

Okay, now cough

Preparing for and attending the defense medical exam


Cooper

By Miles B. Cooper

The defense doctor sat at the witness stand. "The plaintiff stated at the exam that she had no prior back injuries. This was incorrect, as demonstrated by her prior medical records. She is either an inaccurate historian or she's motivated by secondary gain."

The plaintiff's lawyer perched on the edge of the seat, anxious to start the cross-examination.

Defense medical exams

Defendants typically hire a doctor to examine the plaintiff, write a report, and testify in the case. Typically, the report states the incident caused sprains/strains, should have resolved within 4-6 weeks, and that the plaintiff's complaints are likely due to secondary gain. Jaded? Yes. But an accurate summary. So how does one contain the defense medical expert?

Begin at the beginning

It starts with the examination demand. Prepare a timely objection to the myriad objectionable requests. In cases with multiple injuries, a head injury, or psychological injuries, the defense may request multiple exams or a mental exam. Technically, the defense is required to move the court to get anything beyond one physical exam. Practically, the defense motion is likely to be granted. Given that practicality, consider agreeing to the exams, with limitations, rather than require court intervention.

Don't agree to a vocational rehabilitation exam, however. Defendants sometimes demand these. They are not allowed under C.C.P. § 2032. If opposing counsel gets sticky on this, point them to *Browne v. Superior Court* (1979) 98 Cal.App.3d 610, which specifically holds such an exam is not allowed.

Reach out

Contact opposing counsel before the exam. Make sure the lawyer can be reached during the exam. This allows issues to be resolved without recessing the exam. Most issues arise due to doctors unfamiliar with the ground rules or trying to pull a fast one. Better to have the issue resolved right away rather than waste time on protective orders or motions to compel.

Prepare the client

Defense exams are different than depositions. A client should be prepared accordingly; letting the client know what to expect helps. Walk the client through the medical history. Having a client innocently forget a past injury can be twisted into someone who is lying for money (an "inaccurate historian"). A medical chronology prepared prior to the exam can be helpful. Providing it to the client for review before an exam – unlike a deposition – does not make it discoverable.

A quick diversion on medical chronologies: Done accurately and without spin, chronologies with the supporting records can be provided to one's own experts. Most experts hate organizing the records. It saves the experts' time (and at their hourly rate, that can be a big savings for the client).

Who attends the exam?

Someone knowledgeable about the medical-legal exam process should attend the exam. There are different schools of thought on this.

A lawyer attending the exam can be put in the uncomfortable position of potentially being a witness at trial. This is mostly ameliorated by recording the exam, discussed later.

Legal nurse practitioners are another solution. They attend the exams, understand what to expect, the limits, record the exams, and write reports detailing what occurred. An experienced paralegal can also fill this role.

There are strategy considerations here. If one has retained the doctor in the past or has a past relationship – an overly thorough deposition for example – then one might want to go in person. It also reduces the chance that something unforeseen will occur requiring the nurse practitioner or paralegal to check in.

No matter how many times one attends the exams, there are always curveballs. "How about some updated X-rays while you are here?" (No, thanks.)

Record it

The party attending the exam is entitled to record it. Do so. Doctors frequently make mistakes in the report. Some lawyers bring a court reporter. This makes an awkwardly small exam room even smaller. The stenography machine also constantly reminds the doctor to be on best behavior.

A voice recorder, on the other hand, gets forgotten shortly after it is turned on. The recording can then be given to a court reporter to transcribe. That transcript (and the audio) can be used to impeach the doctor at trial.

Get the report

Finally, demand the report and calendar a 30-day follow-up. Some doctors run behind – don't be a jerk about the 30-day deadline. But make sure the report comes in. The more difficult

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it is to get from the defense, the more likely the doctor put something helpful to the plaintiff in there.

Outro

Back to the defense doctor on the stand. The plaintiff's lawyer stood up for the cross-examination. "Let's start where you just finished, where you said the plaintiff reported no prior back problems during the exam. That exam was recorded. I am marking as Plaintiff's Exhibit 32 a certified transcript of that examination and providing you with a copy. Turn to page 20, lines 15 though 23. We're cuing it up to play the audio itself…" The jury quickly learned that it was the doctor, not the plaintiff, who was the inaccurate historian.

Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).

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