Defense medical examinations

Understand the law and protect against common defense traps

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Defense medical examinations are demanded in almost every personal-injury case. It is asserted that a defense medical expert hired to conduct the examination is someone, possibly the only one, who will render an "independent" opinion as to the plaintiff's injuries. Plaintiff attorneys know this is a fallacy but juries do not, which means that plaintiff attorneys must be able to stay ahead of their adversaries throughout the defense medical examination process. The purpose of this article is to explain some common tricks defense counsel and their medical experts try to get away with, and ways you can avoid and protect against them.

Serve written objections

Code of Civil Procedure sections 2032.210 - 2032.650 discuss defense medical examinations and the scope within which they can be conducted. They also govern the types of restrictions as well as the process of placing those restrictions.

Generally, defendants will serve a demand for a medical examination after some basic interrogatories and production has occurred, medical records have been subpoenaed, and the plaintiff's deposition has been conducted. The defense demand for independent medical examination will likely state something like the following:

> This examination shall include such tests and procedures which are ordinarily considered part of a general physical and medical examination and necessary for the examining physician to evaluate the Plaintiff's injuries that are in controversy in the subject accident. The doctor may ask questions relating to the nature and extent of the injuries alleged to have been sustained in the accident; Plaintiff's present symptoms; Plaintiff's medical care and history, including the manner in which the injuries were incurred; prior injuries and diseases.

You have 20 days after service of the demand to serve your objections per section 2032.230(b) or you waive your client's rights. Among others, your written objections should always address two common issues: 1) the generalities used to describe the tests to be conducted and, 2) written or oral questioning by the defense expert regarding the accident, plaintiff's medical care and history, and prior injuries.

Limitations to the physical examination

According to section 2032.220(c), the demand must set out the medical examination, not a "general physical examination" as noticed, and limit it to the parts of the body which have been placed into controversy. You should object to any physical examination beyond the parts of the body which plaintiff has placed in controversy.

Further, you should object in that the defendant has not specified, using precise medical names, the examination to be conducted as required by section 2032.220(c). The physical examination must be limited to those clinical examinations which are specifically set forth in the demand or otherwise agreed to. In the above example, the defendant's generalized reference to "a general physical and medical examination" is improper. You should thus demand that defendant serve a supplemental demand that complies with your objection.

Limitations to the interview

The defense medical expert will always try to ask the plaintiff about the accident itself. Remember that the defense medical examination is not a deposition. You should object to the scope of the examination to the extent the defendant seeks to determine causation of the

njuries sustained by plaintiff due to defendant's negligence. Assert that the plaintiff will not discuss the manner in which the subject accident occurred other than to describe it in general terms. Lastly, you should state that the defendant is entitled to a medical examination and that plaintiff will only provide information pertaining to plaintiff's physical condition.

As to questions about plaintiff's pre- and post-incident medical history, state that the plaintiff is not expected to remember or to specify with any complete degree of accuracy, a medical history. The defendant will have had the opportunity to elicit through discovery a complete medical history, including prior treatment, and to secure all relevant medical records. The Discovery Act does not provide for the taking of a medical history.

Section 2032 does not contain any language permitting the defense doctor to conduct a "full medical history" examination of plaintiff. The statute's operative term is "physical examination." The only exception is section 2032.610(a)(1) which demonstrates that the omission of the term "history" throughout the rest of section 2032 was done deliberately and with knowledge of the difference between the two terms. Basic statutory interpretation demands "[a] court may not add to or detract from a statute or insert or delete words to accomplish a purpose that does not appear on its face or from its legislative history." (*City of Hayward v. United Public Employees, et al*. (1976) 54 Cal.App.3d 761, 766 (emphasis added).) *In Holm v. Superior Court* (1980) 187 Cal.App.3d 1241, the appellate court held that a trial court had acted in excess of its jurisdiction in ordering the exhumation of a body in an attempt to discover indisputably relevant facts. "More recent cases have made it clear that the courts are without power to expand the methods of civil discovery beyond those authorized by statute." (*Id*. at p. 1247.) In *Edmiston v. Superior Court* (1978) 22 Cal.3d 699, 704, the Supreme Court, in reviewing the predecessor statute to section 2032, refused to allow videotaping of defense medical examination on the ground that the procedure was not "expressly" or "affirmatively" authorized by statute.

In addition, a defense doctor's taking a medical history of the plaintiff is contrary to public policy. The Discovery Act sought to eliminate redundant or unnecessary discovery and incorporated the constitutional doctrine of the right to medical privacy. Interrogatories, including judicial form Interrogatory nos. 10.1, 10.2, and 10.3 have already sought information on plaintiff's medical history.

You should also state that the filing of a personal injury lawsuit does not indicate the plaintiff has waived the right to privacy or physician-patient privilege regarding unrelated matters. (See, e.g., *Britt, supra; see also In re Lifschutz* (1970) 2 Cal.3d 415, 435 [Supreme Court held that disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be "relevant" to the substantive issues of the litigation.].)

Attend the examination with an audio recorder

Code Civil Procedure section 2032.510(a) allows for an attorney to attend and audio record defense medical examinations. Nevertheless, injured plaintiffs are still sent to defense medical examinations alone because some attorneys may believe that their objections, stipulated restrictions or even a court order will suffice in properly controlling the examination. Without anyone to enforce the restrictions placed upon defense medical examinations, however, it is simply too easy for defense medical experts and defense counsel to violate plaintiffs' rights and misrepresent what happened, at the plaintiffs' ultimate expense.

To protect your client against a defense medical examiner that would otherwise be in total control, you must go to the defense medical examination with a recorder that will record the length of the examination. Your purpose will be to ensure, on the record, that the defense expert conforms to your written objections, the court order or agreed restrictions, and statutory and case law. Prepare for the examination by reviewing and bringing the objections and other written restrictions placed on the examination.

Begin recording once you enter the office. Make sure to introduce yourself and your client to the receptionist and to specify that your client is appearing to the defense medical examination. It is a good idea to also state the date and time. When the defense doctor enters the examination room, introduce yourself and your client again, notify him of your recorder, and give him a copy of the objections order, or stipulated restrictions, especially emphasizing that your client will not be answering any questions about his or her medical history and facts of the accident. More likely than not, the defense expert will try to argue about these restrictions.

The potential reasons you can offer for your position are numerous, which include: you are simply enforcing your objections; the defense medical examination is not a deposition; the defense attorneys had the opportunity to provide the expert with your client's records as they were already produced or subpoenaed; the defense attorneys had the opportunity to provide the expert with your client's deposition; the expert should have reviewed the records and deposition; the code does not provide for the taking of a medical history; and the expert should only conduct a physical examination. In principle, you should not have to provide more than one reason, but it is always good to have various reasons in the likely event of an uncooperative defense medical examiner.

Keep in mind that you are creating a record through your audio recorder, so make sure to maintain a firm but respectful tone when explaining why the doctor cannot ask about your client's medical history. As much as you may want to, it is not the time for accusatory remarks and bad words. Code of Civil Procedure

section 2032.510(b) states that the observer "may monitor the examination, but shall not participate in or disrupt it." Further, section 2032.510(e) states: "If the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order." It is the defense medical expert that should look like the unprofessional aggressor, not you.

If the expert is abusive and engages in unauthorized diagnostic tests and procedures, section 2032.510(d) allows for you to suspend the examination and move for a protective order. Should you decide not to suspend the examination, however, you will still have a great record for destroying his credibility.

Conclusion

Attending the defense medical examination to enforce your objections with a recorder is essential. Doing neither can make you and your client fall prey to a number of dirty tricks by the defendant and defendant's expert, both during the examination and afterwards. One trick already alluded to is the improper questioning of your client about facts of the accident as if to conduct a second deposition which could create inconsistencies and weaken your client's credibility. Other tricks at the examination include improperly questioning your client on matters to which he or she has the right to privacy such as sexual relations and sexual history, inappropriate psychological questions, and questions about unrelated medical conditions.

However, the acts of serving objections and enforcing restrictions with a recorder at the defense medical examination is only a part of the bigger picture. By taking the above precautionary steps, you will inhibit the defense from laying the foundation to impeach your client at trial. Without any evidence to the contrary, the defense medical examiners can later misstate your client's responses at his or her deposition or at trial, mischaracterize what your client said or did during the examination, mischaracterize what the expert said or did during the examination, and report inaccurate findings to support the defendant. In addition to protecting your client against defense tricks, serving objections and attending the examination will enable you to lay the foundation and obtain evidence for a motion in limine to restrict or limit the defense expert's testimony.

Plaintiff attorneys know that the defense medical examiner chosen by the defendant will be the one who will later accuse your client of malingering, of having undergone excessive medical treatment, or of not needing much future medical treatment, if any. Your effort in serving objections and creating a record will not only protect your client's rights at the examination, but it will also give you the means to show the jury who the "independent" examiner really is – another well-paid advocate of the defendant.

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William Veen founded The Veen Firm *as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates, and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003. For more information, please see www.veenfirm.com.*