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I've Got This Doctor You Gotta See!

By Katherine Gallo

In most personal injury actions the plaintiff is served with a Notice for an Independent Medical Examination. It has become so commonplace that no one really thinks twice about the demand. However, there are a few requirements to this discovery device that defendant must comply with in order to perfect the request.

Pursuant to C.C.P. §2032.020(a) any defendant has the right to demand a physical exam of the plaintiff to whatever portion of plaintiff's body or conditions that are "*in controversy*" which means the specific injury or condition which is the subject of the litigation *Roberts v. Sup Ct. (1973) 9 C3d 330, 337*. This can be determined either by the pleadings [*Vinson v. Superior Court (1987) 43 C3d 833, 840*] or by answers to discovery.

Code of Civil Procedure §2032.020(b) (pdf)) requires that that a licensed physician or other appropriate licensed health care practitioner performs the examination. Thus, a vocational rehabilitation expert who is neither a licensed physician nor a health care profession not working under the direction of a physician can perform the examination. See Weil and Brown, *Civil Procedure Before Tria*l (TRG 2012) §8:1537 citing *Browne v. Superior Court* (1979) 98 CA3d 610, 615.

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The demand itself must comply with C.C.P. §2032.220, which states:

> *(a) In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, if both of the following conditions are satisfied:*
>
> > *(1) The examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive.*
> >
> > *(2) The examination is conducted at a location within 75 miles of the residence of the examinee.*
>
> *(b) A defendant may make a demand under this article without leave of court after that defendant has been served or has appeared in the action, whichever occurs first.*
>
> *(c) A demand under subdivision (a) 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.*
>
> *(d) A physical examination demanded under subdivision (a) shall be scheduled for a date that is at least 30 days after service of the demand. On motion of the party demanding the examination, the court may shorten this time.*
>
> *(e) The defendant shall serve a copy of the demand under subdivision (a) on the plaintiff and on all other parties who have appeared in the action.*

Although obtaining an Independent Medical Examination may appear to be a simple process here are some interesting twists and turns that I have encountered that a defendant should consider before they serve their demand.

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Scenario #1: *Plaintiff was injured on a construction site when a crane hook hit him on the side of the face. Plaintiff brought a personal injury action against the defendant. In his answer to Form Interrogatory 6.1, plaintiff stated that he suffered a fractured skull, fractured jaw, migraines, hearing loss, vision loss and two broken teeth due to the incident. Upon receipt of the interrogatory answers, defendant noticed four separate independent medical examinations with a neurologist, ophthalmologist, ear nose and throat doctor and an oral surgeon. Plaintiff objected.*

Pursuant to C.C.P. §2032.020(a) a defendant in a personal injury case has the right to one physical examination of the plaintiff without leave of court simply by serving a written demand on plaintiff. The only requirement is that the physical examination must be limited to whatever portion of plaintiff's body or conditions that are "*in controversy*" in the lawsuit.

However, in this scenario, there are four separate portions of plaintiff's body that are "*in controversy*." If the defendant wants plaintiff examined by a second, third or fourth doctor and the plaintiff objects, then he must show good cause to obtain a court order. The requirement of good cause "*is not a mere formality*" that may be "*met by mere conclusory allegations.*" Hogan and Weber, *California Civil Discovery*, (Lexis Nexis 2005, updated 2012) §8:6 citing *Schlagenhauf v. Holder* (1964) 379 US 104, 118. A showing of good cause must be established and can easily be established in a variety of ways. Usually the pleadings or plaintiff's answers to form interrogatories provide the basis of good cause. Another is to determine what specialists the plaintiff has seen or will be calling as an expert at trial. Hogan and Weber, *California Civil Discovery, supra*, §8:6 cite helpful language from the federal case *Pastel v. Amana Refrigeration, Inc*. (1980, ND Ga) 87 FRD706, 709:

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> *"Unless [its ophthalmologist] is likewise allowed to examine the plaintiff, the defendant will be at a distinct disadvantage in this "battle of experts" at trial... Because the plaintiff has permitted [his own ophthalmologist] to examine him, fundamental fairness dictates that he now allow [a defense ophthalmologist] to do so also."*

In *Shapira v. v. Superior Court* (1990) 224 CA3d 1249, 1255, the California First District Court of Appeal held that a defendant who had already had the plaintiff be seen by a neurologist and a neuropsychologist could still show good cause for an examination by a psychiatrist.

In light of the statutory authority and case law, I recommend that that ***before*** defendant serve his first demand that they meet and confer with plaintiff counsel regarding the need for multiple medical exams. If that is not successful, then bring the motion to the court ***before*** proceeding with any medical examination.

> **Scenario #2:** *Plaintiff, a world class surfer, has filed a multi-million dollar claim against a maker of sun screen alleging that their product caused burns to his skin and made his skin so sensitive to saltwater that he is no longer able to compete in surfing competitions. Defendant served a Notice of IME stating, "Patch testing will be performed applying the subject product in the appropriate proportions." Plaintiff timely objected to the examination on the grounds that the diagnostic test requested is "painful, protrusive and protracted" and thus, violates C.C.P. §2032. Defendant brings a motion to compel the diagnostic testing.*

California courts have not yet defined what is a "*painful, protracted and intrusive*" test or procedure within the meaning of C.C.P. §2032.220(a)(1). However, many courts across the country have allowed specific tests and procedures to be performed: *Abex Corp. v. Superior Court (1989) 209 Cal.*

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App. 3d. 755, 758 (biopsy allowed); *Sullivan, Long & Haggerty, Inc. v. Washington* (1942, CA5 La) 128 F2d 466 [x-ray examination using lipoidol]; *Riss & Co. v. Galloway* (1941, Colo.) 114 P2d 550, [spinal tap]; *Burns v. Aetna Life Ins. Co.* (1933, Mont.) 26 P2d 175 [periodic immersion of injured hand into hot water]; *United States Fidelity & Guaranty Co.* (1919 Neb.) 173 NW 689 [x-ray procedure requiring injection of contrast substance into the

kidney]; *Cardinal v. University of Rochester* (1946, Misc) 71 NYS2d 614 [bone marrow biopsy]; *Carrig v Oakes* (1940, App Div.) 18 NYS2d 917 [cystoscopic examination of a female plaintiff]; *Bartoletta v. Delco Appliance Cor.* (1938 App. Div.) 4 NYS2d 744 [stomach examination requiring consumption of barium meal]. For more detail see Hogan and Weber, *California Civil Discovery*, *supra,* at §8:7.

In regards to how the court's should handle the issue, Hogan and Weber, *California Civil Discovery, supra*, at §8:8 recommends that

> *"California courts, faced with a motion for a painful or dangerous type of medical test should consider the practice adopted in New York and Illinois for balancing 'the competing interests of the defendant to investigate and completely satisfy his curiosity by generally accepted medical tests and the plaintiff's interest in his own safety and comfort given the risks of a particular procedure...an examinee who is concerned about the pain or the risk connected with any requested examination, must file an objection. The examinee must support its objection by declarations of physicians or excerpts from recognized medical tests that describe the dangers it poses. After such a response, the moving party must show that the requested examination has clear probative value to the litigation's ultimate issues and there is a minimal level of risk to the plaintiff. To meet this burden the moving party must present competent and specific medical evidence, not conclusory statement of defense counsel or physicians."*

So plan your arguments and strategy around this procedure.

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Scenario #3: *Plaintiff was in his pick up when he was t-boned by a cement truck. While his car veered out of control from the impact two other cars hit him. The accident caused multiple fractures in his left leg. Plaintiff was immediately operated on by an orthopedist who repaired the bones, but left plaintiff with stiffness in his left leg and it was shorter by over an inch. Plaintiff eventually sued all three drivers. The driver of the cement truck obtained an orthopedic exam of the plaintiff prior to the other divers appearing in the suit. Once the other defendants appeared in the case they two served IME notices for an orthopedic examination of the plaintiff.*

C.C.P. §2032.220(a) states, "*In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may obtain demand one physical examination of the plaintiff.*" However, there are more practical aspects to this code section then its plain meaning. In this scenario, two defendants came in the case after the first IME was performed. They didn't have the opportunity to choose the specialty of the doctor let alone the doctor. As with a deposition, they should be given the right to conduct their own discovery. However, this is going to prompt either an objection and/or a protective order by the plaintiff. So before you serve a second IME notice for the same area of specialty, ask yourself the following:

A. Can you live with the report from the first IME doctor?

B. Are you going to need to discredit the first IME doctor in order to get your own doctor to perform the IME?

C. If there are conflicting reports from the two IME doctors, how are you going to handle it?

D. Can you do an IME in another specialty (i.e., neurology, plastic surgery, etc.)? See *Shapira v. v. Superior Court (1990) 224 CA3d 1249, 1255*

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If you still want to proceed with your own orthopedic IME then you should bring a motion pursuant to pursuant to C.C.P. §2032.320(a) and be prepared to show good cause and why it is not considered harassing the plaintiff. Some of the arguments you can make in showing good cause is:

A. Significant time has passed since the last IME

B. Continuing injury or injury has worsened *Vinson v. Superior Court* (1987) 43 C3d 833, 840.

C. A subsequent accident or injury since the first IME was performed.

D. Different area of expertise (i.e., neurologist, plastic surgeon, etc.).

Remember that when you bring your motion you will need a separate statement and a declaration showing that you met and conferred with plaintiff's counsel.

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