

CPLR 3121: Second Department Puts Bar on Notice That It Will Strictly Enforce Rule Governing Notice of Availability for Physical Examination

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by CPLR 3101(b) will not be available. Full disclosure will then be ordered pursuant to CPLR 3121. The Court's decision in *Koump* provides the practitioner with appellate guidelines he can utilize in seeking to determine whether or not his client's physical condition has been placed in controversy.

CPLR 3121: Second department puts bar on notice that it will strictly enforce rule governing notice of availability for physical examination.

In *Delgado v. Fogle*¹¹⁸ the rights and obligations of parties under rule I of part 5 of the Rules of the Appellate Division, Second Department¹¹⁹ were clearly delineated. In *Delgado*, which involved an action for personal injuries, the plaintiff served notice of availability for a physical examination on the defendant who neglected to appear at the specified time. Nevertheless, the trial court granted the defendant's subsequent motion to direct the plaintiff to appear for an examination.

In a strongly worded opinion, the court stated that the rule places an affirmative duty on the party served to proceed with the physical examination or to move to vacate the notice. If neither alternative is followed, the right to conduct the examination will be waived unless the defaulting party can demonstrate a reasonable excuse for its failure to appear. However, the court affirmed the trial court's liberal holding because the rule was being construed for the first time. Judge Martuscello, however, issued a strong warning to the bar, noting that the rule would be *strictly* enforced in the future.¹²⁰

CPLR 3121: Medical report not based on physical or clinical examination is not subject to disclosure.

In *Edelman v. Homes Private Ambulances, Inc.*,¹²¹ an action to recover damages for personal injuries, the plaintiff sought to preclude the use of the defendant's medical report because a copy of the report was not served on the plaintiff thirty days prior to trial pursuant to his request.¹²² The court, however, held that the report was based solely upon hospital records, and not upon a physical or clinical examination of the plaintiff. Therefore, it was not available to the plaintiff as part

¹¹⁸ 32 App. Div. 2d 85, 299 N.Y.S.2d 898 (2d Dep't 1969).

¹¹⁹ 22 NYCRR 672.1 (1963).

¹²⁰ 32 App. Div. 2d 85, 87, 299 N.Y.S.2d 898, 900 (2d Dep't 1969).

¹²¹ 32 App. Div. 2d 563, 300 N.Y.S.2d 372 (2d Dep't 1969).

¹²² CPLR 3121 requires an examining party, upon request, to furnish a copy of the examining physician's report to any party.