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Important Limits on Defense Medical Exams

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The 1986 revision of the Discovery Act, especially the redrafted Code of Civil Procedure section 2032, provides powerful and cost effective methods for materially limiting the nature and scope of almost all defense medical examinations. Most importantly, the typically unnecessarily invasive and shotgun "medical history" by the defense doctor is no longer permitted.

THE FORMAL DEFENSE DEMAND

The new law, Code of Civil Procedure section 2032(c)(2), requires that the defendant formally demand the first defense medical exam. This important subdivision requires in pertinent part: "The demand shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform the examination."

In this writer's brief experience under the new law, almost every defense medical exam request is improper on several grounds. First, the defense attorney — who generally knows little about medicine and has had little or no contact with the defense doctor — invariably demands "a complete medical history and physical examination" or something similar. This boilerplate request is facially improper for several substantive and statutory reasons. Most importantly, the request, on its face, unlawfully invades the plaintiff's right of privacy and seeks a "medical history," which is not permitted by statute.

The plaintiff's attorney is required by subdivision (c)(5) to respond in writing to

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the defense's demand for medical exam. This is the time to state the plaintiff's objections and require the defense to modify its unlawful demands. Generally, the plaintiff should insist on the following conditions, as a minimum:

1. That the physical examination be limited to parts of the body that the plaintiff has placed in controversy.
2. That the physical examination be limited to those clinical examinations which are specifically set forth in the demand or otherwise agreed to. Generalized references to "physical examinations of the neck and back" are always improper; the statute requires that the defendant set forth, using specific medical names, the precise exams to be conducted.[1]
3. That no medical history, in writing or otherwise, be taken from the plaintiff.
4. That no X-rays be taken.

Other conditions may relate to the starting time of the exam (i.e., that it will start within 1 hour unless there is a true medical emergency), the length of the exam, etc.

THE MEDICAL HISTORY QUESTION

Defense counsel often seeks an order that the defense doctor may engage in an unsupervised, unlimited in-scope inquiry into the plaintiff's "medical history." *No medical history whatsoever should be permitted.*

The carefully balanced New Discovery Act does not provide for any "medical history taking" by the defense doctor — apparently deliberately. Moreover, the law and motion judge does not have the power, in equity or otherwise, to expand upon the discovery remedies or techniques expressly authorized by statute.

DEFENSE MEDICAL EXAMINATION "HISTORIES" ARE NOT PERMITTED

There is no language in Code of Civil Procedure section 2032 permitting the defense doctor to conduct a "medical history" examination of the plaintiff. Throughout the statute, the operative term is always "physical examination."[2]

It is a well-known basic rule of statutory interpretation that "a court *may not add to* or detract from a statute's words to

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[1] Invariably, defense counsel wants to give the defense doctor discretion to choose the precise exams to be conducted while conducting the exam. This should never be acceptable to the plaintiff. If the defense insists on this, it would be better to force the defense to make a motion on this potentially critical dispute. At that time defense can argue that they relied upon the plaintiff counsel's apparent acquiescence in proceeding with the examination. At best, the plaintiff can dispute these frequently specious claims by another doctor's declaration. At worst, the defense doctor's declaration may be used for trial impeachment.

[2] The one exception is subdivision (h), which relates to exchanging subsequent medical reports, where the words "history" and "examination" appear in the same sentence as different things. This singular reference supports the notion that the omission of the term "history" in the substantive portion of the statute was done deliberately and with knowledge of the difference.

accomplish a purpose that does not appear *on its face or from its legislative history.*'' (*City of Hayward v. United Public, etc.* (1976) 54 Cal.App.3d 761, 766 [129 Cal.Rptr. 710]; emphasis added.)

It is well understood that the term ''physical examination'' is different from ''medical history''; indeed, almost every tort lawyer has read thousands of reports from doctors billing separately for these two distinct procedures. Every health care provider is acutely aware of the distinction.

Quite obviously, if the Legislature wanted to allow for a separate defense medical examination ''history'' to be conducted outside of the well-established forms of discovery (depositions, interrogatories, subpoenas, etc.), it could have easily added the words ''and medical history'' every time the words ''physical examination'' appear in the statute. It did not do so.

Interestingly, the specific rule of statutory construction in civil discovery disputes is actually more adverse to the normal defense claim than that set forth above. In *Holm v. Superior Court* (1980) 187 Cal.App.3d 1241 [232 Cal.Rptr. 432], the court of appeal held, following many authorities, that the trial court had acted in excess of its jurisdiction in ordering the exhumation of a body in an attempt to discover indisputably relevant facts. The court explained:

> 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. [Citations.] We construe these latter authorities as meaning that in the area of civil discovery, *the judiciary has no power to create or sanction types of discovery not based on a reasonable interpretation of statutory provisions.* (*Id.*, at p. 1247; emphasis added).

In *Edminston v. Superior Court* (1978) 22 Cal.3d 699, 704, [150 Cal.Rptr. 276], the Supreme Court, applying the predecessor statute, Code of Civil Procedure section 2032, refused to allow videotaping of defense medical exams on the ground that the procedure was not ''expressly'' or ''affirmatively'' authorized by statute. (*See* also *Volkswagonwerk v. Superior Ct.* (1981) 123 Cal.App.3d 840.)

A DEFENSE DOCTOR'S MEDICAL HISTORY OF THE PLAINTIFF IS CONTRARY TO PUBLIC POLICY

The defense can be expected to ignore the legal authorities on the issue of the trial court's ability to expand the statutory defense examination by ''interpretation,'' there are no recent or authoritative contrary authorities.

Rather, the defense will argue ''fairness'' or submit a defense doctor's declaration professing his ''need'' to conduct a history ''as part of'' the physical examination process. Usually, the defense doctor will claim — truthfully, perhaps — that conventional medical practice requires an unrestricted history-taking to rule out various other (usually far-fetched) causes. The defense doctor may claim that it would be ''malpractice'' not to conduct such an examination. Do not be fooled by these ''medical practice'' arguments: they are red herrings in the legal theater into which the defense doctor has voluntarily injected himself.

This typical defense argument is directly contrary to the public policies implicit in the New Discovery Act: (1) attempting to eliminate redundant or unnecessary discovery; (2) formally incorporating the judicial and constitutional doctrine of the right to medical privacy into the Discovery Act itself, Code of Civil Procedure section

2032(c)(2); (3) encouraging the use of the Judicial Council form interrogatories (which ask three medical history questions, numbers 10.1, 10.2 and 10.3. Number 10.2, in this writer's opinion, is facially overbroad since it seeks material which is protected by the right of privacy); and (4) assuring that each discovery mechanism complements the other.

Defense counsel have argued as if the defense has no other means of acquiring this information. This is patent nonsense — the defendant can, for example, depose the plaintiff or other damage related witnesses, serve interrogatories (including the court form set) and/or acquire the plaintiff's medical records. The defense can also verify this information by utilizing index reports or other non-discovery investigation.

Whatever information is developed by the defense can be given to the defense examiner by defense counsel. The defense examiner may rely upon such reports or information in his or her trial testimony or report. (Evidence Code section 802(b).)

Moreover, contrary to prior practice, the new statute expressly provides, in essence, that, in the absence of an agreement or order to the contrary, the defense doctor has *carte blanche* to do whatever he wants during the procedure. "The [plaintiff's attorney or other] observer may monitor the examination, but *shall not participate in* or disrupt it." (Code of Civil Procedure section 2032(g)(1).)[3] Thus, the normal protective mechanisms which apply to other forms of discovery do not apply here.

It is illogical to assume that the Legislature, in the absence of language on this point, intended to allow the defense doctor, who is not necessarily sensitive to the rules of evidence or other legal restrictions (particularly the right of privacy), to ask an essentially unprotected lay plaintiff whatever he wants. In effect, the unrestricted medical history runs directly contrary to the public policy underlying the ethical prohibition against contacting a represented adverse party.

THE RIGHT OF PRIVACY LIMITATIONS

Even before the adoption of the new Discovery Act, the courts had developed the rule that the defendant could not conduct discovery on a mental or physical condition which was not placed "in controversy" by the plaintiff.

Although the leading cases focus on the mental privilege, the rule is identical with respect to "less personal" medical situations. "An individual's right of privacy encompasses not only the state of his mind but also his viscera..." (*Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 660, 679 [156 Cal.Rptr. 55].)

This limitation is particularly important. As will be seen, the defense cannot inquire as to areas of the plaintiff's medical or mental makeup that have not been placed in controversy — even if the defendant, or its doctor, has a plausible argument that those unrelated parts of the body caused the claimed injury. This is true since "relevance" is not the standard; all privileges, by definition, preclude inquiry into relevant areas of inquiry.

The theory was — and remains — that a plaintiff does not waive the right of privacy or the physician-patient privilege regarding unrelated matters merely by filing a personal injury lawsuit seeking recovery for pain and suffering. (*See*, e.g., *Britt v. Superior Court* (1978) 20 Cal.3d 844, 864, [143 Cal.Rptr. 695].) In the leading case of *In re Lifschutz* (1970) 2 Cal.3d 415, 435 [85 Cal.Rptr. 829], the Supreme Court held, *inter alia*,

> 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 litigation. (Emphasis added.)

In *Roberts v. Superior Court* (1973) 9 Cal.3d 330 [107 Cal.Rptr. 409], the plaintiff began to suffer back pains around the time she was hospitalized for overdose of pills. Following *Lifschutz*, the court held that the proposed discovery would violate the privacy and medical privilege rights of the plaintiff. The court's discussion at pages 338-339 is rather lengthy but entirely on point.

> ...[Defendants assert] that since the [plaintiff's] doctors reports indicate that [plaintiff's] tenderness is in excess of that which may be indicated by their clinical findings, there is some indication that her injuries contain a "mental component."
>
> We must of course recognize that any physical injury is likely to have a "mental component" in the form of the pain suffered by the injured person, at least insofar as he is conscious of the physical injury... Thus in every lawsuit involving personal injuries, a mental component may be said to be at issue, in that limited sense at least. *However, to allow discovery of past psychiatric treatment merely to ascertain whether the patient's past condition may have decreased his tolerance to pain or whether the patient may have discussed with his psychotherapist complaints similar to those to be litigated, would defeat the purpose of the privilege...* (*Id.*, at pp. 338-339; emphasis added.)

After noting that inquiry into a personal injury claimant's mental state would invade the plaintiff's right of privacy, the court held that such an inquiry "might effectively deter many psychotherapeutic patients from instituting any general claim for mental suffering and damage" and "would create opportunities for harassment and blackmail." The court concluded:

> *A fortiori, in a case such as this where there is no specific mental condition of the patient at issue, and discovery of the privileged communication is sought merely upon speculation that there may be a "connection" between the patient's past psychiatric treatment and some "mental component" of his present injury, those communications should remain protected by the privilege of [Evidence Code] Section 1014.*

The "[plaintiff] placed in controversy" standard of *Britt*, *Roberts* and *Lifschutz* was incorporated into the 1986

[3] Since the statute provides for mechanism to resolve potential disputes before the date of the examination, an attorney (or counsel's designated observer) at the defense medical exam may be precluded, at the risk of sanctions, from asserting the right of privacy or other legal protections at the defense medical exam itself. The defense can argue that they relied upon the plaintiff counsel's apparent acquiescence in proceeding with the exam and that the doctor's time — and the defense's money — was avoidably wasted by the failure to assert these valuable rights before the date of the exam. *Thus, it is always better to respond in detail to the defense demand in order to eliminate a possible confrontation at the medical exam itself and possible sanctions.*

revision of the Discovery Act including Code of Civil Procedure section 2032(a). Judges Weil and Brown have noted the connection (Weil & Brown, *California Practice Guide - Civil Procedure Before Trial* (1987) Sections 8:1551 et seq).

NEW RESTRICTIONS ON X-RAYS

Virtually every personal injury attorney is familiar with the practice of defense doctor's overuse of supposedly diagnostic X-rays. This potentially dangerous and emotionally upsetting practice is particularly disturbing when the exam is conducted, as is the normal practice, several years after the practical resolution of soft tissue sprains and strains. The practice is now subject to tight statutory restrictions.

Section 2032(g) provides, in pertinent part, that:

> [i]f the examinee submits or authorizes access to X-rays of any area of his or her body for inspection by the examining physician, no additional X-rays of that area may be taken by the examining physician except with consent of the examinee or on order of the court for *good cause shown*.

Thus, simply be allowing the defense access to already existing medical records (which presumably was done as part of the normal litigation process), the plaintiff may preclude the defense doctor from unnecessarily radiating the plaintiff's body. This may be a great comfort to the injured person.

CONCLUSION

The new Discovery Act provisions regarding defense medical examinations provide plaintiffs' attorneys with a very effective and self-executing procedure to raise specific material objections. Hopefully this will have a positive impact on the prior customs of wide-ranging — and frequently harassing — questioning of plaintiffs by defense doctors and overbroad defense physical examinations.

While many of these rights may have preceded the 1986 law, this procedure virtually demands counsel's vigorous enforcement of the plaintiff's legal rights, particularly regarding the narrow scope of the permissible examination and prohibition of "medical histories." ■