents?

The most common interpretation of the rule, at least amongst defense attorneys, is that the defendant must deliver "like reports" of all earlier examinations of the *plaintiff.* On the other hand, a growing number of plaintiff attorneys have advocated for a much broader interpretation of Rule 35(d)(2), which would include "like reports" of the same condition *in individuals other than the examined party*. Presumably, plaintiff attorneys could use such reports to establish the IME physician's bias, especially when dealing with physicians who are predominately retained by defense attorneys. If their interpretation of "like reports" under Rule 35(d)(2) is accepted, it would make IMEs cost prohibitive and unnecessarily expand the scope of litigation. As a result, discovery disputes regarding the purpose of Rule 35(d)(2) and the interpretation of "like reports" have been on the rise. This article identifies some of those challenges and provides strategies for addressing them.

Case Law from Other Jurisdictions

In Arizona, there is no binding precedent regarding the interpretation of "like reports" under Rule 35(d)(2). However, a small number of federal district courts have interpreted Fed. R. Civ. P 35(a)(1)—the federal counterpart of Arizona's Rule 35(d)(2).

One of the strongest cases that plaintiff attorneys rely on to support their position is *Bryant v. Dillon Real Estate Co.*, where the United States District Court for the District of Colorado held that "like reports of the same condition" extends to previous examinees.[2] In ordering the IME physician to produce "like reports" from previous examinees, the Court in *Bryant* relied on the fact that it "has found—and the parties cite—no cases interpreting the rule regarding whether it refers to reports of the same condition in individuals other than the examined party."[3] As a result, the IME physician was ordered to disclose the last 20 "like reports" prepared for defense counsel's firm, the last 20 "like reports" prepared for any defendant, and the last 20 "like reports" prepared for anyone.[4]

However, the *Bryant* holding is flawed. In ordering "like reports" be produced, the Court and counsel overlooked existing authority from other jurisdictions. For example, the United States District Court for the Northern District of Georgia addressed this precise dispute in *Howard v. Wal-Mart Stores East, LP*, which

pre-dated *Bryant*.[5] Rejecting the plaintiff's request to obtain "like reports" from previous examinees, the Court stated:

> With respect to [the request], the court does not interpret Rule 35(a)(1) as requiring the defendant to deliver like reports for all earlier examinations of the same conditions from all persons [the IME physician] has examined. The court interprets this provision as requiring the defendant to deliver to the plaintiff only like reports of all earlier examinations of the plaintiff regarding the same conditions to which the defendant may have access.[6]

Moreover, the holding in *Wellin v. Wellin*, a case cited in *Bryant*, contradicts the argument that IME physicians must produce "like reports" of previous examinees. While not directly on point, the issue in *Wellin* was whether a preliminary report was required to be disclosed as a Rule 35 report.[7] In holding that a preliminary report must be produced, the Court in *Wellin* acknowledged that Rule 35 "does not limit disclosure to only final reports . . . and makes no distinction between draft reports and final reports."[8] Accordingly, the holding in *Wellin* supports the position that Rule 35(d)(2) refers only to reports related to the plaintiff, and endorses a narrow reading of Rule 35, which "balances the privacy interests of the party examined with the interest of the party seeking the examination, the judicial system, and society as a whole[.]"[9]

Other Considerations at Play

If a broad interpretation of Rule 35(d)(2) was adopted, the added expense of retaining an IME physician would be astronomical. Consider the result of one recent case, in which an Arizona court ordered Defendant's IME physician to produce three years of written reports. This particular orthopedic physician stated that he had prepared approximately 600 reports (from both IME and medical records reviews) in the past three years, all of which involved different injuries and circumstances. Even if the scope was limited to the same injury sustained by Plaintiff—for example, a lower back injury—the IME physician would have to sift through 600 reports to identify those that involved a lower back injury. Then, the physician (or defense attorney), would have to carefully redact all of the previous examinees' sensitive information.

Turing to cost, it is common for an IME physician in Arizona to charge over $2,000 for each report, and then charge an additional amount if further review is needed. If the physician was forced to review previous reports to determine whether it was a "like report," and then make the appropriate redactions, the resulting bill would likely be exponentially greater than the examination itself. It is illogical to conclude that the Arizona Rules of Civil Procedure require physicians with an active clinical practice to perform a report-by-report review, especially in light of the "proportionality" requirement of Rule 26(b)(1), discussed below.

Related Issues Under Rule 26, Ariz. R. Civ. P.

Even when Arizona Courts agree with defense counsel and hold that Rule 35(d)(2) does not extend to "like reports" of other examinees, plaintiff's counsel may argue that these reports are nonetheless discoverable under Rule 26(b) for impeachment and bias. There are several arguments that defense counsel should consider when responding.

- **Rule 26(b)(1)** limits discovery to non-privileged matters *that are relevant* to any party's claim or defense. Using the previous example of 600 IME reports performed in a three-year period, it is doubtful that those reports concerning prior examinees would have any relevance to the case at hand or the doctor's credibility. Moreover, if previous IME reports are to be produced, then discovery into the previous examinee's medical records should be permitted. Creating numerous "case within a case" scenarios would be terribly inefficient.
- **Rule 26(b)(1)** also limits discovery to being *proportional* to the needs of the case. Assuming that the request for "like reports" is to explore bias, then the related expense does not justify the burden of forcing physicians to sift through previous reports. Instead, Plaintiff's counsel can explore bias by cross-examining the physician at trial regarding: (1) the percent of their work related to defense IMEs, (2) the frequency with which they have been hired by the particular defense counsel, and (3) the fees that the physician charges for IMEs.
- **Rule 26.1(d)** sets forth the information that parties must disclose regarding the experts that they intend to use at trial. The expert's prior reports concerning other examinees is not on this exhaustive list. In fact, federal courts have held that "conclusions and opinions offered in unrelated litigation do not fall within the scope of Rule 26 discovery and would unnecessarily burden litigation with pre-trial inquiry into facts and issues wholly irrelevant to the case at hand."[10]

Conclusion

Until there is binding precedent regarding the interpretation of "like reports" under Rule 35(d)(2) in Arizona, disputes regarding the same will likely continue. However, by focusing on the limitations set forth in Rule 26, using favorable case law from other jurisdictions (particularly *Howard v. Wal-Mart Stores East, LP*), and taking a reasoned approach to discovery, defense attorneys can increase the chance of obtaining a favorable result when a dispute over "like reports" arises.

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[1] Under Ariz. R. Civ. P 35(d)(2), "the party who is examined—or who produces the person examined—may request the examiner's report, **like reports of the same condition,** and written or recorded notes from the examination. If such a request is made, the party who moved for or noticed the examination must . . . deliver to the requester copies of: (A) the examiner's report; (B) **like reports of all earlier examinations of the same condition;** and (C) all written or recorded notes made by the examiner and the person examined at the time of the examination[.]"

[2] Bryant v. Dillon Real Estate Co., Inc., No. 18-CV-00479-PAB-MEH, 2019 WL 3935174 (D. Colo. Aug. 20, 2019).

[3] *Id.* at *4.

[4] *Id.* at *5.

[5] Howard v. Wal-Mart Stores E., LP, No. 1:13-CV-2374-CAP, 2014 WL 11955394, at *1 (N.D. Ga. Feb. 10, 2014).

[6] *Id.*

[7] Wellin v. Wellin, No. 2:13-CV-1831-DCN, 2015 WL 1414524 (D.S.C. Mar. 26, 2015).

[8] *Id.* at *2.

[9] *Id.*

[10] Trunk v. Midwest Rubber & Supply Co., 175 F.R.D. 664, 665 (D. Colo. 1997), *citing* In re Air Crash Disaster, 720 F. Supp. 1442, 1444 (D. Colo. 1988) ("the discovery of material relevant to the impeachment of an expert envisioned by courts construing Rule 26(b) is limited to materials possessed by an expert and related to the case at hand."), *citing* In Re IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 41 (N.D. Cal. 1977) ("The fact that an expert's testimony will be based upon his 'background, knowledge, and prior experience' does not make every document that he ever wrote or reviewed relevant.")

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