Prohibiting Medical Histories During Defense Medical Exams and Other Fancy Stuff

By Howard A. Kapp

Over 10 years ago, I published an article,[1] in which I argued that the defense had no right to request a so-called "medical history" – that is, a thinly-disguised quasi-deposition – during a defense medical examination (DME). In the ensuing years, I have continued to receive calls from fellow plaintiff's lawyers regarding this subject.

My personal experience in the years preceding and following the publication of the original article was that the defense routinely, but not universally, requests a "medical history" as "part" of the defense medical exam. I can faithfully report that my experience, covering dozens of cases, is that the defense will usually relent in this request when exposed to the overwhelming – but indirect – case authority to the contrary or that the strong majority of trial courts will reject the request as without legal authority and contrary to the carefully established defense medical examination scheme established in Code of Civil Procedure § 2032.

There should be no doubt as to the seriousness of a defense request for a "medical history": in effect, the plaintiff is being subjected, without any procedural protections, to a question-and-answer period (read: quasi-deposition) by a sophisticated agent of the defense. Even the right to meaningful counsel is virtually unavailable, as plaintiff's counsel is legally relegated to the status of a potted plant. (Code Civ. Proc. § 2032(g)(1).)

While the usual defense attorney will argue that the defense doctor "needs" to conduct the history, the doctor's "needs" or usual practices are totally irrelevant to this pure question of law: this is not expected to be a conventional medical examination, but a defense discovery tool. To be blunt, the plaintiff is not participating in the examination to be treated for injuries. The purpose of the examination is to provide exculpatory evidence for the defense.

> [T]he physician appointed to conduct a medical examination under Code of Civil Procedure section 2032 is not hired for the purpose of being impartial. The medical examination provided for in section 2032 is a discovery tool, just as depositions ..., interrogatories ..., request for inspection and reproduction of documents ... and requests for admission are discovery tool.... Such examinations provide a means for the defense to have a medical expert of its choice evaluate the plaintiff's claims and be prepared to testify if the case goes to trial. (*Mercury Casualty Co. v. Superior Court* (1986) 179 Cal.App.3d 1027, 1033 [225 Cal.Rptr. 100].)

Indeed, the court in *Mercury Casualty Co.* noted, at 1033, that the "plaintiff's allegations [that the notoriously-biased defense doctor had submitted a false report] indicated a naivete about discovery procedures in personal injury actions." Similarly, in the strange[2] case of *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128 [277 Cal.Rptr. 354], the court noted that this examination was in a "strictly adversarial context." (*Id.* at 1135.)

Every experienced plaintiffs' attorney is familiar with the adversarial role frequently played by such examiners. Then why would any self-respecting plaintiff's lawyer acquiesce in a demand that this appendage of the defense be allowed a "medical history"?

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Defense Medical Exam "Medical Histories" Are Not Required by Law

Every doctor, literally before he or she is allowed to approach a patient, is inculcated with the notion that they must always obtain both a (medical) history and physical exam (abbreviated "H&P"), recognizing that both are vital components of a treatment-related examination process. In fact, every physician is trained that the history-taking and the physical exam are related, but separate tasks. It is not uncommon, therefore, to see reports or medical records where the reporting doctor is able to explicitly separate medical history from the results of the physical examination. Apparently, the only group of people who are seemingly oblivious to this distinction are personal injury lawyers.

Throughout the operative statute, the operative term is always "physical examination." The very first words in the statute, for example, state "[a]ny party may obtain discovery ... by means of a physical or mental examination ...." (Code Civ. Proc. § 2032(a)(1).)

> Our analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] In determining intent, we look first to the language of the statute giving

effect to its "plain meaning." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 208-209 [271 Cal.Rptr. 191].)

The term "physical examination," for example, is defined as "Examination of the body by auscultation [the process of listening for internal body sounds, especially in the chest and abdomen], palpation, percussion, inspection and smelling." (Taber's, Cyclopedic Medical Dictionary (F.A. Davis).)

While the term "physical examination" is used repeatedly throughout the statute, there is no language in Code of Civil Procedure § 2032 authorizing the defense doctor to conduct a "medical history" examination of the plaintiff. "The statute mentions only a 'physical examination.' Nothing is said about the right to question the plaintiff regarding his or her injuries or prior medical history." (Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, ¶ 8:1520.1.)

Indeed, the term "medical history" appears only once in the entire statute. The context of that passage plainly does not authorize the doctor to obtain a medical history.[3]

In fact, the conspicuous absence of any language authorizing such a medical history in the governing statutory process is virtually conclusive proof that the Legislature never intended to allow the defense doctor to use the DME as a vehicle to redepose the plaintiff, albeit in a less controlled environment. This makes perfect sense, both practically and from a statutory construction viewpoint.

The Courts May Not Imply a Right to a DME Medical History

Every case that has ever considered the issue has agreed that the right to specific forms of discovery is purely a matter of legislative grace and that *the courts have no power to infer or create other means of discovery not explicitly created by statute.* This fixed principle of law, which is beyond legal or analytical dispute, really decides the question.

In, for example, *Valley Presbyterian Hospital v. Superior Court* (2000) 79 Cal.App.4th 417 [94 Cal.Rptr.2d 137], the court of appeal noted that there was no authority for compelling a party to make its employees available for informal interviews by the adverse side.

In *Holm v. Superior Court* (1986) 187 Cal.App.3d 1241 [232 Cal.Rptr. 432], for example, the court of appeal held, following many authorities, that the trial court acted in excess of its authority in ordering the exhuming of a body in an attempt to discover 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. [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 1247, emphasis added.)[4]

There are numerous instances where this doctrine has been strictly applied, even to the point where the result may be otherwise totally unexpected or even debatably "unfair," This is plainly a matter where the courts absolutely defer to the Legislature. The courts have repeatedly and firmly refused arguably "worthy" demands to expand the discovery devices, even slightly. "It is not the judiciary's function to reorder competing societal interests which have already been ordered by the Legislature." (*University of Southern California v. Superior Court* (1996) 45 Cal.App.4th 1283, 1289 [53 Cal.Rptr.2d 260].)

Attempts to expand the manner of discovery beyond that expressly authorized by statute has been uniformly rejected in a number of other cases where a litigant, usually the defendant, argued that such a vehicle would be "worthwhile" or "customary" or "ancillary" to a statutory procedure. Consider:

1. Held, under prior Act, improper to videotape depositions as not authorized. (*Bailey v. Superior Court* (1977) 19 Cal.3d 970 [140 Cal.Rptr. 669].)
2. Held, following *Bailey*, that *videotaping of defense medical exams* was not permitted on the grounds that the procedure was not "expressly" or "affirmatively" authorized by the former statute. (*Edminston v. Superior Court* (1978) 22 Cal.3d 699, 704 [150 Cal.Rptr. 276].)
3. Held, under current Act, improper to order videotaping of defense medical examinations as not still not authorized. (*Ramirez v. MacAdam* (1993) 13 Cal.App.4th 1638 [16 Cal.Rptr.2d 911].)
4. Held, improper to order disclosure of opinions of defendant physicians in medical malpractice case as "not authorized." (*County of Los Angeles v. Martinez* (1990) 224 Cal.App.3d 1446, 1454-1455 [274 Cal.Rptr. 712].)
5. Held, improper to compel party to advise its employees to "cooperate" by providing interviews to another party. (*Volkswagenwerk, etc. v. Superior Court* (1981) 123 Cal.App.3d 840, 849 [176 Cal.Rptr. 874]; see also *Valley Presbyterian Hospital v. Superior Court* (2000) 79 Cal.App.4th 417 [94 Cal.Rptr.2d 137].)
6. Held, improper to allow a defense examination by a non-physician vocational rehabilitation counselor. (*Browne v. Superior Court* (1979) 98 Cal.App.3d 610 [159 Cal.Rptr. 669].)
7. Held, improper both (1) to allow defense medical by licensed psychologists (result changed by new statute) and (2) to compel mental examination of guardian ad litem/mother of injured child as "collateral" to that of son even though that was indisputably customary and "necessary" to fully evaluate the plaintiff minor. (*Reuter v. Superior Court* (1979) 93 Cal.App.3d 332 [155 Cal.Rptr. 525].)
7. Held, courts have no authority to order an autopsy for civil discovery purposes. (*Holm v. Superior Court* (1986) 187 Cal.App.3d 1241 [232 Cal.Rptr. 432]; *Walsh v. Caidin* (1991) 232 Cal.App.3d 159, 162 [283 Cal.Rptr.2d 326].)

All of the above examples have common factual elements and the same legal result. In each case, the party seeking discovery offered a plausible, sometimes appealing, argument that its "rights" to a fair trial would be severely impaired by some artificial (read: legal) prohibition on its ability to secure that otherwise-unavailable information. In each case, the party opposing discovery argued to the trial and appeals courts: "You can't do that, judge." In each case, the result was the same: the courts followed the law and refused to expand the available array of discovery devices beyond those explicitly established by the Legislature. Analytically, the medical history situation presents the identical situation.

The Prohibition of a Defense Exam "Medical History" Is Not Just a Legal Technicality, But Is Consistent with the Remainder of the Statutory Scheme

A defense doctor's medical history-taking is totally inconsistent with the rest of the statutory discovery scheme.[5] First, the reality, which the Legislature obviously understood, is that the *defense doctor would be provided by the hiring attorneys with medical records, depositions, and other otherwise-available materials to review.* The defense examiner, of course, may rely upon such reports or information in trial testimony or in a report. (Evid. Code § 802(b).)

Secondly, the deposition procedure – which is after all, *the legally-authorized* means of obtaining a detailed medical history from the adverse party – is highly structured and formalized, with full participation by the plaintiff's attorney and a panoply of rights and privileges. *No similar rights exist in the defense medical exam procedure.* To the contrary, the law explicitly provides that all deposition-like protective mechanisms are *not* available during a defense medical exam: "The [plaintiff's attorney or other] observer may monitor the examination, but *shall not participate in* or disrupt it." (Code Civ. Proc. § 2032(g)(1), emphasis added.) Thus, the normal protective mechanisms which apply to other forms of discovery do not apply here; while counsel may observe the exam process, they are expressly relegated to the status of potted plants.[6]

Why would a significant amount of law and practice develop around deposition practice if the defense could have its doctor essentially re-depose the plaintiff under the guise of an unfettered "medical history" when the examinee's attorney is statutorily bound not to speak? It is illogical to assume that the Legislature, in the absence of any 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[7]), to ask a statutorily-unprotected lay plaintiff *whatever* the defense doctors wants, or deems "relevant." Besides, medical doctors, even those operating totally in a legal context, have no training or license to act as attorneys. This is self-evidently the rationale of Code of Civil Procedure § 2032(g)(1): the Legislature has (wisely) recognized that the defense doctor's office is not the proper forum for a deposition or for debating fine evidentiary points.

When to Raise the Objection to a Medical History

The defense is, of course, required to formally request a defense medical examination by a writing which, among other things, sets forth the "manner, conditions, scope and nature of the examination." (Code Civ. Proc. § 2032(c)(2).) In my experience, the usual defense counsel uses a totally boilerplate, one-size-fits-all description to meet this statutory requirement, e.g., "Dr. Notorious will conduct his usual complete orthopedic examination of the plaintiff." Not only is this overly-broad, bad practice (see, e.g., Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery," ¶ 8:1539) and otherwise improper, this leaves a potential minefield for controversy as to whether or not a medical history is even requested.

(Sometimes the defense plainly does not request a medical history; while this does reduce the chance that the doctor will request it – and virtually eliminate any chance that the plaintiff will be punished for failure to provide one – it is not uncommon for the defense doctor to have the "office staff" hand the plaintiff a stack of medical forms, including "medical history" forms, to be filed out. It is plaintiff's counsel's job to make sure that this is never done; this request to complete *de facto* interrogatories in the plaintiff's own handwriting could be worse than a defense doctor's history.)

It is my experience that many plaintiffs' counsel – for reasons that totally escape me – fail to exercise their right and duty to file a written response (see Code Civ. Proc. § 2032(c)(5); see also Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery" ¶¶ 8:1542 et seq.); moreover, many fail to even interpose an unambiguous objection to the providing of any medical history. The failure to serve an aggressively pro-active response – including the objection to history-taking – is inexcusable and can be fatal to any case that ultimately is tried.

What to Expect and How to Deal With It

I believe that, after more than 10 years of exposure to defense arguments on this very point, I have some basis to opine on the anticipated defense response to this objection.

My usual experience is that a substantial percentage of defense counsel accept the validity of the objection. Many of them, without even considering the validity of the legal arguments (as set forth above or otherwise), see the obvious logic in their being prohibited from conducting a "second deposition" at the defense medical exam.

Others will argue that "the doctor insists" on a medical history or "the doctor doesn't want to rely upon 'some lawyer's' deposition or history-taking" or the like. These arguments are totally without colorable legal merit. The defendant's agent does not set the rules; the law does. (See e.g., *Reuter v. Superior Court* (1979) 93 Cal.App.3d 332 [155 Cal.Rptr. 525] [defense doctor's undisputed declaration that it was universal for child psychologists to also examine the mother was not sufficient to require the mother's examination as "collateral" to that of her child since that was not permitted by law].) If defense counsel has a problem with their paid agent's willingness to the comply with the law, that is not a reason to alter the law; if this doctor-agent refuses to comply with the law, the defense has no choice but to acquire an alternative examiner who will. Simply remind defense counsel that this is not a "normal medical exam" and that the doctor has to conform to the law.

I have had several defense attorneys cite the pre-statutory case of *Sharff v. Superior Court* (1955) 44 Cal.2d 508 [282 P.2d 896], which permitted defense medical exams prior to the enactment of the discovery statute. Considering that this case was decided years before the enabling statute subsumed the field and that literally dozens of modern cases, including several from the Supreme Court, have rejected any residual judicial authority to create discovery mechanisms in the intervening years, this case is completely worthless as a precedent today.

The biggest defense objection seems to be tantamount to a religious dogma and not a real-life legal argument. Some

defense lawyers use platitudes about the liberal approach to discovery; this liberality, as discussed above, does not extend to *the approval of extra-statutory discovery mechanisms*. Indeed, many of the above-cited cases address the "liberal approach" mantra and expressly find it inapplicable in this context. The mere fact that we are resisting discovery does not mean that the plaintiff will lose a discovery motion; liberality in discovery cannot function as a fig leaf for naked judicial legislating or defiance of established legal doctrine.

What is clear, however, in my experience, is that no defense lawyer or judge has questioned the validity of these authorities or their applicability. However, in those few cases where defense counsel actually insisted on pursuing a motion, their arguments were entirely "equitable" in nature, appealing strictly to the courts' liberal attitude towards discovery.

When You Receive the Notice ...

When you receive a demand for a defense medical examination, you should compare the notice with the requirements of the statute. You would be amazed how many defense attorneys submit demands for defense medical examinations that do not comply with the statute. First, check to make sure that the examiner is qualified under the statute. Usually, this only applies to examinations conducted by non-medical doctors. Second, be sure that your client is claiming damages for future or present injuries. If your client has recovered or will stipulate that they have recovered from the injury, then the defense has lost its right to a medical examination as a matter of law. (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878 [58 Cal.Rptr.2d 476].) This case is illustrative of a related point: DMEs are allowed for *examination* of then-observable medical conditions, not to generally bolster the defense doctor's general credibility at trial (i.e., to avoid the nagging question of whether the defense doctor ever saw or examined the plaintiff, unlike, in most cases, the plaintiff's treating and testifying doctor).

A corollary of this rule is that, in many cases, the defense attorney who orders an early DME may be able to have a broader, more extensive exam. This is counter-intuitive tactically to many defense attorneys, who prefer a late exam, both because it implies intervening healing (and therefore a more benign exam in fact) and allows the defense to argue, and know, more current information. It also, not coincidentally, allows the defense to hide their expected expert for as long as possible.[8]

Next, be sure that the examination concerns an injury that *the plaintiff has tendered* into the litigation. "[T]he scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 864 [143 Cal.Rptr. 695]; see also, *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 839-840 [239 Cal.Rptr. 292]; Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, "Discovery" ¶ 8:1553; *Davis v. Superior Court* (1992) 9 Cal.App.4th 1008, 1017 [9 Cal.Rptr.2d 331].) The examination is, by statutory intent, a limited one.

Be on the look-out for especially intrusive examinations or proposed examinations based solely on a defense theory of discovery relevance, which should be prohibited.[9] Plaintiff's counsel must be alert to defense theories of "relevance" which do not meet the tough standards to overcome the privacy concerns. (*Davis v. Superior Court* (1992) 9 Cal.App.4th 1008 [9 Cal.Rptr.2d 331].)

The Plaintiff's Reply

A plaintiff's attorney has the absolute obligation to submit a reply that protects the client. Attached is a sample form reply you can "cut and paste" to apply to your particular case. The form is not exhaustive but serves as a starting point. You should feel free to add or modify the paragraphs to address your specific concerns. The reply should attack any flaws present in the demand.[10] This is where objections should be raised as to the procedure of the examination, the qualifications of the examiner, and other incidental concerns.[11] Furthermore, the reply should inform defense counsel and the examiner that the plaintiff will have a representative present at the examination.

The plaintiff's representative, armed with an effective reply limiting the exam, is the most powerful tool you can use to protect your client during this critical, but otherwise uncontrollable, event. While this person cannot interfere with the examination, you must insure this person's attendance at the examination and this person's intimate knowledge of the conditions. It is amazing that plaintiff's attorneys still send their unsuspecting clients to defense medical examinations alone.

Instructing the Client and the Representative

Plaintiff's attorneys have a duty to instruct both their clients and the representatives about the limitations of the examination. The representative's job is to protect your client. The representative is to faithfully enforce the terms of the exam and to prevent unreasonable pain to your client; moreover, such examiners should quietly time each discreet aspect of the exam.[12] Attorneys should instruct the representative to strictly forbid the examiners and their staff from obtaining a medical history, in writing or orally.

Clients should be informed that doctors are routinely trained to observe the patient even when the formal exam is not taking place. Defense examiners commonly carefully observe the patient as they mount or dismount the examining table; defense examiners have been known to plant a dollar bill on the ground to observe whether a plaintiff will bend down to pick it up. While such devices are designed to uncover malingering, unconscious or not, they may be subject to gross misinterpretation. (E.g., back-injured patient is observed bending over to pick up dollar bill but the doctor either doesn't see, or fails to record, that the plaintiff grimaced during this activity.)

Following Up After the Examination

Attorneys have a strong interest in following up after the examination; indeed, the failure to do so may be fatal to the case. Many articles have been written about the importance of getting the examiner's report as provided by the governing statute. This is critical, but just the tip of the proverbial iceberg.

You *must* subpoena the records of the examiner who conducted the defense medical examination. These records include any notes, reports, record reviews, copies

of external medical records reviewed and/or marked on by the defense doctor, medical-legal billing rates sheets, correspondence, billings, test results, and any other documents that reference your client.

The DME bill itself should be a revelation: virtually all DMEs charge seemingly outrageous amounts for their exams; this is, in truth, a major motivation of such doctors. The jury needs to be informed of this; that the defense doctor is not the moral or ethical equivalent of a medical colleague who is donating his or her time to salvaging lives and hopes in Third World disasters.

A thriving DME practice, it can be argued, is a literal license to steal. Most DMEs are billed at rate of 4 or more times the doctor's normal office rate and roughly equivalent to surgery time (which, incidentally, usually includes post-operative visits). The doctor is not treating the patient and therefore has little or no malpractice exposure, no risk of failure of treatment, no responsibility for treating the patient (e.g., no late night phone calls, early morning surgeries or hospital visits), a reliable, non-contingent source of payment, no pre-approval hassles, no requirement of a pleasant bedside manner, no stress, no HMO or PPO hassles. If the patient doesn't show (even for good reason), the doctor still expects to be paid. The defense doctor has the perfect vision of hindsight in evaluating the care provided by his or her colleague and invariably may ignore, without having to deal with the unpleasantness of a complaining patient, the "mere" palliative (pain relief) benefit of many treatment modalities, slyly testifying that this or that modality did not accelerate a cure.[13] The defense doctor's work is generally all done in the comfort of the doctor's office and, if outside-of-the-office testimony (or even a phone consultation) is required, that can be billed at the highest possible rate. The record review can be dictated at the doctor's pleasure and pace. Finally, the doctor is encouraged to pontificate on the actions of others, certainly a boost to many doctor's egos.

Not only this, but many defense doctors, in their hubris, submit their bills directly to the defendant's insurance company, or include the insurer's name as part of their chart, thereby exposing them

to charges that they pander to that carrier. (And possibly opening up the scope of plaintiff's discovery and even trial testimony; i.e., to establish the doctor's bias in favor of that insurance company and the financial basis therefore. The alterative is to bill the defense counsel – who, of course, is a mere conduit – and therefore create plausible deniability of a relationship between insurer and defense doctor.) Care, of course, should be made to avoid non-compliance with Evidence Code § 1155, although evidence of insurance is always admissible *to show bias*. (See e.g., *Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 795 [130 Cal.Rptr. 915].) Thus, this is proper and admissible to prove the doctor's bias (and, indeed, this may be quite pertinent) but evidence of insurance should not be argued as proving liability or offered in a pandering way.

Oftentimes – and this is an unprofessional but not uncommon practice – defense counsel, well aware of the potential for having to disclose the exam report pursuant to Code of Civil Procedure § 2032(h), instruct the defense examiner to prepare two reports (or, just as commonly, these litigation-savvy doctors will separate the reports without request). The first, entitled, "Report of Independent [sic] Medical Exam" (or the equivalent) will blandly relate the hard findings of the examination, but frequently with little or no analysis.[14]

The second report, reporting the doctor's review of external medical records, may be much more important and invariably is not provided pursuant to a simple Code of Civil Procedure § 2032(h) request. Such "record review" reports may set forth the doctor's anticipated trial testimony, provide both (1) an anticipatory basis for your expert's counter-opinions and/or (2) a neat summary of the records, which incidentally may save you the money involved in having your expert repeat this frequently time-intensive labor (i.e., send this to your doctor). Moreover, the existence of such a "record review" report will totally undermine any law-and-motion assertion that the defense doctor "needed" an oral medical history.

Furthermore, you want impeachment information such as the amount of time the examiner spent versus how much the examiner was paid; you cannot imagine the joy of finding that the defense doctor's criticism of the treating doctor's "outrageously high" bills when their own bills are invariably much higher.[15] Also, request any prior billings for the defense firm by the examiner. The goal is to cast as broad a net as possible so as to get as much information as possible.

Conclusion

If you are pro-active, a defense medical examination does not need to have a negative impact the plaintiff's case. The defense's right to a medical examination is a limited part of the adversarial process. You need to understand the role of the examination in the adversarial process.

You need to understand that tools exist to protect the plaintiff: you should use the statutory-mandated reply not only to raise the bare objections, but also to educate the defense of the limits of the examination.

The advocacy process requires you to follow up by using a subpoena to the examiner's records in addition to the examination report. ■

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[1] "Important New Limits on Defense Medical Exams," Advocate (LATLA) March 1988, p. 5; republished in Forum (CTLA) March 1989, p. 63.

[2] In that case, the plaintiff was examined in the context of a workers' compensation claim where he claimed head, neck and back injuries. During the examination, a reusable metal electrode drew plaintiff's blood. After the examination, the plaintiff volunteered to the defense doctor's nurse that they should clean the needle to protect others, since he was HIV positive. After the exam, the defense doctor disclosed this information in his report and opined that the HIV infection was the cause of plaintiff's muscle tension. Plaintiff then sued the defense doctor for invasion of privacy.

[3] The only time that "history" is even mentioned in passing in section 2032 is in subdivision (h) – which relates to exchanging subsequent medical reports. Clearly, this indicates that the Legislature understood that the defense doctor would be expected to know and relate relevant history in *any meaningful report*; clearly, it is does not, contrary to the entire rest of the statute, imply that the only source, or even a source, of history would be the physical examination.

[4] *Holm* was followed on this precise point in *Walsh v. Caidin* (1991) 232 Cal.App.3d 159 [283 Cal.Rptr. 326], a decision by the Second District Court of Appeals.

[5] "It is a fundamental rule of statutory construction that a statute should be construed with reference to the whole system of law of which it is a part in order to ascertain the intent of the Legislature," (*Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 178 [275 Cal.Rptr. 449].)

[6] The rule relegating the examinee's lawyer to silence is not unwise; indeed, it is necessary. The statute provides for a formal demand and response mechanism which is designed to force eliminations of problems prior the defense exam itself. The defense doctor is neither a judge nor a lawyer, nor unbiased, and has no authority to resolve disputes on their own.

Clearly, the Legislature provided a mechanism to eliminate problems prior to the exam. Just as clearly, if it had wished to allow "line drawing" – for example, as to what is a "permissible" medical history – it would have allowed a right to object. It didn't. The only explanation is that the Legislature understood the term "physical examination" as being literally that and not a unregulated, free, *ex parte*, *de facto* second deposition.

[7] There is no question but that the plaintiff does not give up the right of privacy or the usual legal protections in submitting to a defense medical exam. Those legal standards may well preclude questioning on areas of potentially relevant interest; e.g., the broad protections of the right of privacy. (See, e.g., *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 840 [239 Cal.Rptr. 292]; *Davis v. Superior Court* (1992) 9 Cal.App.4th 1008, 1017 [9 Cal.Rptr.2d 331].) It is naive, if not foolhardy, to assume that a defense doctor would properly understand these *legal* restrictions, even if we were to make the assumption that the defense doctor would be "fair." We simply do not allow paid agents of one party to make binding legal decisions about the scope of discovery.

[8] Strangely, many defense attorneys, even very capable ones, persist in setting the DME after the date for the expert witness disclosure. In the hands of capable plaintiff's counsel, this provides a golden opportunity for impeachment. Certainly, it is proper impeachment to demonstrate that, in the expert witness declaration, defense counsel makes, under oath, explicit representations as to that doctor's willingness and ability to testify, etc. Here, plaintiff's counsel's own opponent has sworn that the defense doctor – who still hasn't seen the plaintiff – is already predisposed to testify favorably for the defense!

[9] The scope of the exam is, as a general rule, limited to the same part(s) of the body that plaintiff has claimed remain injured as of the date of the exam. However, in many cases, examination of an opposite limb (in medical parlance, the counterlateral limb), may be subject to examination. For example, if the plaintiff claims that their grip has been impaired, strength testing is always done by measuring grip on both hands. Likewise, where plaintiff claims present-day atrophy of a limb (which is, incidentally, not a common feature of "soft tissue" injuries), the defense counsel may be allowed to measure the circumference of the counterlateral limb to show the existence or absence of atrophy.

[10] Occasionally, defense counsel will ask for defense counsel or its representative to be present. There is – in marked contradiction to plaintiff's counsel – no authority for this. This should always be objected to. Not only is this demand legally unauthorized, but the potential embarrassment of having the client parade around half-naked, or being subjected to manual manipulation by the defense doctor, in front of adverse counsel is totally unjustifiable.

[11] One common condition proposed by the defense is a liquidated cancellation fee; e.g., "if the plaintiff cancels the exam less than 48 hours prior thereto, the plaintiff will pay $1000 as a cancellation fee." Undoubtedly, the Court could impose, on motion, a reasonable penalty for a no-show, but there is no obligation to pre-agree to a liquidated – and undoubtedly outrageous – late cancellation fee.

[12] Commonly, many of the typical examination procedures literally take seconds to complete. Anyone who has observed a range of motion (ROM) exam knows that such an exam, which can quickly become critical to the outcome of the case, can be accomplished within 2 or 3 minutes.

While, arguably, it takes "years of experience and training" to understand such findings, it is certainly relevant to a proper jury understanding of the actual exam time expended by the defense doctor. Certainly, a defense doctor who may spend 45 minutes with the plaintiff-patient (of which maybe 10 minutes are actual evaluations) is subject to impeachment for a "quicky exam," especially when the defense examiner offers many detailed opinions in testimony and may have charged the defense side, for example, $1000 for the defense exam. Good money, if you can get it!

[13] It should be beyond dispute that it is a valid role for doctors to treat pain even when pain relief treatment may not affect outcome; medical insurers pay for such treatment all of the time.

This is undoubtedly generally true of many forms of physical therapy for muscle strains and sprains. It is universally accepted that such treatments provided temporary pain relief as well as improved function. Some of this may, it may be argued by the defense, be a placebo effect or relate to the feeling that the doctor is doing something. These benefits, of course, are perfectly valid justifications for palliative treatment and, by causing the patient to feel better, permits more normal movement and therefore an improved prognosis. The direct effect on prognosis of, say, moist heat, however, is less certain which allows this common, but truly barbaric (i.e., human suffering is not worth treating), defense doctor opinion some plausibility.

If the defense makes this argument, simply ask the defense doctor if they would refuse to treat a patient to relieve pain, misery or symptoms, even if that would not cure the underlying disease. Fortunately, I have never met a defense doctor who would refuse to relieve pain, if requested to do so.

[14] Counsel for the examinee (invariably, plaintiff) has a right to such a report even if the DME did not prepare one. *(Kennedy v. Superior Court* (1998) 64 Cal.App.4th 674, 678 [75 Cal.Rptr.2d 373].)

[15] The usual minimal cost to the defense for an orthopedic DME and related work – before trial – ranges from $1500 to $2000.

I arbitrated a soft tissue case some years ago where the defense aggressively argued – citing the opinion in their DME report criticizing the treating doctor's $375 "initial evaluation and report" charge as "outrageous" – that the plaintiff's case was based on inflated billing. This argument exploded in defense counsel's face when we handed the arbitrator the DME's bill, for four times as much!

Sample Response to Demand for Demand Medical Exam

1. The physical exam shall be strictly limited to those parts of the body which plaintiff has placed in issue, which areas should be specified in the Demand to avoid any confusion and to insure compliance with the Code. (Code Civil Proc. § 2032(a); see also, Weil & Brown, *California Practice Guide / Civil Procedure Before Trial*, ¶ 8:1519.)

2. Plaintiff objects to the proposed examination in its entirety pursuant to *Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878 [58 Cal.Rptr.2d 476], as plaintiff will not be claiming any injuries on or after the date of the proposed examination.

3. Plaintiff objects to any automatic time limit for cancellation or attempt to create a form of "liquidated damages." While plaintiff does not anticipate any problems with "late cancellation" (as does the Demand), any cancellation fee discussion will have to take place after all of the circumstances are known and will involve considerations of good faith, reasonable diligence, actual proven loss, sufficiency of notice, etc. and must be mutual. In any event, 24 hours of notice to counsel shall be effective.

4. The defendant has not given the statutorily-mandated notice of the proposed examination. Therefore, plaintiff will not appear at same without a stipulation of counsel or an order of court for good cause shown. Plaintiff's counsel invites defense counsel to set forth forthwith why this examination should be permitted within 30 days of trial.

5. Plaintiff reserves the right to have an observer present at the exam, as permitted by law. No "defense observers" (other than the examiner and his or her usual staff) will be permitted to attend or observe the examination. [Note: There is *no* authority allowing *defense counsel* the right to attend a defense medical exam.]

6. No defense counsel or any representative thereof (other than the defense medical examiner and permanent and conventional staff members; e.g., nurses, technicians and other persons normally employed by the examiner) may attend the examination. Plaintiff reserves the right to request identification of any person(s), including regular staff members, seeking to attend any portion of the exam and/or to exclude any unqualified persons from the examination room.

7. The demand fails to comply with Code of Civil Procedure § 2032(c)(2) in that it fails to set forth the "manner, conditions, scope, and nature of the examination" in that plaintiff's counsel cannot determine which tests are proposed. The allegedly descriptive terms used in the defense demand do not comply with the statutory requirement and are pure computer-generated boilerplate. *Without this information, counsel for plaintiff has no intelligent means of determining whether to agree, or object, to the proposed examination.* In the spirit of discovery, plaintiff's counsel, refers defense counsel to the next paragraph.

8. Generally described examinations (e.g., "Dr. X will conduct a complete examination of the plaintiff's neck and back") are insufficient as a matter of law. (Code Civ. Proc. § 2032 (c)(2).) As an accommodation and as a demonstration of good faith, counsel for plaintiff will agree to discuss this issue with counsel, no less than 7 days prior to the date of the examination, so that the defense examiner will conduct only those clinical tests and/or examinations expressly agreed to by counsel and no others, provided that demanding counsel initiate communications on this point and provide a specific, *written* and finite list of the tests and/or examinations proposed. *Delivery of such writings may be accomplished by facsimile or by hand-delivery to plaintiff's counsel's office.* Until and unless the precise tests and examinations are agreed to by counsel and confirmed in writing by defense counsel, with a carbon copy to the examiner, at least 7 days prior to the examination, the plaintiff will have no choice but to refuse to appear at the examination.

9. The defense agrees to give plaintiff promptly and without further request all medical records, correspondence from and/or to defense counsel and/or any other person regarding plaintiff, raw data, bills, notes, and reports of any description resulting from the defense exam and/or record review.

10. As there has been a previous defense medical examination of plaintiff, this examination cannot be compelled merely by a notice (Weil & Brown, *California Practice Guide / Civil Procedure Before Trial* ¶ 8:1519.1), but only upon a motion on a showing of good cause justifying a second examination. The mere fact that the injuries may arguably involve different medical specialties does not, *ipso facto*, justify a second examination of the same condition. (*Ibid.*) In the spirit of discovery and as required by Code of Civil Procedure § 2032(c)(7), counsel for plaintiff invites defense counsel to make a written offer of proof as to justification for this second examination and why this matter was not properly covered in the initial examination. Counsel for plaintiff will reply in good faith as soon as reasonably possible to such a written offer of proof.

11. Defense counsel has failed to stipulate that no further defense examinations will be demanded or requested.

12. No questions regarding plaintiff's medical, accident or other history shall be asked, in written form or orally. The defense examiner will be limited to asking questions limited to plaintiff's then immediate physical sensations and/or complaints of pain or discomfort, or lack thereof, which are elicited by the exam itself. The defense examiner may be provided by defense counsel with any records, depositions, responses to other discovery, or other things which defense counsel deems necessary to provide the examiner with any history. Plaintiff reserves the right to provide the examiner, if requested, with basic information to verify plaintiff's identity or other information such as weight, height, etc., without waiving any objections.

Sample Response to Demand for Demand Medical Exam — continued

13. Neither plaintiff, nor any other person with plaintiff, shall be required or requested to answer any written questions or questionnaire or prepare or sign any writing, other than a document to confirm that the person appearing for the exam is in fact the plaintiff.

14. No X-rays or other radiographic studies shall be taken of plaintiff except by the express written prior approval of counsel. Such prior approval may be acquired by calling plaintiff's counsel. Defendant agrees to provide copies of any agreed radiographs to plaintiff without cost. Defendant is invited to obtain any existing radiographs prior to the exam and provide same to the examiner.

15. The defense medical examiner will fully and promptly validate and/or otherwise pay for the cost of parking, if any, associated with the examination.

16. Absent a true and unavoidable medical emergency explained to the plaintiff at the time of the examination, the examination itself will commence promptly (i.e., not later than 30 minutes after the scheduled time). Thereafter, the examination will be deemed to have be completed and plaintiff may leave.

17. Defense counsel represents: (1) that he or she has confirmed that the examiner is in the appropriate medical specialty for the examination in this case; (2) that the examiner is qualified to conduct this examination within that area of medical specialty; (3) that this is an appropriate time within the course of the litigation to conduct this examination; (4) that all other defendants currently known have, through counsel or otherwise, agreed that this examination will be conducted on behalf of such defendants; and (5) that the examiner will be aware of the agreements herein and comply therewith.

18. Any information acquired or learned in violation of this agreement will not be admissible in evidence for any reason. The parties further agree that the court or any arbitrator may, upon motion at arbitration or trial, strike, preclude or limit any testimony of the examiner in the event it finds that the examiner was not informed of, or willfully violated, the terms of this agreement in a material manner.

19. Unless expressly agreed to, or altered, by all counsel in writing, the terms of this Reply shall be deemed to be agreed to. Unilateral demands or arguments of defense counsel are *not* relevant; only the terms of the Demand, to the extent modified by this Reply or subsequent written agreement, are applicable.