

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at <http://www.kttlaw.us/memos.html>

RE: GEORGE THE BARTENDER AND THE ADVOCACY LETTER PURSUANT TO CALIFORNIA CODE OF REGULATIONS TITLE 8 §35 OR IT BEARS REPEATING ¹

FROM THE LOBBY BAR AT THE HYATT:

After a difficult day of denying benefits, I made my way to the Lobby Bar, seeking the solace of the beautiful visage that is Kim, the Hyatt's breathtakingly beautiful cocktail waitress, and a Beefeater's martini straight up with two olives.² I arrived at the bar and was pleased to see my friend and noted defense attorney, Frank Falls, was there along with Pat Pennipincher, claims manager for Integrity Insurance Company (Frank's largest client). I bought a round of drinks for the three of us and inquired what brought them to my neck of the woods.

Frank replied that he had a case with George the Bartender's worker's compensation attorney, the infamous Mr. Ron Summers. Their case involved an admitted slip and fall injury to the applicant's lower back, which resulted in minimal treatment and minimal time off work – that is until Ron designated none other than his fellow duke of duplicity and go-to Primary Treating Physician, Dr. Nickelsberg, as the applicant's primary treating physician. Dr. Nickelsberg had recommended what Frank thought was unnecessary treatment and medication.

Frank objected to Dr. Nickelsberg's treatment and requested a QME panel from the Division of Workers' Compensation Medical Unit. After Frank and Ron utilized their strikes, Frank ended up with a very conservative orthopedic physician.³ Ron, in reaction to the designated QME, tried everything he could to disqualify them from evaluating the applicant.

Nothing Ron attempted worked, until Frank happened to send the Panel QME an "advocacy letter." Ron seized upon this, immediately filing a motion to disqualify the Panel QME from evaluating his client as Ron alleged that Frank's letter provided the Panel QME with prohibited "non-medical information" in violation of Title 8, Division 1, Chapter 1, Article 3, §35 of the *California Code of Regulations* (abbreviated 8 CCR 35).

Frank handed me a copy of his letter and I looked it over. Frank's letter was pretty standard fare. It was objective and requested the Panel QME take a history from the applicant as to the accident, provide his diagnosis and prognosis and evaluate the applicant's permanent impairment and/or permanent disability pursuant to the AMA Guides to the Evaluation of Permanent Impairment, (Fifth Edition). Nowhere in Frank's letter was there a hint of "advocacy."

¹ For those new patrons to the Lobby Bar, located in the Hyatt Regency Long Beach on South Pine Avenue, George the Bartender's workers' compensation case involves an injury to his elbow, epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

² A Beefeater's martini, straight up, is best served at 38° Fahrenheit

³ I, of course, mean an objective and fair-minded physician.

Pat chimed in and advised me that the hearing was next week and they were afraid that the Workers' Compensation Judge (WCJ) would bounce the selected QME from the panel and they would have to start all over again. I told Frank that I knew of only one instance where the Board addressed what constitutes an advocacy letter which provides prohibited non-medical information as well as a vanilla advocacy letter (which is really not an advocacy letter at all). This of course was *Manuel Ferniza v. Rent A Center, Inc.; Specialty Risk Services* (ADJ1644999) filed on December 27, 2010.⁴

At this point Ron Summers strode happily into the Lobby Bar, ordered a drink and decided to join us. To the enjoyment of Frank and Pat I began my discussion on *Ferniza*.

WHAT CAN AND CANNOT BE SHOWN TO THE PANEL QME?

Pursuant to 8 CCR 35 the Panel QME (or an AME for that matter) can be sent both medical and non-medical information with the exception of those items prohibited by 8 CCR 35(e). Most applicant attorneys will object to any non-medical information being sent to the Panel QME, which usually requires a Rule 35 Motion.⁵

However, it is somewhat unclear whether or not the advocacy letter itself (a letter to the doctor prepared by either party) can be sent to the Panel QME over an objection.

In *Ferniza* the defense counsel prepared what can only be regarded as an overzealous advocacy letter to the Panel QME, which is described by the Board as follows:

Both of these position statements were at least somewhat adversarial, e.g., complaining about internal, sleep, and psych complaints that "this Applicant has created out of a simple back injury" and stating that "the community is aware that the only way for many of the claims to be worth any money now is if the attorneys add on internal, psych and sleep claims."

In addressing the defense counsel's letter the Board stated:

Division of Workers' Compensation Rule 35(a) enumerates the various types of "information" the claims administrator or employer shall, and the injured worker may, provide to an agreed medical evaluator or PQME. Subdivision (b)(1) provides, "All communications by the parties with the evaluator shall be in writing and sent simultaneously to the opposing party when sent to the medical evaluator, except as otherwise provided in subdivisions (c), (k) and (l) of this section." (Emphasis added.) . . .

⁴ Previously discussed way back in a 2011 edition, *George the Bartender and the Ex Parte Dilemma II or Giving the QME Process Its Due*. A copy of *Ferniza* can be obtained by email request.

⁵ As was filed in *Jonathan Duong v. Automobile Club of Southern California, Hartford Insurance Company of the Midwest*, which was discussed in our last edition, *George the Bartender Contemplates the Admissibility of Surveillance Video in Light of California Code of Regulations Title 8 §35(d) Or The Ongoing Battle Between Truth, Justice and Privacy*

Thus, pursuant to section 4062.3, both medical and nonmedical records are considered “information.” We also construe “medical and nonmedical records” to encompass letters from attorneys that discuss medical and nonmedical information, particularly where the letter engages in advocacy.

The Board further noted:

However, just because defendant's position statements were "communications" within the meaning of section 4062.3(e) does not mean they were not also "nonmedical records" within the meaning of section 4062.3(b). To the contrary, "nonmedical records" under section 4062.3(b) are a subset of "communications" under section 4062.3(e). Some communications--those which convey only neutral information, e.g., an unembellished list of issues to be determined, a list of records sent to the evaluator, basic information such as the injured worker's date of birth or date of injury--are "communications" only, and not "information," i.e. "medical and nonmedical records" within the meaning of section 4062.3(a). In this case, however, no one disputes that defendant's position statement crossed the line into advocacy. Because of its nature as an advocacy letter, this communication constitutes "information" and falls within the prohibition of section 4062.3(b), and exposes defendant to liability for attorney's fees and costs pursuant to section 4062.3(g).

The Board seems to make the distinction that a true “advocacy letter” sent to the Panel QME is one that is confrontational. Pat and Paul were overjoyed. Disgusted, Ron downed the remainder of his drink, unable to muster a counterargument.

DISCLAIMER

All characters in the Lobby Bar aside from George the Bartender, Kim and I are fictional and a product of my very vivid and warped imagination, as is the story line.

As discussed at length in our last episode about non-medical information that can be sent to a Panel QME (guided by Title 8, Division 1, Chapter 1, Article 3, §35 of the *California Code of Regulations*), one of the problems facing those in the defense community in a medical examination is that the doctor can only take a history of the applicant’s complaints from the applicant. The Panel QME effectively gets only one side of the story, as the employer or employer representative isn’t allowed to be present.

Therefore, in some cases the only way you get the position of the employer (which may be opposed to the position of the applicant) before the Panel QME is to state this in an “advocacy letter” which must be sent to the opposing counsel twenty days prior to the examination by the Panel QME.

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If there is an objection, our remedy is to file an Administrative Rule 35 motion with the Board seeking an order that the non-medical information as contained in the advocacy letter be sent to the Panel QME. The advocacy letter by the defense attorney in *Ferniza* clearly crossed the line.

In any advocacy letter we want to err on the part of fairness and make it explicit that this is the defendant's position so that the Panel QME may well be given conflicting positions.

Make mine a double, George.

-Joe Truce