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The defense medical examination

PROTECTING YOUR CLIENTS AND THEIR CASES FROM IMPROPER EXAMINATIONS AND INTERROGATIONS DURING DMEs

A defense medical examination is a routine and expected part of personal injury litigation. Too often, though, a DME is turned into a weapon wielded proudly (and effectively) by defense counsel who rely on ill-prepared plaintiff's counsel to take advantage of their clients. The purpose of this article is to provide a comprehensive framework for responding to a DME notice, preparing your clients for the examination, analyzing whether you should stipulate to a request for additional examinations, and ultimately guarding your clients from potentially unscrupulous medical experts and protecting their cases from unreliable and biased opinions.

Responding to a notice of physical examination

Defense counsel in a recent case sent a notice of physical examination by their orthopedic surgeon who intended to perform "both an oral and physical examinations of the Plaintiff." As for the physical exam, the notice stated it "will consist of touching the Plaintiff's body including the use of accepted diagnostic instruments, tests, manipulations and techniques." As to the "oral exam," the notice stated that it "may involve questions that the physician may ask, and the Plaintiff shall answer, including inquiries relating to the nature and extent of the injuries claimed, history of the trauma including the manner in which the injuries were sustained, and plaintiff's occupational history."

See Owen, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

Such a notice is hopelessly improper and must be challenged. As is common throughout our practice, we tend to use the same template when responding to discovery, including when responding to a DME notice. While there is nothing wrong with that *per se*, a carefully-crafted response that is specifically tailored to defendant's notice will provide a proper legal basis for your initial refusal to proceed with the exam while simultaneously protecting your client's right to proper notice about what exactly will occur at the exam.

The DME notice requirements are well known, but rarely followed. The notice "*shall* specify the time, place, manner, conditions, scope, and nature of the examination…." (Code Civ. Proc., § 2032.220, subd. (c). (emphasis added).) "The word 'specify' means to speak of fully or in detail," and requires the demanding party to "describe in detail who will conduct the examination, where and when it will be conducted, the conditions, scope and nature of the examination, and the diagnostic tests and procedures to be employed. The way to describe these 'diagnostic tests and procedures' — *fully* and *in detail* — is to list them by name…[and] with specificity…." (*Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 260 (emphasis in original).)

Carpenter requires defendants to state, by name, each and every test and examination the defense experts intends to administer so you can fairly evaluate whether the examination is properly limited to the parts of your client's body that are at issue. Defense counsel's vague reference to "accepted diagnostic instruments, tests, manipulations and techniques" is never sufficient. Force them to comply with the Code and specifically name each and every test.

Responding to a Notice of Mental Examination

The notice requirements for a mental examination are the same as those for a physical exam. Defendant must still specifically list each and every test the examiner intends to administer per *Carpenter*, 141 Cal.App.4th at 260. The *Carpenter* court dismissed defendant's argument that all that is required is the demand "just mention the *types* of diagnostic tests and procedures (such as 'written standardized tests' evaluating 'emotional and cognitive functioning')," because section 2032.220, subdivision (c)'s plain meaning requires the demanding party or the trial court "specify the…diagnostic tests and procedures" of the examination "by *naming* the tests and procedures to be performed." (*Id.* at 260, 262 (emphasis added).) The reason for this specificity is so "plaintiff, assisted by counsel…may consider whether the proposed tests are inappropriate, irrelevant, or abusive, and submit evidence and argument to that effect if necessary." (*Id.* at 267.)

With rare exceptions (e.g., actual evidence of prior abusive discovery tactics by defense (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 845-46), the attorney cannot personally observe a mental examination. (Code Civ. Proc., § 2032.530(b); *Edwards v. Superior Court* (1976) 16 Cal.3d 905, 910-11.) That said, you are allowed to audio record *the entire examination*. To be sure, include in your response to the notice the following language:

> Plaintiff is statutorily allowed to audio record the entire mental exam. Civ. Proc. Code § 2032.530(a) ("The examiner and examinee shall have the right to record a mental examination by audio technology."); see also, *Baqleh v. Superior Court*, (2002) 100 Cal.App.4th 478, 492 ("The Act permits mental examinations to be recorded only by means of 'audio tape.'"); *Golfland Entm't Centers, Inc. v. Superior Court* (2003) 108 Cal.App.4th 739, 750.
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> In *Golfland*, the reviewing court ordered the entire mental examination be recorded by audio recording stating:
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> > …[R]ecording only the examinee's responses would defeat the main purposes of the audiotaping, which are to ensure that the examiner does not overstep the bounds set by the court for the mental examination, that the context of the responses can be judged for purposes of trial, that the examinee's interests are protected (especially since the examinee's counsel ordinarily will not be present), and that any evidence of abuse can be presented to the court.
>
> (*Ibid.*)
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> Indeed, the *Golfland* court even suggested that the mental-health professional conducting the examination be "responsible for audiotaping it *in its entirety*, rather than burdening [plaintiff] or his mother with that task. Having [the examining doctor] do the taping is more likely to avoid disruption of the examination, and his office is almost surely properly equipped to perform this task, which is a common feature of psychological practice."
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> (*Id.*, emphasis added.)
>
> "Accordingly, plaintiff *will audio record the entire exam*."

Without fail, defense counsel balk at this language. The typical claim is that certain testing is copyright protected and cannot be audio recorded. But this is not the law. *Carpenter v. Superior Court* addressed this very issue. There, defendant objected to plaintiff's attempt to record the entire mental examination arguing, among other things, the test materials were copyright protected and not allowed to be disclosed. The trial court agreed, but the reviewing court reversed, finding the decision "erroneous." (*Carpenter*, 141 Cal.App.4th at 272.)

While the *Carpenter* court recognized certain tests were entitled to copyright protection, there was a sufficient compromise that allowed the test companies to maintain their protections and afford a plaintiff protection for the integrity of his testing and results. (*Id.* at 272-74.) "In essence, the publishers propose, the test questions and answers may be given to plaintiff's counsel or a designated psychologist, subject to a protective order strictly limiting the use and further disclosure of the material, and providing for other safeguards against access that would compromise the integrity and validity of the tests." (*Id.* at 274.)

See Owen, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

As part of your good faith, meet and confer effort, advise counsel of this authority and ensure the audio recording and test results will be used only for purposes of that particular case. To the extent defendant continues to resist, force them to move to compel. The statutes and case law are on your side.

Preparing your client and attending the examination

You should always personally prepare your clients for their examinations. The amount of preparation should turn on the type of client you have based on the following analysis:

Is your client a reliable historian? Do they have a consistent and truthful account (and recount) of their pre-incident health, specific incident-related injuries, and treatment of those injuries. Assuming they do not, are they savvy enough to tell the examiner when asked questions about these things to say that they "just don't recall" or qualify answers they are unsure of by telling the examiner "well, as best as I can recall…" or "I have a memory of X, but I'm not confident of that…" or words to similar effect?

Continuing down the spectrum of confidence, is your client nervous, a poor historian, easily led, overly agreeable, or otherwise not willing to challenge something a doctor states incorrectly? We all have these types of clients. Perhaps it is a condition of our occupation, but as lawyers who depose and cross-examine defense doctors for a living, we have a natural (and healthy) skepticism of doctors retained by insurance companies (as I am sure our defense colleagues have of doctors retained by us). But for many of our clients, doctors are still held in high regard simply because they are doctors and are wearing a white lab coat with their names spelled in blue cursive on their chest. And with this mindset, there is a natural tendency to want to please (or not confront) them. With this demure attitude, a defense doctor's examination can easily reach the wrong conclusions and their reports will contain incorrect, incomplete, or otherwise misleading information.

Most clients fall somewhere in between these two extremes, so it is imperative that you have a true sense of your client's ability and aptitude in order to decide just how much you are willing to allow your client to handle (and answer) at the examination.

Something to consider with clients who you have less confidence in is to have them, on their own, write a list that identifies (1) from the top of their head to the bottom of their feet, each body part that was injured, (2) the specific injury to each identified body part, (3) how each injury has been treated to date, (4) what their 0-10 pain rating is for each body part on average, at its worst, and at its best, and (5) how specifically the injuries have affected their personal and professional lives.

As most DMEs are performed after a client's deposition, your job is to make sure the list is consistent with their testimony, allowing for some variation if the injuries have improved (or gotten worse) since their deposition occurred. Usually having the client write this out in advance is sufficient preparation. However, there are clients who still are not able to commit the list to memory, so have them bring it with them and tell them they can refer to it during the examination if they need to. If and when that list is brought up, have clients explain to the examiner that they are nervous (as they always are) and that they wrote this down to make sure they told the examiner everything.

Attending the exam

As for attending your client's examination, we are all very busy professionals. When there is a scheduling conflict, it is tempting to send an attorney from your office not familiar with the case, or a paralegal, or a legal-nurse observer. But you are strongly encouraged to personally attend these examinations. With rare exception, every single one of your clients will be nervous and apprehensive about being seen by an "adverse" doctor. Your personal attendance will help you relate to clients and better understand their cases. It shows them you are genuinely interested in their injuries and ensuring they are protected from improper examination.

It also provides first-hand knowledge of everything that takes place during these examinations, which is critical for two reasons: (1) if your client raises a new injury not previously disclosed in discovery, or details an existing injury in a way that is new or different from what was previously disclosed, you will be able to disclose it in response to a supplement discovery request (or in a voluntary supplement response), so you can avoid defendant's attempt to exclude it at trial, and (2) when you are sitting directly across from these doctors during their depositions, you are asking questions from a position of power as you personally observed everything these doctors did, measured and asked during that exam.

Another benefit from your personal attendance is finding excellent impeachment evidence in doctor offices and exam rooms. Indeed, during one exam performed by a well-used defense expert specializing in hand and wrist trauma, the doctor had in his waiting room a brochure (*for his actual patients*) that read, "Few of us truly appreciate the importance of our hands, wrists, elbows or shoulders until injury compromises their function. Then the impact on quality of life often becomes dramatically clear. Even if you don't depend directly on your upper extremity skills to make a living…we all rely on these critical tools every day in countless ways, from driving and typing to dressing ourselves and lifting our children." You can imagine how we used this in that case.

Most importantly though, your primary objective in personally attending is to protect your client from improper interrogation. The questioning I have observed at my clients' DMEs ranges from the expected to the astonishing:

- What body parts did you injure?
- Were you wearing your seatbelt?
- How fast were you going?
- Did you signal before you turned?

See Owen, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

• Why did you think the other driver was going to stop?
• Tell me how this accident happened?

Innocent question, or ulterior motive?

I believe many doctors ask these questions without any bad intent or ulterior motive. Many times the questions are borne out of a total ignorance of your client and the case. In other words, all the defense doctor knows is that they have been retained by the defense firm to perform a physical examination of your client, and nothing else. They likely have not received or reviewed any medical records or imaging. They likely have no details about the actual incident itself, so they do not know if your client was hurt in a slip and fall or was knocked of his motorcycle and into the bumper of a parked car. So their questioning is often an honest attempt to just learn about what happened.

On the other hand, there are doctors who, either on their own doing or at the direction of others, ask the same questions that your client was asked in his deposition with the specific intent of getting some type of inconsistency for use at trial. Courts across the country recognize this unscrupulous tactic. (See, e.g., *Golfland Entm't Centers, Inc. v. Superior Court* (2003) 108 Cal.App.4th 739, 745-46 (addressing the "legitimate concern" of a medical provider treating the exam as a second deposition and ordering the examiner "shall not ask [plaintiff] questions regarding the facts and circumstances of the accident to the extent those matters were already stated by [plaintiff] in his deposition or in his interview with [plaintiff's first examiner]."); *Langfeldt-Haaland v. Saupe Enterprises, Inc.* (Alaska 1989) 768 P.2d 1144, 1145 ("Those courts which permit an attorney to be present generally reason that the physician should be prevented from making inquiries beyond the legitimate scope of the exam, thus transforming the exam into a sort of deposition."); *Reardon v. Port Auth. of New York & New Jersey* (N.Y. Sup. Ct. 1986) 132 Misc. 2d 212, 215 ("'[T]he possible adversary status of the examining doctor for the defense is under ordinary circumstances, a compelling reason to permit plaintiff's counsel present to guarantee, for example, that the doctor does not interrogate the plaintiff on liability questions in order to seek damaging admissions.'") (Citation omitted).)

But assuming no bad intent, and that the doctor is genuinely ignorant of your case and your client, it is surely not your client's job to educate this doctor about the facts of the incident or to give defense counsel a second bite at the deposition apple.

Use the examiner's ignorance (real or feigned) to your advantage. This is *your* opportunity to educate that doctor about your client's case. You can do this in a thoughtful and professional way that helps both your client and the doctor, and avoids any suggestion that you interfered in the examination in any way. So what do you do? You come armed with documents that broadcast what your client's case is about, how your client was harmed, and how defendant's negligence caused that harm. These documents include:
• Your client's deposition transcript;
• Deposition transcripts of any witnesses who testified about your client's injuries (e.g., treaters, spouse, friends, co-workers, etc.);
• The traffic collision report or other accident report[1];
• Photographs and/or video of the incident and/or plaintiff's injuries; and
• All medical and billing records to date, including all radiology and imaging (all saved to a USB stick).

Because you are audio-recording the examination, make it a habit to announce on the record everything you are giving the doctor so there is no ambiguity in a later deposition. The twin purposes of providing all this information is to give the defense doctor all documents relevant to your case that defense counsel may not have supplied (intentionally or not), and to make sure you – and not your client – are the messenger of this information.

Once the exam is underway, and after you have provided the defense doctor the information detailed above, your job is to just sit back and observe (the physical exam), and only interject when appropriate.

More than one exam?

Defendant is statutorily allowed one physical examination without leave of court, so why should you agree to any others?

Code of Civil Procedure section 2032.220, subdivision (a) allows defendant only one physical examination without leave of court. Inevitably, you will have a case where defendant wants more than just one exam and asks you if you would stipulate to others. Your immediate response is likely to reference the Code and tell defendant to seek leave of court.

However, are there circumstances where you should stipulate to additional exams? Part of the decision making involves the same analysis detailed above concerning the type of client you have. But suppose you have made the decision not to allow a second physical examination and defense threatens to move to compel, claiming "good cause" for an additional exam. (See Code Civ. Proc., §§ 2032.310; 2032.320, subd. (a).)

In my experience, it is rare that a defendant's motion for an additional examination is denied if (1) the motion concerns an exam for a unique body part that could not reasonably be covered by the first exam (e.g., a request for a neurological exam after an orthopedic exam where plaintiff is claiming orthopedic injuries and a traumatic brain injury), and (2) I intend to designate and call at trial an expert in that particular discipline. So if these two factors are present in your case, consider seriously whether it is worth your time opposing the motion and potentially forcing a trial continuance if the availability of a hearing date is months away.

A mental exam?

Why is defendant asking me to stipulate to a mental examination? The answer likely lies in your complaint or your discovery responses. What specific emotional and mental distress damages

See Owen, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

did you allege or identify in your answers? Extreme, serious, or severe emotional suffering? PTSD? Using these words (or words similar) is an express invitation for a defendant to demand a mental examination.

Accordingly, from the beginning, a realistic assessment of your client's emotional-distress damages must occur. The natural tendency is to associate extreme emotional distress with extreme injuries, but a careful wording of your complaint and discovery responses will avoid the inevitable mental exam demand that accompanies the severe emotional harm buzzword we use too frequently.

In my pleadings and discovery responses, the typical language used is that "defendant's negligence was a substantial factor in causing the subject collision and plaintiff's past and future harm, including emotional distress and mental suffering commensurate with the physical injuries sustained." Code of Civil Procedure section 2032.320 – and substantial time wasted responding to defendants' meet and confer attempts requesting a mental examination – were the genesis of this language.

Section 2032.320 provides that if plaintiff stipulates that he is not making a claim for "mental and emotional distress over and above that usually associated with the physical injuries claimed," and that he will not offer "expert testimony regarding this usual mental and emotional distress" at trial, then absent "exceptional circumstances," the Court "*shall not* order a mental examination" of your client. (Emphasis added.)

But what if your client genuinely suffered some serious emotional distress, something beyond the distress commensurate with his injuries?

Avoid the mental exam if possible

Even then, you should still be exceedingly wary of exposing your clients to such an examination. The reasons are myriad, but the most serious one is that this examination is essentially unfiltered access to your clients and their *entire* past. While you can audio-record the entire exam, you are forbidden from being in the room. You cannot protect your client from inappropriate or leading questions. And you can be assured that doctor will explore every single aspect of your client's life – from birth to date – in an attempt to learn whether his current emotional condition was not potentially caused by anything else. This means questions about your client's childhood, prior emotional and physical abuse, drug use, criminal past, relationships past and present, etc. And if your client has seen psychologists, psychiatrists or therapists in the past, those records become fair game and a potential gold mine of impeachment material if your client is less than candid in his interview.

So if you believe your client genuinely suffers from *severe* emotional distress, and you believe pursuing this path is in his best interest, make sure you make explicitly clear that almost nothing about his life will be private. Tell your client he will be asked things that no one has ever asked him about before (unless they have seen therapists in the past). Again, it goes back to the original question: is your client someone who can handle this examination?

The bottom line is, you should think carefully about what specific mental and emotional distress damages you want to allege and can prove at trial. Keep in mind that if you stipulate pursuant to section 2032.320, thereby forgoing your right to call a mental-health expert at trial, you can still put on evidence your client's serious emotional distress damages through your client, a spouse or significant other, medical treaters who noted your client's emotional distress, and other damages witnesses without exposing your client to the crucible of an examination with a defense psychologist or psychiatrist.

Demand your copy of the report

You and your client survived the examination, now demand the report and enforce the demand when defendant fails to respond.

Set a calendar alert the day after your client's examination to send a demand for production of the examiner's report. Pursuant to Code of Civil Procedure section 2032.610, subdivision (a), plaintiff "has the option of making a written demand that [defendant] deliver both of the following to the demanding party: (1) A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner; [and] (2) A copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner."

The defense expert report "*shall* be delivered within 30 days after service of the demand, or within 15 days of trial, whichever is earlier." (Code Civ. Proc., § 2032.610(b) (emphasis added).) In other words, the creation of the report is not optional. The typical excuse that the examining physician did not write a report is legally insufficient. "If one party to personal injury litigation is required by…her opponent to submit to a medical examination, at the very least…she is entitled to a report of the information obtained by the adversary in litigation…. [T]he Legislature expected a written report be prepared for the examinee whenever requested, *even if one did not exist*." (See *Kennedy v. Superior Court* (1998) 64 Cal.App.4th 674, 678 (emphasis added).) In other words, the examining doctor must write a report or otherwise face exclusion.

Keep in mind that demanding the report triggers a waiver of any privilege, including work product, for any writing or report created by any of your experts. (See Code Civ. Proc., § 2032.630 ("By demanding and obtaining a report of a physical or mental examination under Section 2032.610…[plaintiff]…waives in the pending action…any privilege, as well as any protection for work product…that [plaintiff] may have regarding reports and writings as well as the testimony of every other physician, psychologist, or licensed health care practitioner who has examined or may thereafter examine [plaintiff] in respect of the same physical or mental condition.").)

So, if you retained an expert (or experts) who you intended to be

See Owen, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

only a consultant on the case, and the consultant wrote a report for your eyes only, any protection afforded that report vanishes once you demand production of the defense report. To me, this "risk" rarely affects any of my cases as I either have my client examined by my retained expert *after* the defendant's expert or I follow the Code and produce responsive reports upon defendant's demand for same (or even absent a demand, for example, in advance of a mediation pursuant to the privileges and protections of Evidence Code sections 1119, 1152, *et seq*.).

Enforcing Your Demand

To date, in less than five percent of my cases has defendant timely produced a report pursuant to a Section 2032.610 demand. The typical response is either claimed ignorance of the production requirement or that it was the doctor's fault for not completing the report on time. Regardless, the enforcement mechanism is found in Code of Civil Procedure section 2032.620. Like all other discovery motion, you must meet and confer and good faith prior to filing any motion to compel. (See Code Civ. Proc., § 2032.620, subd. (a).)

Taken seriously – and with an acknowledgment we also face challenges with timely responses from our own retained experts – the meet and confer should allow the parties to set an alternative deadline for the report's production. Unless there is some genuine emergency or unmovable deadline, will it really affect your case if you get the report two or three weeks later than you were allowed? The point is that you should be reasonable and give your colleague on the other side additional time to comply. There will surely be a time when the professional courtesy is reciprocated.

Assuming there is still no compliance after your meet and confer attempt, you must then file a motion to compel pursuant to section 2032.620. The motion is simple and can be drafted in an hour. In the few times I have actually filed this motion, the report was miraculously produced a few days after service. While I was still arguably entitled to attorney fees and costs pursuant to section 2032.620(b) and California Rule of Court 3.1348(a) ("The court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery…[if] the requested discovery was provided to the moving party after the motion was filed."), I never pursued them. The ultimate goal was achieved and I saved myself the time of attending a hearing and saved the Court and its staff from having to work up the motion.

But suppose you filed your motion, the motion was granted, and the Court gave defendant a fixed time to produce the expert's report, but that deadline came and went? Pursuant to section 2032.620, subdivision (c), "[i]f a party then fails to obey an order compelling delivery of demanded medical reports, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction…. The court *shall exclude at trial the testimony of any examiner whose report has not been provided by a party*." (Emphasis added). To date, I have never seen this extraordinary remedy ordered, but the potentially ruinous consequence makes it a potent tool in forcing a defendant to comply with the law and produce the examiner's report.

Conclusion

A defense medical exam occurs in a majority of our cases. Too often we ignore defective notices that so clearly fail to comply with the Code of Civil Procedure. It is important to enforce these requirements because they are designed to protect your clients and their cases from abusive discovery tactics that, if left unchecked, can have a significant impact on the cases' value and outcome.

Hopefully, the plan and strategies outlined above help you and your client navigate the defense medical exam and turn the defense expert into your expert or, alternatively, provide you with facts, information and knowledge that you can use to attack the defense expert's opinions, and foundation for those opinions, in their deposition and at trial.

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Endnote:

[1] For tips on how to get access to an employer or company accident report, see my article entitled "Company accident reports, a guide for compelling their production over defendant' s objections," *Advocate* (April 2018).