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Plaintiff's Rights Regarding an Independent Medical Examination

By Katherine Gallo



When plaintiff receives a demand for a physical examination he or she have 20 days after the service of the demand to serve their response. Pursuant to C.C.P. §2032.230, plaintiff has three options:

1. Agreeing to the request;
2. Agreeing as modified to the request; or
3. Refusing to submit to the demanded physical examination for reasons specified in the response.

If plaintiff refuses to submit to the physical examination, then the response must specify the reasons. The most common objections are the:

- date, time and location of the IME;
- IME is not being performed by a licensed physician or other appropriate licensed health care practitioner;
- scope of IME is outside the “condition in controversy” and/or
- IME includes painful, protracted or intrusive tests.



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Plaintiff is not obligated to file a protective order, as it will be defendant's burden to bring a motion to compel the independent medical examination. See Weil and Brown, *Civil Procedure Before Trial* (TRG 2012) 8:1542.1 and C.C.P. §2032.250. However, if plaintiff does not serve a timely response then all objections will be waived. C.C.P. §2032.240(a)

More likely than not, plaintiff counsel is going to allow the plaintiff to submit to the independent medical examination. If so, then there are a few things plaintiff counsel should be aware of.

1. Plaintiff Counsel May be Present During the Examination

Pursuant to C.C.P. §2032.510(a), plaintiff counsel must be permitted to observe and record a physical examination of their client. Counsel may designate a third person as the observer, provided the representative's authority to so act is in writing and signed by the attorney. C.C.P. §2032.510(c)

The court has no discretion to exclude counsel from any portion of the examination. *Munoz v. Superior Court* (1972) 26 CA3d, 643,645-646 This is to assure that the examination is restricted to the scope ordered by the court and to prevent improper questioning by the IME doctor. See *Sharff v. Superior Court* (1955) 44 C2d 508, 510

2. Examination May be Recorded

Plaintiff counsel is also entitled to record stenographically or by audio (but not video) technology "any words spoken to or by the examinee during any phase of the examination." C.C.P. §2032.510(a) This assures an objective record of what transpired and avoids unseemly dispute at



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trial between the attorney and the examining physician Weil and Brown, Civil Procedure Before Trial (TRG 2012) ¶8:1587.1 citing *Munoz v. Superior Court* (1972) 26 CA3d 643, 645-646

3. Others Present at the Examination

The presence of anyone other than the plaintiff's counsel and a court reporter lie within the sound discretion of the court. Thus, for example the plaintiff cannot insist on having his or her personal physician present. Whether such presence is allowed is discretionary, not a matter of right. See *Long v. Huser* (1975) 52 CA3d 490, 493. However, a court would probably be quite lenient if a parent or spouse or adult child of the plaintiff was present during the examination.

4. Questioning of Plaintiff is Limited

The IME statute mentions only a "physical examination." Nothing is said about the right to question the plaintiff and there is no real case law as to the permissible scope of questions for the IME doctor to ask. In practicality, the IME doctor is going to need to ask the same questions they would ask their own patient to be able to properly evaluate the cause of the plaintiff's present condition. It is also understood that an examining doctor may ask plaintiff their medical history. According to *California Civil Discovery Practice* (CEB 4th Ed. 2012) §1051 The plaintiff should be cooperative and be prepared to give:

- * A general statement of how the accident or injury occurred;
- * A concise chronological history of the treatment to date;
- * A description of the injuries;
- * A complete statement of the present complaints.



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However, an IME doctor may not cross-examine the plaintiff regarding liability issues (e.g., the color of the traffic light), inquire into areas outside the scope of the medication examination (e.g., ob/gyn questions are not pertinent in an orthopedic exam) or ask questions that the examinee has already answered (questions answered in a deposition). See *California Civil Discovery Practice* (CEB 4th Ed. 2012) §10.50 citing *Golfland Entertainment Centers v. Superior Court* (2003) 108 CA4th 739, 746.

The easiest way for plaintiff counsel to protect against inappropriate questioning by exercising is by being present and recording the examination.

4. Other Rights of the Plaintiff

Though not delineated in the Code of Civil Procedure or discussed in any of the discovery treatises, plaintiff has other rights that are so fundamental, that they shouldn't need to be listed here. Yet, due to some of the horror stories I have heard and read about regarding less than reputable IME doctors, I feel that they need to be laid out.

Plaintiffs have the right to be examined in an office that is clean, dust free, sanitized, and suitable for medical evaluation.

- * Plaintiffs have the right to be evaluated in a medical office or facility, which is in a safe and professional location of town.
- * Plaintiffs have the right to be treated and examined with respect.
- * Plaintiffs have the right to request an ambulance should an



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injury occur during the IME caused by the IME physician.

- * Plaintiffs have the right to be examined by a physician who speaks and understands English.

- * Plaintiffs have the right to refuse contact with any physician who is not clean and presentable, smells, has not washed his hands, or proceeds with the examination in a rough, painful or unexpected way.

If any of the above occurs, plaintiff should conclude the examination and seek the protection of the court.