Seeking Presurgery Exams In NY Personal Injury Suit Defense

By **Nicholas Hurzeler** (August 9, 2021)

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The plaintiff and defense bars often spar over whether the defense can obtain an independent medical examination, or IME, prior to the plaintiff undergoing surgery.

The presurgery IME is a common point of contention, especially in cases where the plaintiff is alleging spinal injuries. Defendants seeking to prove a causation defense, or a preexisting condition defense, would prefer to present trial testimony from a doctor who examined the plaintiff prior to surgery.

Surgery, particularly spinal fusion surgery, can significantly alter the body part in question such that a post-surgery IME may be of limited value. Although films may be available, they may not include intraoperative films and, in any event, films cannot replace an in-person examination.

Given the importance of this issue in numerous cases, this article provides a guide to presurgery IMEs, including a summary of the current state of the law and suggested tips on common points of contention.

In New York, the law on this topic is somewhat unsettled because the Appellate Division has not yet weighed in.

Until those appeals are decided, litigants are left with only the statutes and lower court decisions. The governing statute, Civil Practice Law and Rules Section 3121, grants defendants the right to notice an IME for any medical claims in controversy.

However, the statute is silent as to whether the defendant can demand an examination prior to surgery. As to timing, the statute only says that the IME can be noticed "[a]fter commencement of an action." Arguably, this open-ended language demonstrates an intent by the Legislature to allow the IME to be noticed at any time after the summons and complaint are filed.

Moreover, the statute indicates that the notice of examination may be served "not less than 20 days" before the examination occurs. Therefore, the statute appears to grant defendants the right to control the timing of the IME.

Nothing in the statute gives plaintiffs control over the timing of the examination. While plaintiffs can argue that Section 3121 says nothing about presurgery IMEs, its plain language overall appears more consistent with defendants' position, that defendants are entitled to demand a presurgery IME.

Indeed, New York generally favors open disclosure in discovery, as per the plain language of CPLR Section 3101(a): "There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof."

And according to the Second Department's 1968 decision in Allen v. Crowell-Collier Publishing Co., the words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist

preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason."

The Allen court also quoted the Fourth Department's 1964 ruling in Matter of Comstock:

> If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered "evidence material … in the prosecution or defense."[2]

Thus, it would appear that CPLR Sections 3101(a) and 3121 arguably favor presurgery IMEs. More specifically the current case law, such as it is, also favors defendants' right to a presurgery IME, at least under certain circumstances.

Most notable is the decision of the Supreme Court of the State of New York, County of Queens, in Mangione v. Jacobs,[3] which offers a thorough review of the law on presurgery IMEs in New York and other jurisdictions, at least as of 2012.

The Mangione court held that a plaintiff's failure to comply with a presurgery IME may qualify as spoliation of evidence. The court did limit its holding to the facts before it, noting in particular that the plaintiff was "undergoing nonemergency and non-life-threatening surgery."

The court thereby crafted a rule under which the presurgery IME may be warranted, but only if the surgery is not of an emergency nature. Along these lines, plaintiffs will often argue that if surgery is needed to alleviate pain, they should not be made to wait and hold off on important treatment, merely to suit defendants' demand.

The Mangione decision was appealed, giving the Second Department a chance to rule on the issue. The court declined that invitation, opting instead to affirm the dismissal of the complaint in Mangione, "albeit on other grounds."[4]

The court affirmed the dismissal of the complaint because the plaintiff had violated three court orders mandating her appearance for ordinary IMEs. Based on that holding, the court did not reach the presurgery IME issue.

Plaintiffs may try to argue that the Second Department rejected the defendant's right to a presurgery IME, but this is a stretch. The court did not actually reach the issue, and did not explicitly address the lower court's rationale with respect to the presurgery IME.

Another lower court decision that offers a thorough discussion of the topic is Martinez v. Nelson,[5], wherein in 2019 the New York Supreme Court, Bronx County, held:

> The condition of plaintiff's cervical spine tends to prove or disprove the existence of several facts material to this litigation, including the extent to which (if any) plaintiff sustained injuries to her cervical spine as a result of the ... accident, and the extent (if any) of plaintiff's damages. Relatedly, the condition of plaintiff's cervical spine tends to prove or disprove the existence of facts material to a physician's evaluation of plaintiff's claimed injuries ... Therefore, the condition of plaintiff's cervical spine was evidence that was capable of being spoliated.

The Martinez court also noted that the defendants' presurgery IME demand was timely served before the surgery took place.

Outside New York, in Baskerville v. Albertson's LLC,[6] in 2016 the U.S. District Court for the District of Nevada granted the defendant's motion for spoliation relief based upon the plaintiff's failure to appear for a presurgery IME of the lumbar spine at L4-5, and because the plaintiff failed to present any valid excuse for failing to appear for the examination.

Likewise, in Kennedy v. Terral Riverservice Inc.,[7] in May this year the U.S. District Court for the Eastern District of Louisiana granted the defendants' application to compel a presurgery IME, and held that any prejudice the plaintiff might sustain was "outweighed here by the importance of the discovery at issue."

In Jackson v. Family Dollar Stores of Louisiana Inc. in 2020,[8] the U.S. District Court for the Western District of Louisiana granted spoliation relief in the form of an adverse inference charge based on the plaintiff's failure to appear for a presurgery IME.

Finally, in Clark v. E.I. DuPont de Nemours & Co. in 2001,[9] Judge Peggy Ableman of the Delaware Superior Court dismissed the plaintiff's complaint based on evidence that the plaintiff willfully had hip surgery in contravention of the defendants' demand for a presurgery IME. The Supreme Court of Delaware affirmed, and the U.S. Supreme Court denied a writ of certiorari.[10]

Based on the foregoing, defendants in New York can plausibly argue that a consensus has emerged from the foregoing lower court decisions: Spoliation may occur from surgery, therefore defendants are, at least under certain circumstances, entitled to a presurgery IME, as well as spoliation relief if their demand is ignored.

However, the following rules emerge from these decisions, which defendants should keep in mind before moving for appropriate relief. A defendant should: (1) prove that the plaintiff's surgery is, or was, not urgent or immediately necessary; (2) submit evidence that the presurgery IME was timely demanded prior to the surgery taking place; and (3) submit medical evidence that the presurgery IME is needed to fairly evaluate the plaintiff's condition and possible defenses, such that other options — for example, a post-surgery IME or intraoperative films — are not a good enough substitute.

In a typical case, a defendant should be able to meet this burden of proof with the affidavit of a doctor, of the appropriate specialty, who examines the pleadings and medical records in order to reach an informed opinion. If an informed doctor swears in an affidavit that the presurgery IME is needed to avoid spoliation and will not cause the plaintiff substantial pain or adverse medical consequences, and other options are not good enough substitutes, then all defense counsel has to do is timely serve the presurgery IME notice.

Anecdotally, in the past few years many defense firms have added presurgery IME notices to their standard set of initial combined demands. In such cases, timely notice of the demand should not be an issue.

As a best practice, though, defense counsel should probably serve another demand upon receipt of the bill of particulars or any other notification that plaintiff may need surgery, or may be planning to have surgery.

As promptly as possible, defense counsel should also obtain all necessary medical records and films and provide them to their experts for review, so that an affidavit can be promptly crafted, if and when it proves necessary to file a motion with the court.

Based on the foregoing summary of the law, it should not be expected that the Appellate Division will eventually hold that defendants are always entitled to a presurgery IME under any and all circumstances.

However, one can expect that most likely, the Appellate Division will agree with the consensus that has emerged in the lower courts, and hold that defendants are entitled to a presurgery IME under certain circumstances, as detailed above.

If the IME is timely demanded, and the demand is supported by medical evidence, particularly a doctor's affidavit, the defense should meet its burden of proof. It appears unlikely that the Appellate Division would reject the defendants' right to a presurgery IME if this burden of proof is met. However, until the Appellate Division resolves the issue, the defense bar can be guided in the meantime by the foregoing lower court decisions.

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[1] Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406 (1968); see also, Tower Ins. Co. of N.Y. v. Murello, 68 A.D.3d 977 (2d Dept. 2009).

[2] Allen, supra, 21 N.Y.2d at 407; quoting Matter of Comstock, 21 A.D.2d 843, 844 (4th Dept. 1964).

[3] Mangione v. Jacobs, 37 Misc.3d 711 (Sup. Ct. Queens Co. 2012).

[4] Mangione v. Jacobs, 121 A.D.3d 953, 954 (2d Dept. 2014).

[5] Martinez v. Nelson, 64 Misc. 3d 225, 229-30 (Sup. Ct. Bronx Co. 2019).

[6] Baskerville v. Albertson's, LLC, Case No. 2:15-cv-902-JAD-VCF (U.S. Dist. Ct. D. Nevada 2016).

[7] Kennedy v. Terral Riverservice, Inc., Civil Action No. 19-11363 (Dist. Court ED Louisiana 2021).

[8] Jackson v. Family Dollar Stores of Louisiana, Inc., Civil Action No. 3:19-cv-00388 (Dist. Court WD Louisiana 2020)

[9] Clark v. E.I. DuPont de Nemours & Co., C.A. No. 97C-12-048-PLA, 2001 Del. Super. LEXIS 453 (Super. Ct. Oct. 11, 2001)

[10] 2002 WL 392423, 2002 Del LEXIS 147; 537 U.S. 941.