BOGOROCH & ASSOCIATES LLP
LAWYERS

Insurer Examinations for Law Clerks

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1// INTRODUCTION

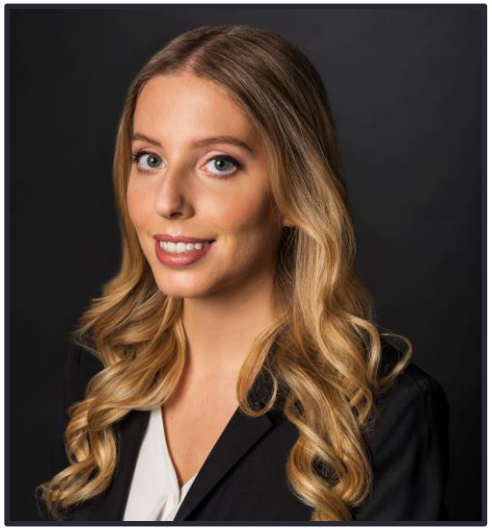
Alexandra Bratseiko, Bogoroch & Associates LLP

Alex is a law clerk with 10 years of experience in plaintiff personal injury, with expertise in both civil litigation and accident benefits. She joined Bogoroch & Associates LLP in January 2018.

Alex is well-versed in the Statutory Accident Benefits Schedule and Rules of Civil Procedure. She provides ongoing assistance to lawyers in all aspects of the litigation process, including assisting with preparation for examinations for discovery, mediations, trials and applications to the Licence Appeal Tribunal. Alex has extensive experience assisting in the management of complex catastrophic cases.

Alex is dedicated to helping seriously injuries people and their families through the difficult times they face after an accident. She has volunteered with the Lyndhurst Centre at the Toronto Rehabilitation Institute, where she dedicated herself to helping people with serious brain and spinal cord injuries at the out-patient fitness centre.

1// INTRODUCTION



Rachel Radomski, Bogoroch & Associates LLP

Rachel Radomski is an associate at Bogoroch & Associates LLP. Her practice focuses primarily on representing plaintiffs in personal injury cases, including those who have been injured in motor vehicle collisions, slip and falls, as well as individuals that have been denied disability benefits.

Rachel attended Western University where she obtained a Bachelor of Arts degree in 2009, and her Juris Doctor in 2012. Rachel was called to the Ontario Bar in 2013.

Prior to joining Bogoroch & Associates LLP, Rachel articled and practiced at a boutique personal injury firm in Toronto where she represented seriously injured victims and their families.

Rachel is a member of the Canadian Bar Association, The Advocates' Society, the Ontario Trial Lawyers Association, and the Women's Law Association of Ontario.

2// S. 44(1) of the *SABS*

Section 44 of the *Statutory Accident Benefits Schedule* provides as follows:

44. (1) For the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, but not more often than is reasonably necessary, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation.

[cont]

2// S. 44(1) of the SABS

It is clear that the insurer has the ability to notify the insured person that they require an examination pursuant to s.44 of the *SABS* to determine:

- **if an applicant is entitled to a benefit;**
- **if an applicant is receiving a benefit, if the applicant *is still entitled to a benefit*.**

However, they may not do so: **"more often than is reasonably necessary".**

3// What is “reasonably necessary”

The guiding criteria in assessing the reasonableness of a proposed IE:

1. The timing of the insurers request;
2. The possible prejudice to both sides;
3. The number and nature of previous IE;
4. The nature of the examinations being requested;
5. Whether there are any new issues being raised in the applicant’s claim that require evaluation; and
6. Whether there is a reasonable nexus between the examination request and the applicant’s injuries.*

**(17-002973 v Aviva Insurance Company, 2018 CarswellOnt 13391; Al-Shimasawi v. Wawanesa Mutual Insurance Company (FSCO A05-002737, May 11, 2007))*

3//(i). Who bears the onus reasonableness?

- The onus is on the insurer to provide evidence that the medical examination is reasonable and necessary.
- Insurance examinations should be for the purpose of adjusting the claim and not to reinforce a case for litigation.

A// The timing of the insurer's request

The insurer has an ongoing responsibility to assess the condition of an insured person. This principle of an ongoing responsibility to assess the condition is qualified by there being changes in the nature of the insured person's medical or physical condition.

Historically, the courts looked to see if there had been any changes in the nature of the insured person's medical or psychological condition relevant to his or her disability claim. However, it was unreasonable to request an examination where circumstances indicate that its only apparent purpose was to acquire medical evidence to bolster the insurer's case at a hearing.*

* (*17-004358, 17-006118, and 17-00752 vs. Economical Mutual Insurance Company*, 2018 CarswellOnt 19839 (LAT); *Bogic v. AXA Insurance (Canada)* 1999 CarswellOnt 5479*).*

[cont]

A// The timing of the insurer's request

Can an IE be ordered on the eve of a hearing?

- **In short, yes.**
- *17-002973 v. Aviva Insurance Company*, 2018 CarswellOnt 13391 (LAT)
  - Aviva sought to schedule IEs for Attendant Care Benefits, including: Physiatry Assessment, Functional Abilities Evaluation, Orthopaedic Assessment, and a Psychological Assessment.
  - The request for IE was made <u>two weeks prior to the submission due date</u> for a LAT hearing;
  - Applicant refused to attend on the basis that:
    - the IEs were scheduled on the eve of a hearing
    - the IEs were scheduled for the purpose of bolstering the respondent's case
  - The respondent submitted:
    - the applicant is statute barred from proceeding with the application pursuant to section 55(1) of the *Schedule* based on the applicant's failure to attend IE's;
    - The IEs were required to assess if the applicant qualified for IRB, AC benefits, and medical/rehabilitation benefits.

A// The timing of the insurer's request

- It was held that the Applicant had to attend the IEs:

  "Aside from the Disability Certificate (OCF-3), the respondent initially had little medical documentation to verify the applicant's condition without the benefit of conducting a series of IE's. Without this additional information, they could not make a determination regarding the applicant's entitlement to IRB, physical injuries, and functional abilities. For the respondent to proceed to a hearing without this information regarding the benefits sought would be procedurally unfair and contrary to Rule 3.1(a) of the LAT *Rules of Practice and Procedure* ("*Rules*")."
- The reason why the request for IEs was before submissions were due at the LAT was due to the tight timelines imposed by the LAT.

- ***17-004358, 17-006118 and 17-007752 v. Economical Mutual Insurance Company,*** 2018 CarswellOnt 19839: Applicant unsuccessfully made a similar argument.

B// Possible prejudice to both parties

<u>Balance</u> is necessary between the insurer's right to impose the examination and the prejudice suffered by the Applicant, as well as the Applicant's right to privacy.

Prejudice to Applicant:

- Insurer examinations have an impact on Applicants: inherently intrusive, stressful, may trigger feelings of fear and anxiety.
- Excessive insurer examinations cannot be used to harass or intimidate an applicant.

Prejudice to Insurer:

- IE necessary for the insurer's ability to assess the validity of an Applicant's ongoing claim.

[cont]

B// Possible prejudice to both parties

How has the prejudice to each party been considered in the past?

16-003144 v Cumis General Insurance Company, 2017 CarswellOnt 5922

- The tribunal considered the insurer's right to impose an IE, balanced with the Applicant's right to privacy;
- Insurer sought to impose an IE of 5 assessments regarding a CAT application;
- Applicant had only attended 2 assessments for their application;
- Agreement between parties that cardiology assessment would proceed by way of paper review;
- In dispute: physiatry assessment.

- Adjudicator Pay **denied the in-person physiatry assessment** and held that to permit it would be overly intrusive given the extent of the in-person assessments.

[cont]

B// Possible prejudice to both parties

- Adjudicator Pay made the following comments:

*"… **the** **insurer's right to insurer's examinations must be balanced with the privacy rights of applicants**. Insurer's examinations are **inherently intrusive, and constitute an invasion of individual privacy.** The onus is on the insurer to establish that a proposed examination is reasonable. In balancing these rights, a number of factors can be considered. **There must be a reasonable nexus between the type of examination requested and the claimed impairments**. The purpose and timing of the request should be considered. Insurer's examinations should be for the purpose of adjusting the claim, not solely to bolster a case for litigation. Some other factors to consider include the number and nature of previous and requested examinations, whether there are new conditions that need to be evaluated, and whether either side will be prejudiced by the examination or non-compliance with a request for an examination. If there are numerous examinations, the insurer should proceed cautiously, as all of the assessments may not be necessary. There must also be an acceptable reason for non-compliance with requests for insurer's examination requests, such as a medical reason for non-attendance. "*

[cont]

B// Possible prejudice to both parties

- Keep in mind that the insurer's ability to assess an applicant's entitlement to a benefit is not limited to an in person assessment.
- Rather, pursuant to the *SABS* there are other options:
  - Request a new disability certificate;
  - Request a paper review;
  - Send a request to the applicant under s.33(1) (request for information).

C// Number and nature of previous IEs

- When looking at the number and nature of previous examinations, you want to look at the examinations as a whole, and not just with respect to the benefit being assessed.

- You also want to consider the nature of the previous examinations (which specialists) as well as the doctors.

- It is surprisingly common for the insurer to request an IME for one benefit with a doctor who has already made an unfavourable findings with respect to another benefit. If this is the case, you may not want to oppose the examination entirely, but rather, request a different physician.

- Similarly if there were assessors who found favourably for your client before, is the insurer proposing new assessments with different assessors in the same specialty?

[cont]

C// Number and nature of previous IEs

- The insurer must provide evidence that would suggest a significant or important change in the claimant's conditions since the last assessment.
  - Does the new information provided by the claimant since the last insurer's examination suggest a new diagnosis, a change in condition, or a new direction of medical investigation?

- Practical considerations:
  - Purpose of the new IEs being requested (ie: requested because new information or seemingly to bolster case).

C// Number and nature of previous IEs

***B.H. v. Aviva Canada Inc.*, 2017 CanLII87160 (ON LAT)**

Background

- A claimant was injured in a motor vehicle accident which occurred on March 2, 2014.
- In late 2014, the insurer arranged for the claimant to undergo two examinations.
- The insurer's medical assessors diagnosed the claimant with lower back pain and whiplash associated disorder.
- In 2016, an occupational therapist (OT) reviewed the claimant's living situation and made series of recommendations to improve the claimant's functionality.

[cont]

C// Number and nature of previous IEs

Background (continued…)

- The insurer denied to fund the recommendations made by the OT as the insurer was “unable to determine whether the recommendations are reasonably required for the injuries [the claimant] received in this motor vehicle accident”.
- The insurer arranged for an independent medical examination with an OT of its own choosing.
- The claimant declined to attend the insurer’s examination requesting to clarify the reasons provided by the insurer for its decision to deny the recommendations made by the OT.
- The insurer declined to provide any additional clarification.

C// Number and nature of previous IEs

Application to the License Appeal Tribunal (LAT)

- The claimant filed an application to dispute the denial made by the insurer, taking a position that the insurer failed to comply with section 38(7) and section 44(5) of the *SABS,* as it did not provide an adequate reason for either the denial or the need for an IME.
- The Tribunal sided with the insurer and decided that the claimant was barred under section 55(1) of the *SABS* from applying to the LAT given the refusal to attend the IME.

[cont]

C// Number and nature of previous IEs

The Executive Chair's Decision

- Executive Chair Lamoureux rendered a reconsideration decision overturning LAT's decision for the following reasons:
- The insurer failed to "explain in a meaningful way" why it believed the OT's prescribed treatment was not medically reasonable and necessary.
- The insurer must give "specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify the insured's condition that the insurer does not have but requires."
- The OT's recommendations were "entirely consistent with the [claimant's] diagnosis of low back pain".
- Lamoureux declared that the insurer failed to comply with the statutory notice requirement and as a result must pay for the prescribed treatments without further delay.

D// The nature of the IEs requested

Are the assessors reasonable?

- Look at the nature of the examinations being requested: are they excessive and duplicative (ie: a psychologist and a psychiatrist?)
- Similarly, does the specialty relate to the actual injury of the applicant (ie: no orthopedic injury but sent to an orthoapedic surgeon).
- Does the assessor actually practice, and have there been negative decisions about them?
- Strategic considerations.

[cont]

D// The nature of the IEs requested

The number of assessments being requested

It is frequent that a battery of IEs will be scheduled, not all of which may be reasonable,

- ie: Is a multi-disciplinary exam fair in response to a limited claim?
- ie: If a CAT application has been submitted on a single criterion basis, should the insurer have the right to test all criteria categories?

E + F// New issues + reasonable nexus

E: Whether there are any new issues being raised in the applicant's claim that require evaluation; and

F: Whether there is a reasonable nexus between the examination requested and the applicant's injuries;

4// Requirements of the Notice of Examination s.44(5)

S.44(5) of the *SABS* :

(5) If the insurer requires an examination under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,

(a) the medical and any other reasons for the examination;

(b) whether the attendance of the insured person is required at the examination;

(c) the name of the person or persons who will conduct the examination, any regulated health profession to which they belong and their titles and designations indicating their specialization, if any, in their professions; and

(d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days. O. Reg. 34/10, s. 44 (5).

[cont]

4// Requirements of the Notice of Examination s.44(5)

What constitutes "medical and any other reasons"

- The onus is on the insurer to provide the medical reasons for the IE.
- A medical reason must be provided by virtue of the language of the *SABS:* "medical and any other reasons".
- Insurers must "explicitly and unambiguously advise" insured in "straightforward, and clear language, directed towards an unsophisticated person. (*Ni v. TD Home and Auto Insurance Company,* FSCO A13-013501 (27 April 2017)).
- "Insurers must provide reasons encompassing more than a desire to determine ongoing entitlement. There must be something in the medical records that leads to questions and warrants investigation." (*W.(J.) v. Co-operators General Insurance Co.* 2016 CarswellOnt 21178 (LAT)).

[cont]

4// Requirements of the Notice of Examination s.44(5)

What constitutes "medical and any other reasons"

- *K.S.Y. and Aviva Insurance Canada, Re,* 2018 CarswellOnt 23067 (LAT):
  - "respondent indicated that it had reviewed the treatment plan, and, as it was not consistent with the applicant's diagnosis, an insurer's examination was required; the respondent's notice provided both a medical reason and the need for an assessment of the treatment plan."- **valid reasons**
- *Milan and Aviva Canada Inc.,* Re 2018 CarswellOnt 532 (FSCO):
  - Medical reason provided for treatment plan was: "the type(s) of treatment does not appear consistent with the patient's diagnosis" – notice was invalid and/or improper
- *W.(J.) v. Co-operators General Insurance Co.* 2016 CarswellOnt 21178 (LAT):
  - Medical reasons provided, "to determine the timelines for recovery and future prognosis in relation to [your] injuries"- **valid reasons**
- *17-001508 v. Heartland Farm Mutual,* 2018 CarswellOnt 4030 (LAT):
  - Applicant claimed that the Insurer identified the purpose of IEs, but failed to provide medical reasons:
    - "The medical documentation on file does not support the need for a neuro-optometry assessment.
    - Further to our correspondence dated November 17, 2016 we are not in receipt of all of the requested medical documentation, request made in accordance with Section 33 of the Statutory Accident Benefits Schedule. We do however acknowledge receipt Dr. Johnston's and Dr. A. Tzcieniecka's clinical notes and records from February 2013 to September 2016 and October 2016 respectively and the Decoded OHIP Summary had been request by your legal representative's office."- **valid reasons**

4// Requirements of the Notice of Examination s.44(5)

The "Rationale"

- The question of what wording might satisfy the requirement to give "medical and other reasons" was considered by Arbitrator Sapin in the Financial Services Commission of Ontario decision of *Augustin v. Unifund Assurance Co.* [2013 CarswellOnt 15809 (F.S.C.O. Arb.)], (FSCO A12-000452, November 13, 2013).

- Arbitrator Sapin stated:

> Given the serious consequences to an insured person of refusing to attend an IE for which proper notice has been given — barred from commencing a mediation proceeding to dispute an insurer's denial of medical treatment — the notice requirements set out in s. 44(5) should be strictly construed and the insurer's notice should be closely examined to ensure it complies. The requirements are mandatory. They are there to balance the naturally intrusive nature of an IE and to ensure fairness. The insured person is entitled to make an informed decision about whether they wish to pursue their claims and attend the IE, or not. The legislature has determined that, in fairness, an insured person is entitled to specific information, including medical reasons, about why they are being required to attend an IE. I find it would be unreasonable and unfair to require them to attend without first being in possession of that information.

5// What if the notice doesn't comply with s.44(5)?

- If the notice doesn't comply you may refuse to have your client attend an assessment, however, there are potential consequences.

- ***17-001508 v. Heartland Farm Mutual*****,** 2018 CarswellOnt 4030 (LAT):
  - The applicant refused to attend a scheduled IE because the respondent failed to provide "the medical and any other reasons".
  - The reasons included: a lack of medical documentation supporting the need for the treatment plan in dispute, and the applicant's noncompliance with request for medical documentation.
  - The Applicant's argument was rejected, and the insurer's reasons were found to be sufficient.
  - **Consequence: s.55 of the *SABS* precluded the Applicant from applying to the LAT.**

6// Consequences of failing to attend an IE

- A refusal to attend can result in the applicant being precluded from applying to the Tribunal pursuant to s.55 of the Schedule.

- *17-001508 v. Heartland Farm Mutual*: Applicant was barred from applying to the LAT.

- *17-002894 v. Aviva Insurance Company*, 2018 CarswellOnt 4041
  - Adjudicator Brian Norris held that **the applicant was barred from commencing a proceeding for failing to attend a properly scheduled Insurers Examination.**

7// Practical considerations

- How to balance threat of suspension v. requests for “unreasonable” IEs/ incomplete notice of IEs;
- How to proceed- correspondence with the adjuster;
- Maintain a paper trail;
- Client management: keep client informed.

8// Consents: to sign or not to sign

- Ambiguous area with many questions:
  - Can an assessor require an applicant to sign a consent prior to the examination?
  - If the applicant refuses to sign it, does this constitute a refusal to attend for the purpose of denying benefits?

- S. 44 is silent on the issue of consent.

- **Tort context:**
  - S.105 of the *Courts of Justice Act*, R.S.O. 1990, c. C43 ("CJA") in particular, *Chapell v. Marshall Estate*, [2001] O.J. No. 3009 (Ont. S.C.J.), Valin J. concluded that there is no requirement under s. 105 of the *CJA* or Rule 33 of the *Rules of Civil Procedure* requiring an injured plaintiff to sign an authorization, consent or agreement when attending a defence medical examination.

- *Luther v Economical,* 2012 CarswellOnt 8237, *Intact Insurance v. Anne Beaudry* 2016 ONSC 6127: Both decisions stand for the proposition that **some kind of consent can be required by an assessor prior to conducting an assessment.**

[cont]

8// Consents: to sign or not to sign

Luther v Economical 2012 CarswellOnt 8237 (FSCO)

- Arbitrator Wilson found that the claimant was not in breach of s. 37(7) of the *Schedule:*
  - he made himself available for his assessment and attended on time and ready to consent verbally and by counsel to the proposed assessments.
  - his failure to sign an unapproved "consent" form, in the context of these examinations, did not constitute a "failure to attend."
  - So, in a way, what was at issue was *whether the insured had breach their obligation to attend an examination, rather than a decision about signing consents.*
- Arbitrator Wilson concluded that it was reasonable for an examiner to ask for generalized consent undertaking a regulated examination and to document that process; and that "any written consents requested should be simple and consistent in accordance with the purposes of the *Schedule*."

- Arbitrator Wilson indicated that a consent should only cover the actual conduct of the assessment:

> "Any written consents requested should be simple, consistent, and in accordance with the purposes of the *Schedule*. These were not. Waiving liability for assessment injury is not part of the *Schedule*."

[cont]

8// Consents: to sign or not to sign

Intact Insurance v. Beaudry, 2016 ONSC 6127

- Intact sought a declaration that the applicant was in breach of s.44 because of failure to sign consent forms required by Intact.
- It was held that any consent form "required" must be reasonable, and what is reasonable turns on the circumstances of a case and will necessitate negotiations between parties.

Interestingly, The College of Physicians and Surgeons of Ontario recommends that a consent form be signed. Although the Health Care Consent Act requires consent before an individual undergoes medical treatment, IMES are excluded and not subject to the consent provisions of the HCCA.

[cont]

8// Consents: to sign or not to sign

Practical Considerations:

- Ask in advance if there will be a consent required, and if so, have it sent to you to review;
- Forward your own consent to the insurer;
- Work with the insurer to agree to terms of consent.

9// Tips to give your client to prepare for an IE

- Arrive early, know where you going, where to park, and be aware of traffic.
- Remember that the examination begins that moment you arrive to the parking lot of the assessment centre.
- Understand the role of the examiner.
- Bring in a written list of your medications, physicians, symptoms, dates, activities, restrictions.
- If possible, bring in a list of pertinent medical records and diagnostic imaging reports (x-rays, ultrasounds, scans etc).
- Be honest.
- Be polite and courteous.

[cont]

9// Tips to give your client to prepare for an IE

- Dress appropriately.
- Bring a family member or friend for support.
- Take notes after the assessment to record your impressions.
- Do not discuss your legal case with the assessor.
- Do not answer questions if you do not fully understand it.
- Do not volunteer information about the accident.
- Keep answers short.
- Do not exaggerate your injuries and do not minimize injuries.

10// Scope of questions allowed

Permitted questions include:

- Background (number of family members, size of home, number of bedrooms, washrooms, size lawn etc.);
- Medical and family history (pre-existing accident, falls, work compensation claims, disability claims etc.);
- Employment history;
- Social history (hobbies, recreational sports and activities etc.);
- Injurie, symptoms, limitations.

Non-permissible questions include:

- Questions regarding discussions with lawyer;
- Questions regarding experts seen (without reports available);
- Questions about history, over 5+ years old.

11// Chaperones at IEs

- The *SABS* is silent regarding use of chaperones.
- When a chaperone is necessary v preferred.
- How to request the use of a chaperone.

12// Assessor v. nurse

- The Canadian Medical Protective Association encourages independent medical assessors to have a chaperone be present during an examination to enhance the patient's experience and support fair, prompt and effective assessment.
- Sometime claimants are seen by the expert for less than 5 mins for a physical examination and all other information is collected by another individual (ie. nurse, administrative assistance etc).
- Claimants should record the length of time of the assessment with the doctor and the chaperone.
- If a claimant was only in the examining room for a brief period of time this may have an impact on the weight an adjudicator will give to the contents of the IE report.

13//Ghostwriting of IE reports

What is ghostwriting?

- Ghostwriting is when an individual other than the assessors prepares and/or alters some portion of the report. Sometimes these changes occur without the permission of the original author.
- Ghostwriting is different than a consensus report, which is commonly written by a medical professional or consultant working at a facility that provides assessments of an applicant's injuries. The document takes into account all of the original reports prepared by various medical specialists who examined the accident victim. A consensus report is basically a summary report.

Remember: experts and assessors are to be impartial and unbiased.

[cont]

13//Ghostwriting of IE reports

- **Tort context:** In *Lavecchia v McGinn*, 2016 ONSC 2193 (CanLII), a 2016 personal injury case, Master MacLeod of the Ontario Superior Court discussed the practice of ghost-writing.

  - The defendant moved for an order compelling the plaintiff to attend an independent medical examination ("IME"), and the plaintiff argued for the court to impose restrictions on the defendant's right to require the IME. One of the contemplated restrictions was a prohibition against ghost-writing – the expert report had to be prepared by the examining doctor exclusively, and not by administrative staff or other individuals employed by the agency through which the doctor provided expert services.

  - The plaintiff sought to prohibit ghost-writing in order to preserve the confidentiality of her health records. Master MacLeod commented favourably on the agreed-upon prohibition against ghost writing stating, "[s]uffice to say that there is merit to the argument that greater rigour and predictability concerning the role and use of experts might save time at trial and promote settlements".

- Master McLeod ordered the following restrictions:
  - The written report must be drafted solely and entirely by the examining doctor;
  - The research and medical record review leading to the report must be conducted solely and entirely by the examining doctor; and
  - The plaintiff's medical records must not be shared with any third parties.

14// Negative experiences: how to handle?

- Encourage your client to complete the assessment, but if need be, a claimant can stop the assessment.
- Take detailed notes of your client's experience and report them to the adjuster.
- Request a re-assessment by a different assessor.

15// What should you do when an IE report is inaccurate?

- Point out to the adjuster any inaccuracies or incompleteness in the report.
- If possible, use material from the claimant's own medical records to point out the inaccuracies.
- Contrast for the adjuster the very brief extent of the IE with the much more significant time the claimant's own doctors have spent diagnosing and treating your client's injuries.
- Have your client's own doctor or specialist comment on the IE report (consider cost v. worth).
- Ask for information about the IE doctor's relationship with the insurance company:
  - the number of IE referrals the insurance company has given the particular doctor over the previous five years;
  - the amount of money the doctor is paid for each IE;
  - how many IEs the doctor has performed for victim's attorneys over the same period.

Questions?