Vocational rehab examination by the defense

Don't agree to any sham demand for a vocational exam of your client by a defense expert

By Eustace de St. Phalle and Andy Clay

They often come in waves – defense demands to do a vocational-rehabilitation expert examination of your client. This often happens after a defense attorney tells a war story at a lecture about how he tricked a plaintiff's attorney into giving him something he was not entitled to in discovery. Following the lecture, we begin receiving a flurry of requests for defense vocational examinations of our clients. Sometimes these are couched as medical exams, although they are not. The defense follows the adage, "Run it up the flag pole, and see if anyone salutes."

For many years, the defense has often made these requests, and from time to time they have succeeded in obtaining vocational examinations of an injured plaintiff. Then, the charlatan defense expert will have a foundation for making wildly inaccurate claims about your client's ability to work. Many of us have repeatedly resisted such requests by pointing out that they are not authorized under California law and no California code permits such an exam. The recent case *Haniff v. Sup. Ct. of Santa Clara Cty.* (*Holman*) (2017) 9 Cal.App.5th 191 reaffirmed what we in the plaintiffs' bar have said all along: that defendants cannot

demand a vocational examination, bolstering the defense against this unauthorized discovery demand.

Plaintiff's vocational-rehabilitation expert

In a personal injury case, the plaintiff may claim future loss of income (CACI 3903C) or future loss of earning capacity (CACI 3903D). Generally, the plaintiff may claim an amount equal to what the plaintiff's expected income or earning capacity would have been if the incident hadn't happened, minus any mitigating income, i.e., what the injured plaintiff is likely to earn with their current physical limitations.

The plaintiff will often present opinion testimony about plaintiff's future income loss and mitigating income through a vocational-rehabilitation expert. Typically, a vocational-rehabilitation expert will interview the injured plaintiff, evaluate the plaintiff's skills and ability to work, and match these with the demands of potential jobs. The vocational-rehabilitation expert's opinions are usually central to the plaintiff's claims regarding mitigating income, i.e., that the plaintiff can't work, must change careers, or will not make as much money as they did prior to the incident.

Vocational-rehabilitation experts are not medical doctors. To assess the plaintiff's physical limitations affecting their potential work tasks, the vocational evaluation must rely on foundational materials and opinions of other experts. The vocational expert may obtain information from medical experts or may utilize a Functional Capacity Evaluation (FCE) to establish a person's injuries and limitations. An FCE inventories the plaintiff's ability to perform various functions (such as reaching, lifting, carrying, sitting, standing, mentally concentrating, etc.). The FCE may be done by the vocational expert, or by another professional assisting or advising the vocational expert.

While a vocational-rehabilitation expert's work often involves medical issues, this expert is primarily concerned with the potential future jobs and/or career of the injured person. The vocational-rehabilitation expert's central task is to assess how the plaintiff's physical and mental abilities and limitations allow them to fulfill (or prevent them from fulfilling) the demands of particular jobs in the labor market at particular salary rates.

Objections to defense vocational rehabilitation exams

The defendant may also retain a vocational-rehabilitation expert to evaluate the plaintiff's ability to work and potential mitigating income. However, a defense vocational-rehabilitation expert *does not have a right to examine or interview the plaintiff.*

There is no provision in the Discovery Act for a defendant to demand a "vocational examination" of the plaintiff by a non-physician. Code of Civil Procedure section 2019.010 sets forth six methods of civil discovery: "(a) Oral and written depositions; (b) Interrogatories to a party; (c) Inspections of documents, things, and places; (d) Physical and mental examinations; (e) Requests for admissions; (f) Simultaneous exchanges of expert trial witness information." Courts examining arguments for defense vocational examinations have noted that a "vocational exam" is not an authorized method of discovery under section 2019.010 or any other statutes. (See, *Browne v. Superior Court* (1979) 98 Cal.App.3d 610; *Haniff, supra,* 9 Cal.App.5th 191; discussed *infra.*)

Generally, the defense may demand a physical examination of the plaintiff under Code of Civil Procedure sections 2032.210-2032.260, or a mental examination (or further physical examinations) under sections 2033.310-2032.320. Section 2032.220 references "the *physician* who will conduct the examination." Case law holds that only a *licensed physician* may conduct an examination under sections 2032.210 *et seq*. (*Browne, supra,* 98 Cal.App.3d 610, 615)

The plaintiff's recognized privacy considerations are yet another reason the courts should not add yet another invasive examination method to the defendant's repertoire of discovery devices. Privacy and intrusiveness are a general concern with defense examinations. Physical examinations are inherently invasive. A doctor, whose job it is to disprove the plaintiff's claims, gets to examine plaintiff, touch the plaintiff's person, and measure their body parts or physical responses. California courts have recognized that physical examinations may invade the plaintiff's privacy as to their health conditions or rights as a litigant. Both statutory and case law uphold limitations into defense physical examinations. The statute limits the exam to portions of plaintiff's body or conditions that are "in controversy" in the action (Code of Civ.Proc., § 2032.220(c); examination related to other parts of the body would be invasive of the plaintiff's privacy. (See, *Britt v. Superior Court* (1978) 20 Cal.3d 844) Also, the statute prohibits any demand for painful, protracted, or intrusive tests or procedures. (Code of Civ.Proc., § 2032.220(a)(1))

Further, a defense vocational exam is almost certainly duplicative of other discovery. With respect to defense medical examinations, case law holds that taking a history from the examinee is not authorized, and is likely to be duplicative of other discovery, such as the history given in the plaintiff's deposition. (*Golfland Entertainment Ctrs., Inc. v. Super. Ct.* (2003) 108 Cal.App.4th 739, 745-746.) For vocational examinations, again, the defense has other sources for the information sought in these exams. Defense counsel usually asks the plaintiff at deposition about their work history and work limitations, and obtains documents and written discovery related to these issues. The defendant's medical experts will offer opinions on plaintiff's medical limitations that relate to employability. It would be

unnecessary and duplicative for the defendant to obtain yet another interview with the plaintiff through the defense vocational expert, on issues covered elsewhere in discovery.

Case authority prohibiting examinations

The leading case on defense requests for vocational examinations is *Browne v. Superior Court* (1979) 98 Cal.App.3d 610. In *Browne*, the plaintiff was injured in an automobile-motorcycle accident and claimed future wage loss. The defendant requested a vocational examination, arguing that the statute did not expressly prohibit vocational examinations, and the court should permit the exam based on the liberal policy permitting discovery.

The Court granted defendant's request.

The Court of Appeal reversed, holding that since the statute provided for an examination by a physician, it would subvert the intent of the statute to include vocational exams by non-physicians: "To read into the governing statute authority to conduct a physical examination by a non-physician would *subvert the express legislative policy that such physical examinations be conducted only by a physician*, by definition a person holding a valid certificate to practice medicine issued by a competent medical authority." (*Browne, supra,* 98 Cal.App.3d 610, 615, emphasis added.)

The Court also noted that the defendants were not disadvantaged by an inability to conduct a separate vocational examination, as the defendants already had enough information. Defendant had been "afforded access to all of the notes and records of the examination of petitioner conducted by the state vocational rehabilitation counselor, augmented by the latter's deposition. . . ." (*Browne, supra,* 98 Cal.App.3d 610, 616 n. 4.)

Based on the authority and reasoning of *Browne*, and the lack of a statute authorizing a vocational exam, plaintiffs have resisted defendants' demands for vocational examinations. However, defendants may sometimes demand an examination despite the negative case authority in civil law. (In Workers' Compensation cases, there is authority for demanding a vocational rehabilitation evaluation, since Labor Code section 5708 exempts workers' compensation judges from the statutory rules of evidence or procedure; see, *Holz v. Workers' Comp. Appeals Bd*. (2013) 78 Cal. Comp. Cases 484, 2013 WL 1915679.)

Haniff

This issue was recently discussed in the Sixth District case, *Haniff v. Sup. Ct. of Santa Clara Cty* (*Holman*) (2017) 9 Cal.App.5th 191, which reaffirmed the *Browne* decision against vocational exams. [The *Haniff* case should not be confused with *Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, a medical malpractice case often cited regarding the proper measure of medical damages.] *Haniff* was a personal-injury auto accident case in which the plaintiff sustained a fractured pelvis, and claimed he could not return to work. The defense sought to have the plaintiff examined by a vocational-rehabilitation expert. The defendant successfully moved the trial court to compel this examination, based on the broad authority of Code of Civ.Proc., § 2017.010 and the need for the exam to avoid injustice, as well as out of state authority supporting defense vocational exams.

On a writ of mandate, the *Haniff* Court reversed the trial court's decision. The Court noted that generally, civil discovery "cannot be expanded beyond the statutory limits." (*Haniff, supra,* 9 Cal.App.5th at 199.) The Court cited *Browne* with approval, noting that *Browne* did not find any legal rationale for authorizing vocational exams. (*Id*. at 200.) The Court also noted that C.C.P. § 2019.010 listed six authorized methods of discovery, which did not include vocational exams. (*Id*. at 200-201.) The history indicates that the Legislature intended these six methods to be the complete list. (*Id*. at 202-203.) C.C.P. § 2017.010 could not authorize new methods of discovery as it only discussed the scope of discovery. (*Id.* at 205-206.) Finally, neither Workers' Compensation Appeals Board cases, criminal cases, nor out-of-state cases, were persuasive on this issue, as California statutes were specific about permissible civil discovery methods and excluded vocational exams. (*Id.* at 206-208.)

The Court of Appeal concluded by holding as follows:

> Since a *vocational rehabilitation examination is not one of the civil discovery methods* authorized by section 2019.010, we conclude under the applicable legal principles that *the trial court acted outside the scope of the court's discretion when it ordered Haniff to undergo a vocational rehabilitation examination*.

(*Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 208-209, emphasis added)

How to object to vocational examinations

Given the recent case authority, it should be straightforward to object to a request for an examination by a non-physician vocational-rehabilitation expert. The objection can be in a form such as the following:

> Objection. Defendant's request for an examination of plaintiff by defendant's vocational-rehabilitation expert is outside the methods of permissible discovery under Code of Civil Procedure section 2019.010. The proposed examiner is not a physician and is not authorized to conduct an examination of plaintiff pursuant to sections 2032.210 *et seq*. There is no statutory authority for this examination. (*Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 208-209) Plaintiff will not submit to this examination and will not appear on the date demanded.

If the defendant tries to compel a vocational examination over your objection, you are likely to defeat this motion based on the *Browne* and *Haniff* cases, and the lack of authority for this type of discovery.

Check the code and restrict at least one of the defense tactics of misinformation and distortion.

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