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# LETTERS TO MEDICAL-LEGAL EVALUATORS:
## Communications v. Information

**January 25, 2017**

On January 23, 2017, the WCAB issued the en banc decision of *Maxham v. Calif. Dept. of Corrections*, clarifying the definition of "information" and "communication" in Labor Code §4062.3.

The issue of communicating with agreed medical evaluators and panel qualified medical evaluators is governed by the timelines and rules in §4062.3.

In the case of *Maxham*, defendants objected to applicant's advocacy letters to three AMEs. Applicant sent the letters to the AMEs over defendants' objections. Defendants filed for a hearing. At the trial level, the Workers' Compensation Judge found in favor of applicant, indicating that the letters constituted "communications" rather than "information".

When parties utilize an AME there is an important distinction between "information" and "communication". Per §4062.3, information sent to the AME must be agreed upon first with the opposing party. Communications can be served on the AME and copied to opposing counsel simultaneously.

This begs the question: what falls into the category of information versus communication?

The WCAB has now provided the following definitions: 1) "Information" constitutes (a) records prepared or maintained by the employee's treating physician or physicians, and/or (b) medical and nonmedical records relevant to determination of the medical issues; 2) A "communication" can constitute "information" if it **contains, references, or encloses** (a) records prepared or maintained by the employee's treating physician or physicians, and/or (b) medical and nonmedical records relevant to determination of the medical issues.

The definition of "communication" has effectively been expanded to include anything that references or encloses "information".

The WCAB does specify that correspondence referencing or enclosing information that was previously agreed upon does not require agreement by opposing counsel.

The rules for communicating with a QME are stricter, providing that all information and communication must be served on the opposing party 20 days prior to service on the evaluator. The opposing party has ten days to object to nonmedical information or communication.

In *Maxham*, the WCJ's Order was rescinded and the case was returned to the trial level to determine whether applicant's letters and enclosures were prejudicial enough to warrant removal of the AME. In order to warrant removal, the information provided must cause the opposing party to suffer substantial prejudice and irreparable harm.

In the end, the opinion seems to get semantically entangled in itself in dealing with the definitions of "communication" and "information" that it loses sight of the forest in trying to name the trees. The crux of the difficulty in the letters applicant's attorney created and sent off to the three AMEs, despite objection, was in its strongly partisan description of what the various cases like *Benson, Almaraz-Guzman etc.* stood for. The trial judge noted in his report on reconsideration that "the letter[s] also contained both legal and factual assertions to which defendant might have wanted to object." The Board treats the advocacy portions of the correspondence as "communication" because it does not fit the rigid definition of "information" it has created.

The panel skirts the issue noting that, per its rigid analysis, "we are unable to presently determine whether applicant's counsel sent impermissible 'information' to the AMEs." And what if those advocacy letters don't specifically contain "information" or only indirectly refer to such "information" in the midst of a legal harangue?

The panel throws a bone to the offended party by noting that a party may engage in "misrepresentation of case law or legal holdings, engag[e] in sophistry regarding factual or legal issues, or misrepresentation of actual 'information' in a case." The judge is left with the discretion to assess whether advocacy letters could confuse or misdirect the attention of a medical examiner." In a footnote, the commissioners say that AMEs are supposedly chosen for their expertise and neutrality, and are therefore "well equipped to evaluate the parties' reasonable advocacy when formulating an opinion regarding each case." What about the less qualified QMEs out there or AMEs who are chosen as the least of several? Why not simply ban advocacy and argument in these letters? Or at least use a form of advocacy that leaves to the evaluator the choice of how to determine an issue without fear of a bludgeoning if the point asserted is rejected?

It seems that for now, the best course of action is to serve all correspondence on opposing counsel prior to serving the AME. This will help to avoid a hearing, and perhaps an order to obtain a new evaluator based on prejudice. Although it can be difficult in practice to complete this extra step, it is better to have opposing counsel's agreement or objection prior to sending correspondence rather than engaging in litigation after the fact.

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