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Counterbalancing the Defense Medical Examination

[InDepthAnalysis]

By William D. Shapiro &
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Introduction

In the field of personal injury, the plaintiff's physical and mental condition is threshold to the determination and evaluation of a case. For this reason, the law provides the defense an opportunity to have a physician examine the plaintiff to formulate their own evaluations and conclusions of the plaintiff's injuries. Coined an "independent medical examination" (or "IME"), these defense examinations are anything but "independent." Most defense examiners are bent for the defense, whose examination and conclusions will almost certainly weigh against the plaintiff's injury claims.

In spite of the biased nature of this examination, there are a number of ways plaintiff's counsel can counterbalance the defense medical examination to strengthen the client's case. This article touches on the legal basis for the medical examination followed by some practical pointers to assist a plaintiff's attorney in making the most of the defense medical examination.

Part I: Legal Basis Physical Examination

The defense may choose a "licensed physician" to examine the plaintiff's condition in controversy. (*Code Civ. Proc.*, § 2032.020; *Pratt v. Union Pacific R.R. Co.* (2008) 168 Cal.App.4th 165, 181.) The examination must take place within 75 miles of the plaintiff's residence (*Code Civ. Proc.*, § 2032.220, subd. (a)), unless good cause is shown for required travel, in which case the plaintiff is entitled to reasonable travel expenses. (*Code Civ. Proc.*, § 2032.320, subd. (e)(2).) While the Code expressly limits the defense to "one physical examination" (*Code Civ. Proc.*, § 2032.220, subd. (a)), upon a showing of good cause, the court may require multiple examinations. (*Shapira v. Super. Ct. (Sylvestri)* (1990) 224 Cal.App.3d 1249, 1256.) Such generally occurs when plaintiff's condition worsens, or when different types of injuries are in issue, requiring examinations from different medical specialists or sub-specialists (e.g., orthopedic and neurologic specialists).

The examination can "not include any diagnostic test or procedure that is painful, protracted or intrusive." (*Code Civ. Proc.*, § 2032.220, subd. (a).) However in *Abex Corp. v. Super. Ct. (Crouson)* (1989), 209 Cal.App.3d 755, 758, the court permitted submission to procedures involving local anesthetics.

Plaintiff's attorney is entitled to attend all physical examinations

and to record the exam with an audio device or court reporter (*Code Civ. Proc.*, § 2032.510, subd. (a)), but may not videotape. (*Ramirez v. MacAdam* (1993) 13 Cal.App.4th 1638, 1641-42.) If plaintiff wishes to have their own doctor present, this should be cleared with opposing counsel in advance as such is discretionary with the court. (*Long v. Hauser* (1975) 52 Cal.App.3d 490, 493.) A representative may attend the examination in the place of the plaintiff's attorney so long as he or she presents written authorization from plaintiff's attorney at the examination. (*Code Civ. Proc.*, § 2032.510, subd. (a).) On behalf of the defense, the only persons entitled to be present at the examination are the examining physician and persons working under the general direction. (*Reuter v. Super. Ct. (Tag Enters.)* (1979) 93 Cal.App.3d 332, 339 [nurse or x-ray technician permitted to be present].) Non-licensed vocational rehabilitation or non-licensed life care planners are not permitted. (*Browne v. Super. Ct. (Reeves)* (1979) 98 Cal. App.3d 610, 615.)

Mental Examination

Where plaintiff places his or her mental condition in controversy, such as in an emotional distress or mental injury claims, the defendant is entitled to take a psychiatric or psychological examination. (*Edwards v. Super. Ct. (Santa Clara*

U.S.D.) (1976) 16 Cal.3d 905, 909.) The mental examination must be conducted by a psychiatrist, or by a psychologist under the general direction of a psychiatrist, as *all* examiners must be licensed as a physician or surgeon under the Medical Practices Act. (*Reuter, supra*, 93 Cal. App.3d at 339.) While the same recording rules apply to both physical and mental examinations, the presence of counsel is *not* permitted at a mental examination; however, courts have discretion to permit counsel to attend “*when needed*.” (*Golfland Entertainment Centers, Inc. v. Super. Ct. (Nunez)* (2003) 108 Cal.App.4th 739, 748.)

The Code does not distinguish between plaintiffs and defendants. As plaintiff’s counsel, you can demand the defendant undergo a medical examination if the defendant’s mental or physical condition is in controversy, often vision tests in automotive cases. While plaintiff is typically the examinee, these rules apply to any examinee.

The Examination Report

Plaintiff is entitled to a copy of the examiner’s report (*Code Civ. Proc.*, § 2032.610) as by conducting the examination, the defense waives any work product privileges that may otherwise apply to the examiner’s reports or deposition testimony. A plaintiff is entitled to an examination report *even if one was not prepared*, or if the examining doctor is later re-designated a consultant or withdrawn as an expert altogether. (*Kennedy v. Super. Ct. (Lucky Stores, Inc.)* (1998) 64 Cal.App.4th 674, 678.) Plaintiff may demand the doctor provide “a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner.” (*Code Civ. Proc.*, § 2032.610.) Note, however, when plaintiff demands a report from the defendant’s examiner, or takes their

deposition, plaintiff waives any work product privilege that may apply to his or her own medical examinations related to the same physical or mental condition, making the information derived from such examinations equally discoverable to the defense. (*Code Civ. Proc.*, § 2032.630; *Queen of Angels Hospital v. Super. Ct. (Jones)* (1976) 57 Cal.App.3d 370, 374-75.)



Scan and save all materials obtained at the exam and put them in your case file on this doctor. Create a redwell on the defense medical examiner to keep all materials, photographs, video and everything else you collected at the examination. You never know what will become an advantageous picture or exhibit in trial.



Part II: Preparation Is Key *Plan To Attend the Examination*

After you receive a Demand for a Defense Medical Examination, immediately review the Demand to ensure the defense complied with all mandates as a delay waives the right to object. (*Code Civ. Proc.*, § 2032.240, subd. (a).) Promptly make sure the date and time is convenient for you and your client as you do not want to be

exposed to any costly cancellation fees or sanctions for failure to appear. Always plan on attending the examination. Your presence not only permits you to record, take photographs and notes for points on cross examination, it also gives you the opportunity for a face-to-face meeting with defendant’s medical expert, to talk and listen to them, and to observe and evaluate them, their staff, and their facility, all in their own element. If you cannot make it, make sure a qualified representative is present in your place.

Pre-Exam Meeting with Client

Several weeks before the exam, set a meeting with your client to go over what they can expect. They will be comforted to know you will be there the entire time. Brief them on the importance of being early, how to dress and what to bring or not to bring. Approximate how long the exam will be and stress nothing will be painful or intrusive. Arrange to meet them in the parking lot before the examination begins as a common goal throughout all cases is making the client feel comfortable and confident.

Your client’s primary goal on examination day is to make the best impression possible. This is not a time to “sell,” over-state or whine about their injuries. Explain the doctor in many respects is testing credibility and integrity. Your client should present in a calm and respectful manner, not be rude nor over-dramatize their injuries, residuals or any aspect of their life. It doesn’t matter whether your client has suffered a broken leg or a catastrophic injury, when people are nice and act positive, others, including the adverse doctor, will truly respect them. People who like people subconsciously want to help them; so often this is true with juries, the same with doctors.

After discussing attitude and presentation, it is important to go over each of your client’s injuries and physical limitations. They should be ready to provide a truthful and honest description of their injuries, and the effect of the injuries, in a very factual way. There

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is a balance between giving an honest description of injuries and whining; your client should never seem whiney.

Remind your client to be on guard for questions about the accident, liability and causation. Explain they are not there to discuss the liability aspects of the case or fill out any forms. When asked about what happened, they should only give a basic statement of the incident such as "on April 1, 2015, I was involved in a traffic accident." Let them know if the examiner probes too deep into the facts of the case, you (the attorney) will step in to let the doctor know, "we're not going to get into the facts of the incident." Your client needs to know this is not a traditional medical exam where their doctor is trying to help them. The examining doctors are often hired guns; there is no need for small talk, no need to talk at all unless they are answering medical-related questions. Everything they say can and will be used against them later on.

Before the end of the pre-examination meeting, your client should know how to dress, who should attend, the fact that liability and causation will not be discussed and they are not to complete any forms. Explain the defense's right to a medical examination is a fair rule, that when claims of injuries are made, it is only fair both sides have the opportunity to objectively evaluate the injuries in issue. Often during this stage of the case, your client will realize the limitations of their claims, and will come to a more realistic expectation of their case. With proper preparation, clients are usually ready and prepared for their defense medical examination.

Research the Doctor

Today, Google and other search engines empower us to do extensive research on the examining doctor. Start your file on this "professional witness" long before the examination takes place. Go online, ask colleagues, search the cases to see what activities this doctor has been engaged in. While you are preparing for the exam, you are

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also preparing for cross examination. If they advertise, get the ads. If they have written books, articles, seminar materials or the like, get these writings. Try to get past medical exam reports they have written and past depositions. Legal organizations have information banks or blogs where information can be obtained on these doctors. Research their credentials, board certifications and any issues they have had with any organizations. Determine if the doctor has a clinical practice or are they only doing defense medical exams. Suffice to say, get as much information about the doctor as possible, both good and bad. Remember: on many occasions, it is the defense medical examiner who is your best damage witness.

Part III: Be Active On Examination Day

The Defense Medical Examination is not only useful for establishing injuries, it is a great way to investigate the defendant's medical expert and gather more information

for cross examination. Focus on gathering information and protecting your client's interests from the moment you arrive until the moment you leave.

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walk in together as a team. Use your phone to take pictures of everything from the moment you arrive until the moment you leave the premises: the building's exterior, any exterior signs, interior signs, placards, the office, the doctor, the examination room and anything else unique or out of place. Don't be blatant, but take them; pictures are great to include on your opening statement PowerPoint. Take a copy of all promotional materials in the office and get the doctor's business card, as these may provide hidden gems for cross examination.

Doctor's Staff, Waiting Room

When you arrive at the doctor's office, always be polite and courteous to everyone in the office even though sometimes staff can be hostile. There are times when staff will be very courteous and you can gain good information in small talk about the doctor's practice. While in the waiting room, look to see who is there; often times these doctors set multiple defense medical exams on

the same day and you will see other lawyers with their clients or just people holding letters where it's clear this doctor has scheduled multiple defense medical exams that day. Depending on the doctor, it might be a good idea to subpoena the doctors calendar for the day of the exam which may not only establish the number of "clients" they examined on one day, but also the amount of money the doctor is making in doing defense examinations.

No Forms Completed

Sometimes the doctor's staff will hand your client a clipboard full of forms just like any normal doctor's visit. There is no need for filling out forms. In a courteous manner, advise the staff it is best to just ask questions and take the notes. Notes taken by staff are fine but depending what they say, forms in your client's own handwriting can be devastating when published to a jury. Filling out forms is not necessary and will, more often than not, do more harm than good.

There may be times the doctor has

your client write something down as part of the examination of motor skills. Make sure to get a photograph of any such writing for your own records and while the audio recording is on, request the doctor keep the writing and include it in his or her report.

Make a Record of Everything

Keep a time schedule from the time you arrive to the end of the examination. Once in the building, record the time you arrived in the office, the time you were called back to see the doctor, the amount of time the doctor actually saw your client and any times the time the doctor entered or leaves the room. There will be times the doctor never physically touches your client; note that.

While you are entitled to have a court reporter present during the examination, it is generally unnecessary as it can be clumsy and constraining, and it tends to over-occupy space and time. A small recording device or second smartphone is useful and convenient, just let it run

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and announce things as they happen like creating a record in trial, "We arrived at the office, it's 10:05," and "It's 10:23, we are going in the examination room." An old non-working smart phone is discreet, you are assured no one will call and interrupt the recording and it serves as an extra camera if necessary. Before you end the recording, make sure to request copy of the doctor's entire report and ask the doctor what he has received before the exam, try to get a list of everything the doctor received as of the date of examination.

Limit Who Is Present

Depending on the severity of the injuries, the defense may request other professionals be present during the examination such as life care planners, vocational rehabilitation specialists or others. Sometimes it is best to limit the other professionals in the room. While non-physicians are not permitted to examine the plaintiff (see *Reuter* and *Browne*, *supra*), there may be times when such is appropriate for your case. If you do permit others to attend, make sure to get their full name and contact information, credentials and take a photograph of everyone just in case, and do not permit any discussion between anyone other than the designated examining doctor and your client.

Liability or Causation Will Not Be Discussed

As was discussed during the pre-exam meeting with your client, causation or liability will not be discussed. This is important. If the doctor starts to ask questions about the details of the incident, you can step in. The purpose of the examination is for the defendant's examiner to assess your client's 'then medical condition,' not to determine what happened in the accident or what caused the injuries. If the doctor begins asking questions about the accident or in any way alludes to the topic of liability, cordially advise the doctor we are not going to discuss what happened. This generally can

be taken care of with one respectful but pointed comment.

If You Cannot Attend

There will be times where busy schedules prevent you from attending. In such case, have another attorney in your office or colleague attend. Alternatively, there are experienced nurses who are available to accompany your client to the examination. Make sure you meet with the person standing-in and go over with them these basic guidelines. Exchange cell phone numbers in case any emergency or unforeseen event arises. Always provide your stand-in with a written authorization signed by both you and the client. It's a good idea to introduce the nurse or other attorney to your client before the examination. Ideally, have them attend the pre-exam meeting with your client.

Polite, Courteous and Cooperative

It's always important to be polite courteous and cooperative at all phases of a case and the defense medical exam is no exception. Remember if the doctor likes you and likes your client, they are more likely to be favorable toward them.

Part IV: The Finish Demand a Copy of the Report

After the examination is complete, serve a formal written demand for a copy of every written report prepared by the doctor as a result of the exam. The codes specifically states you are entitled to a report that sets forth the "history, examinations, and findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner." (*Code Civ. Proc.*, § 2032.610.) Request a copy of all writings and materials including Review of Records, and any reports the doctor has prepared, every version and every draft of every report. You should also demand a copy of all writings and materials the examiner reviewed in preparation for the examination. This way, there will be no surprises at trial.

Save All Materials

Scan and save all materials obtained at the exam and put them in your case file on this doctor. Create a redwell on the defense medical examiner to keep all materials, photographs, video and everything else you collected at the examination. You never know what will become an advantageous picture or exhibit in trial.

Conclusion

This overview of medical examinations was intended to provide a basic foundation of the legal basis, preparation for the examination, your activity on examination day and how to finish the process. A defense medical examination is an exceptional opportunity to establish credibility for all aspects of your case, all while spreading good news from the doctor to the defense lawyer that your client is a great person.



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