The defense physical exam (medical exam) is not an interrogation

Don't let the medical examiner conduct an oral examination – this isn't a deposition

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Contrary to what they believe, the defense doctor is not entitled to an oral history from plaintiff as part of the "physical examination" permitted under Code of Civil Procedure section 2031.010. In fact, the defense has one chance to interview your client: the deposition. Counsel may argue that their examiner needs to ask your client about: (1) how the injury-producing event occurred; or (2) plaintiff's medical and treatment history. The code simply doesn't authorize this questioning. The defense may obtain this information by other means (e.g., depositions, subpoenas, written discovery). But the doctor may not conduct an oral examination outside the protection of an attorney.

Word choice matters. "Defense Physical Exam" (DPE) is probably the best name for the visit provided by section 2031.010. Unlike the verboten "Independent Medical Exam" (IME), this term accurately reflects the examiner's prejudices against the plaintiff. (See *Mercury Casualty Co. v. Super. Ct.* (1986) 179 Cal.App.3d 1027, p. 1033 (defense doctors are "not hired for the purpose of being impartial").) "Defense Medical Exam" (DME) is not a bad term, but "DPE" is best because it emphasizes that the scope of the exam is physical.

Legal basis

Why isn't it fair for the defense examiner to interview plaintiff during the DPE? First, because it is not a deposition. The protections in place at a deposition do not exist in the context of a DPE. (Code Civ. Proc. § 2032.510(b).) The DPE occurs without counsel for both sides, without a court reporter, without an oath, and without procedural safeguards. Permitting a defense doctor to ask any questions she wishes under the guise of obtaining a "medical history" could therefore pose a serious hazard. Unrestricted questioning at a DPE is more powerful than a deposition. Defendants frequently use examinees' statements for impeachment and other purposes at trial. By contrast, plaintiff's counsel has no expectation in litigation to interview the defendant outside the presence of their counsel. (California Rule of Professional Responsibility 2-100, [1] (barring contact with a represented party).)

Statutory Interpretation

The statute only provides for a "physical examination." The court's analysis of the relevant statute must start with the language of the statute, giving effect to its "plain meaning." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, pp. 208-09.) "Physical examination" is defined as "[e]xamination of the body by auscultation [the process of listening for internal body sounds, especially in the chest and abdomen], palpation, percussion, inspection, and olfaction." (Davis, Taber's Cyclopedic Medical Dictionary (22d Ed. 2013) p. 861.) Had the legislature intended to permit defendants' retained doctors to ask questions about plaintiffs' injuries or prior medical history, it would have used the broader term "medical examination," or would have specifically permitted such questioning.

A medical history is not provided for in Code of Civil Procedure section 2032 as to the conduct of the examination. The only mention of the word "history" is in section 2032.610(a)(1), which states plaintiff may receive a copy of the DPE doctor's report setting out the history, examination, findings, diagnosis, prognosis, and conclusions. In writing said report, the DPE doctor has the benefit of reviewing subpoenaed medical records, interrogatory answers, deposition testimony of plaintiff and medical treaters, and any other information provided by defense counsel. In this manner, the history can be inserted in the report.

The omission of the term "history" throughout the rest of Code of Civil Procedure, section 2032 was done deliberately and with knowledge of the difference between the two terms. It is basic statutory interpretation that "the court may not add to or detract from a statute's words to accomplish a purpose that does not appear on its face or from its legislative history." (*City of Haywood v. United Public Employees* (1976) 54 Cal.App.3d 761, p. 762.) Even though discovery tools not explicitly authorized may be arguably "fair" or "reasonable," the appellate courts have repeatedly reaffirmed that the judiciary is "without power to expand the methods of civil discovery beyond those authorized by statute." (*Holm v. Super. Ct.* (1986) 187 Cal.App.3d 1241 (no authority to exhume corpse); *Valley Presbyterian Hosp. v. Super. Ct.* (2000) 79 Cal.App.4th 417 (no authority to make party employees available for inter-views); *Ramirez v. MacAdam* (1993) 13 Cal.App.4th 1638 (no authority to videotape defense physical exam); *Browne v. Super. Ct.* (1979) 98 Cal.App.3d 610 (no authority for defense vocational rehabilitation interview).)

In *Edmiston v. Superior Court*, (1978) 22 Cal.3d 699, in interpreting the previous statute applying to medical examinations, the court refused to allow videotaping of the defense physical exam on the ground that the procedure was not "expressly authorized by statute." The court was not persuaded by the argument that the legislature had not expressly precluded the activity. The court held,

> In *Bailey* we declined to consider such claims and held the only issue was whether [the method] had been authorized by the legislature. As it had not been affirmatively authorized in *Bailey*, we declined to authorize it judicially. Videotaping is not affirmatively authorized … and, as in *Bailey*, whether it should be 'is a matter for the Legislature to determine.'

(*Edmiston*, *supra* 22 Cal.3d at p. 704 (citing *Bailey v. Super. Ct.* (1977) 19 Cal.3d 970).) Thus, consistent with well-established principles of statutory construction, the California Supreme Court has made it clear that if the conduct – a method or procedure sought to be employed within the context of discovery – is not expressly authorized by the statute, it is not permitted.

Case Law

Courts have recognized the inherent possibility of history-taking abuse under the guise of an "independent" medical examination. In *Sharff v. Superior Court* (1955) 44 Cal.2d 508 (a common law case decided before the enactment of the discovery statutes), the California Supreme Court issued a writ of mandate directing the trial court to allow an injury case to be tried without requiring plaintiff to submit to a medical examination in the absence of her attorney. The court noted, "Whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination [citation omitted]." (*Sharff*, *supra*, 44 Cal.2d at p. 510.) More recently, while allowing the use of an audio recorder during the examination process, in *Ebel v. Superior Court* (1974) 39 Cal.App.3d 934, the Fifth District Court of Appeals, referring to *Sharff*, reiterated the concern that "… the injured party can be subjected to extensive and even improper interrogation, …." (*Ebel*, *supra* at p. 936; see also, *Gonzi v. Super. Ct.* (1959) 51 Cal.2d 586.)

Psychological exams

Defendants may cite irrelevant case law dealing with psychological examinations (Code Civ. Proc. § 2032.020(c)) as a means to wedge open the parameters of a DPE. The principles behind defense psychological examinations do not apply to physical examinations. The *Golfland* case often cited by defendants is unsupportive of the proposition that a DPE should include historical questioning. (*Golfland Entertainment Centers, Inc. v. Super. Ct.* (2003) 108 Cal.App.4th 739.) *Golfland* addresses mental examinations and a distinct section of the code. Mental examinations are of course different by virtue of the exam itself, which requires extensive questioning by the defense's psychologist. To the same end, the *Golfland* court quoted the Supreme Court of California: "The basic tool of psychiatric study remains the personal interview, which requires rapport

between the interviewer and the subject." (*Id.* at p. 745 (citing *Edwards v. Super. Ct.* (1976) 16 Cal.3d 905, p. 910).) Given the special need for interviewing in the psychiatric examination in that case, the court gave that defense doctor "significant latitude" to ask questions that were duplicative of the plaintiff's prior testimony. (*Id.* at p. 744.) By contrast, a physical examination under the code doesn't require such questioning by the examiner.

Negotiating the DPE

Plaintiff's counsel should begin negotiating fair limits of the DPE by serving timely objections to the DPE notice. Upon receiving a defendant's written demand for a DPE, plaintiff may comply with the demand "as specifically modified by the plaintiff." (Code Civ. Proc. §§ 2032(c)(5), 2032.230 (a).) The objections should include one to the effect that plaintiff will appear on the condition that plaintiff gives no oral history during the examination. Plaintiff should agree to answer questions that reasonably relate to current symptoms or to the examination itself. As a threshold, the DPE doctor's questions should all be posed in present tense. Some common "fair game" examples from DPE's include:

"Can you feel when I touch here?"
"What type of shoes do you wear?"
"Do you limp at the end of the day?"
"Are you currently seeing any doctors for this?"

Questions relating to plaintiff's past treatment or pre-injury activity levels are not fair game. Here are actual samples from a DPE examiner who crossed that line:

"Before this incident, you enjoyed walking or hiking, or skiing?"
"I assume that you were fairly high activity level. Uh, let's just go right to the end. You had no previous injury?"
"I need to know, you know, if you were able to dunk basketballs."

Best-case scenario, the parties agree to parameters along these lines. You should request in writing that defense counsel send the DPE doctor a copy of plaintiff's objections and explain the new parameters to the DPE doctor. Finally, ask defense counsel to be available to receive phone calls during the DPE in case a dispute arises.

If the parties reach a stalemate in the meet-and-confer process, plaintiff should reiterate their willingness to appear at the DPE subject to the "no oral history" term. Defense counsel then has two options. First, defendant may move to compel the DPE as noticed. (Code Civ. Proc. § 2032.250(a); Weil and Brown, Civil Procedure Before Trial (TRG 2017) 8:1542.1.) Defendant must make this motion *prior* to the DPE, and not after the DPE is completed. (*Id.* at § 2032.220(a) (defense may convene only one DPE without leave of court).) Section 2032.250, subdivision (a) permits the defendant to move to compel the examination only "on receipt of the plaintiff's response." The defense may not ignore the plaintiff's modifications, allow the DPE to proceed, and then ask the court for relief ex post facto.

Alternatively, defense may proceed with the DPE but "suspend" it if plaintiff is uncooperative or disruptive. (Code Civ. Proc. § 2032.250.) If the defense examiner finds that she is unable to complete the DPE due to a lack of oral history, then the doctor could likewise "suspend" the physical examination. (*Id.* at § 2032.510(e).)

Refereeing the DPE

It's important for plaintiff's counsel to accompany plaintiff to the DPE, and enforce the "no oral history" parameter. The purpose of allowing plaintiff's counsel to attend the examination is to prevent improper questioning by the examining physician. The Supreme Court of California held en banc that a plaintiff undergoing a DPE deserves to have such "assistance and protection" during the examination to avoid improper questions. (*Sharff v. Super. Ct.* (1955) 44 Cal.2d 508, p. 510.)

Section 2032.510(a) permits plaintiff's counsel to attend and audio record the examination. On the day of the DPE, it's likely that the defense's doctor will be unaware of the limits you've set. In the author's experience, defense attorneys rarely relay the new terms, much less relay plaintiff's objections and the meet-and-confer correspondence. Even if they do, defense doctors claim not to care about "all that lawyer stuff," and so it's unlikely the doctor reads the materials sent by counsel. Finally, some examiners may disagree with the terms settled upon by counsel. With scenarios like these, it's important for plaintiff's counsel to be present at the DPE and complete any negotiations at the doctor's office.

At the outset of the DPE, and with the audio recorder on, plaintiff's counsel should make a record. Present the examiner with the objections and any agreements reached with defense counsel. Explain that plaintiff is appearing for examination subject to those terms. Ask the examiner if she previously received and reviewed those materials. Ask the examiner to proceed with the physical examination. During the course of the examination, politely intervene if the examiner crosses the line. Don't bother giving orders or advice to the doctor. Instead, simply instruct your client not to answer when the doctor poses an inappropriate question. Above all, do not interfere with the physical examination. If your conduct is disruptive, the DPE doctor may suspend the examination in order to allow defense counsel to move for a protective order. (Code Civ. Proc. § 2032.510(e).)

If you can't or prefer not to attend the DPE, consider hiring a nurse who specializes in attending medical exams to accompany your client. There are many legal nurse practitioners who are familiar with the local defense medical examiners and can offer you some guidance in addition to attending the exam.

Conclusion

Plaintiff should not submit to a medical interrogation under section 2031.010, nor to any other method of discovery not authorized by the code.

California law doesn't authorize the DPE doctor to conduct an extensive historical interview. Fight this fight, and you should win.

The author is grateful to Joseph May and other SFTLA and CAOC members who shared their excellent research and briefing on this topic. Readers are welcome to contact the author for sample briefing and favorable trial court orders.


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