Deposing the Defendant's Medical Examiner in Personal Injury Cases
Preparing for and Conducting the Deposition, Leveraging Deposition Admissions at Settlement or Trial

TUESDAY, OCTOBER 14, 2014

1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

Today’s faculty features:
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Taking the Defense Medical Examiner’s Deposition and Using it at Trial or Mediation

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The Independent Medical Examination
Independent ... Not

Physician hired by Insurance Company
No doctor-patient relationship
Non-medical malpractice personal injury claims
Purpose is to Deny or Minimize a Claim
Better Called

IME – Insurance Medical Exam
DME – Defense Medical Exam
The Pre-Exam Exam

Watching begins before entering the Waiting Room

Sitting down, walking within the facility, opening doors

How Plaintiff takes off a shirt and undresses
Practice Tip

Everything Plaintiff Does is Observed and Recorded

Wear loose fitting clothes that are easy to remove.
Shirts that button rather than pull off
No tight fitting pants
Easily removable footwear
Your History is Known Before You Arrive

Prior Medical Records have been reviewed
Imaging studies have been seen
The Mechanism of the Accident is known
Plaintiff Expert Reports are known
Advising Your Client – What to DO

Be Honest
Don’t Exaggerate
Don’t Minimize
Be Cooperative
Be Serious
Advising Your Client – What NOT to Do

Do not volunteer information not asked
Do not discuss how the accident happened anywhere in the facility
Do not discuss who was at fault
Do not allow an x-rays or diagnostic tests to be done
Do not use medical jargon to describe your injuries
Advising Your Client – What to EXPECT

Do Not Expect a “Fair” Report
The Questionnaire

Give Client Information Form to Fill Out Immediately After IME

- Contemporaneous Recording
- How Exam was Conducted
- How Much Time Spent
- Other Details of Exam
Sample Client Questionnaire

11. How much of the time did the doctor spend examining you?

12. Did the doctor videotape or photograph you?
   Yes ________ No ________

13. Please list all questions you recall the doctor asking you:
   a. 
   b. 
   c. 
   d. 
   e. 
   f. 

14. Please describe what parts of your body the doctor examined:
   a. 
   b. 
   c. 
   d. 
   e. 

15. Please describe all tests, maneuvers (example: raising leg, lifting arm, touching toes, bending, walk on heels, walk on toes, etc....) the doctor asked you to perform:
   a. 
   b. 
   c. 
   d. 
   e. 

 Comments or statements the doctor made about your condition or your case:

Reactions or actions about this exam that you think should be mentioned:

Doctor treated you and why:

Yes ________ No ________
Attendance by Plaintiff’s Representative

Attorney, Paralegal or Nurse
Allows confirmation of exam details
Prevents attempts to go beyond proper scope of DME
Prior Notice
Unobtrusive
Video Recording of IME

N.J. Court Rule 4:19
Notice of intention to videotape
Nurse and/or Paralegal does the videotaping
Unobtrusive
Advantages
Practice Tip

Smartphone with Tripod is more than sufficient
New Jersey Court Rule 4:16

Psychological or Psychiatric Examination


Physical Examination

Plaintiff must demonstrate that circumstances warrant representation and/or videotaping (Briglia v. Exxon CO, USA, 310 N.J. Super. 498 (Law Div. 1997))

Defense has burden to show why plaintiff attorney or representative should not be allowed at exam (B.D. v. Carley, 307 N.J. Super. 259 (App. Div. 1998))
Prior DME Physician Reports

Most DME physicians do just that – DMEs
Orthopedists and Neurologists
Reports are often contain identical boilerplate language
Reports almost always have similar conclusions
Create a file with DMEs by the Regular Players
Preparing for IME Deposition
Organize Plaintiff’s Medical Records

a. Treating Physicians - Best source of impeachment material
b. Key Records – Consultation Notes, Admission Discharge Summaries, Imaging Reports
c. Treatment Over Time
   i. Prior to time of the injury
   ii. At the time of injury
   iii. Post Injury Treatment
   iv. Imaging Reports
IME Physician Curriculum Vitae

Generally Neurologist or Orthopedist
Often not practicing clinically
Define areas of Non-Expertise
Expertise in Reviewing Imaging Studies
Independent interpretation
Rely on radiology report

Practice Breakdown
Time Spent in Active Clinical Practice
Percentage of Practice
Time Spent IME Insurance work
Percentage of Practice
Breakdown of Income
1099s and Tax Returns
Select Critical Pages

Admission Discharge Summaries
Consultation Notes
Imaging Reports
General Issues Related to The Case
Plaintiff Expert Reports

- Provide Understanding of Injury
- Provide Medical Assertions
  - Of Injury
  - Of Causation
- Insight into Medical Defenses
General Concessions

You would agree that treating physician who performed multiple exams of the patient staring soon after the injury and over time is in a better position to judge the cause and nature of the injury than your one time evaluation years after the event.
General Concessions

You would agree that pain is subjective. The same injury to one person may elicit a higher level of pain and discomfort than that experienced by another.
General Concessions

You would agree that orthopedists and neurologists do not treat imaging studies but rather patients. Some patients have abnormalities MRI spine studies but minimal or no clinical symptoms. Some patients with unimpressive findings of MRI spine studies have significant clinical complaints.
May 7, 2014

Re: Independent Medical Examination
DOB: 3/21/08

Dear Attorney,

I performed an Independent Medical Examination of Tamia Jackson at my clinical office in Newark NJ on Monday May 4, 2013. Tamia’s mother was in attendance and provided the verbal history. Tamia is a bright and active 6 year old girl. She is right handed. In 2010, she was an inpatient at Hackensack University Medical Center. During that hospitalization, she sustained an intra-venous infiltration. This resulted in a slough of skin on the dorsal aspect of her right hand. During the hospitalization, she underwent a debridement surgery and placement of a split thickness skin graft using the right lateral thigh as a donor site.

On examination, she is a healthy appearing girl with no abnormal findings other than that of her right dorsal hand and right thigh. The right wrist and hand have a full range of motion of all joints. There are no scar contractures, or deformities of the digits. There is no stiffness. Strength is normal. Sensation is normal. The skin of the dorsum has been replaced by a skin graft with surrounding scar. The graft is supple. The color is darker than her surrounding skin and the surface has a waxy like appearance due to the use of a meshed skin graft. The right lateral thigh is remarkable for a slightly raised dark donor site scar. Tamia has no functional impairment but does have a permanent scar on both the thigh and the hand. I have attached photographs of the scars taken during the examination.

Both of the scars are healing well. I have recommended that the scar be treated with scar cream. I would recommend that the scar be treated with Elastoplast. I have also recommended that the scar be treated with the use of a firm compression bandage to help reduce the scar.

Sincerely,

[Signature]

[Address]
Taking the Deposition
And using it at trial...
Two Goals for most* DME Depositions

• * We say “most” because there are rare dme depos where you use the defense medical examiner to bolster your case.

• In most cases, you are looking to:
  1) Lay a foundation for a Motion in Limine
  2) Expose the examiner’s bias so the jury rejects his conclusions
Excluding testimony

• FRE 702 “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise…”

• Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) – examine the inferences, the bases for them, and the logical sequences leading to them.
Goals of the Defense?

• Rebut negligence (med mal)
• Minimize the extent of plaintiff’s injuries
• Rebut causation
• Cutoff treatment, or minimize future care
• Have a likeable witness associated with the defendant
• **Impugn the plaintiff’s credibility**
Juror expectations that permit defense examiners to damage plaintiff credibility

• Some jurors view doctors as authority figures and expect them to be forthright and honest.
• Some jurors view plaintiffs as greedy malingerers, and expect them to falsify the nature and extent of their injuries to cash in.
Show the jury that it’s the DME examiner’s job to impugn credibility

- Whenever the doctor calls the plaintiff’s honesty, truthfulness or trustworthiness into question, it will always be in a context that excludes third-party validation.
- Make sure the jury understands this is what the doctor is paid the “big bucks”!
Specifically, how do DME doctors impugn your client’s credibility?

• Subjective is out of proportion to the objective findings
• The complaints have lasted longer than one would expect, given the type of condition/lack of serious trauma, etc.
• Creating false positive responses to objective “faking tests” such as Waddell’s, SLR, compression tests, distraction tests, etc.
• Falsely attributing statements to your client
• Falsely attributing fraudulent responses to stimuli.
Ripe for doctor fraud – completing forms

• One of the things that can be abused is completion of forms. The DME doctor or his staff may influence the plaintiff, through improperly instructing them, pressuring them to complete forms quickly, etc.

• In Delaware, plaintiff’s counsel can require the defense to produce the forms in advance of the DME evaluation so that plaintiff’s counsel can meet with the plaintiff to complete them. Forms to be completed for a DME are “essentially interrogatories”. Phillips v. Pris-MM, LLC, 2009 Del. Super. LEXIS 337, 2009 WL 3022117 (Del. Super. Ct. Sept. 21, 2009).
Our “top 10 list” for DME depositions

- A list of items that you routinely include in your deposition outline that can help you plumb for bias, or just to show the jury what this is all about.
#1. Time

- How much time did the examiner spend evaluating your client?
- The inference is that if they didn’t spend much time, they didn’t do a thorough job with their evaluation.
Recording the exam

- In your jurisdiction, can you – Plaintiff’s counsel – attend the DME?
- Can you have a nurse attend?
- Can you have a family member or close friend of the patient attend?
- Can you send your paralegal?
- Is the patient going in alone?
- #1 item to record is the time spent evaluating the Plaintiff because most DME doctors won’t spend a lot of time with the subject of the exam.
#2. Recollection

• Can the examiner recall anything about the Plaintiff that’s not in his notes?
• The inference is that if the DME doc can’t independently recall this person, then they must not have done a very thorough or reliable job evaluating them.
• “Doctor, would you know Mrs. Smith if you saw her at the supermarket? Would you know her if she were sitting here at the table with me?”
#3. How much $$$ did you get paid?

- How much did you get paid for your evaluation and report?
- How much are you getting paid to testify now?
- How many evals/reports do you do each week? Month? Year?
- How many times do you testify each month?
- Run the numbers and confirm the totals (take a calculator into the deposition)
- Do you ever testify for injured plaintiffs or only for the defense lawyers / insurance company?
Q. Uh-huh. Are you going to stop seeing patients soon and start doing defense medical exams full time?
A. I haven't talked to Mr. Obama today, but that is a very large possibility.
#4. Consequences

- What are the consequences when the treating physician gets it wrong?
- What are the consequences when a defense medical examiner gets it wrong?
#5. Do you ever agree with the treating physician?

- Chances are, the defense medical examiner has never given testimony in a case where he completely agreed with the treating physician. If he agreed, nobody would be paying him to testify. Ask him to name some people he’s examined where he has concurred with the treating physician’s diagnosis, causation opinion, future expectations, etc.

- Practice tip: In the beginning of the deposition, get him to say there’s no doctor-patient privilege so he can’t claim that as a reason for refusing to give you names.
#6. Standards

• Explore the defense examiner’s knowledge and understanding of the standard(s) in the case.

• Delaware standard for admissibility of physician testimony is “reasonable degree of medical probability”. Ask the doctor what the standard is, and ask him if he can describe what it means.

• Are there different causation standards? In a DE work comp repetitive use injury, it’s not a but-for standard. It’s substantial contributing cause. Defense examiner in my last repetitive use injury case used a but for standard.
#7. Cross on their “priors”

- We are always concerned about our clients’ priors. What about the examiners’ priors?
- Search google, PubMed, LexisNexis, Westlaw, State TLA databases, etc. for prior reports, transcripts, articles for prior statements by the examiner that contradicts current testimony.
#8. Is this a case where there are things that only the treating physician can know?

- Is this a surgical case where the defense examiner is giving testimony about a surgical condition?
- DME doctor says lumbar disc is not related to the MVA, but degenerative?
- DME doctor says the rotator cuff tear was caused by the hooked acromion but the treating physician says the client doesn’t have a hooked acromion?
- DME doctor says the meniscal tear is degenerative, but the treating physician says he saw a clean tear and blood?
#9. Ask about the doctor’s appearance

- This may seem too simple, but you would be surprised what effect it has on some jurors.
- Why did you put on a fresh lab coat and tie, and hang your stethoscope around your neck for this 6 pm video deposition?
- You have been dictating chart notes for the last hour in your scrubs with your Nike running shoes propped up on the desk, right?
#10. Know your strengths and limitations

• Don’t try to outsmart a doctor about medicine generally.
• Do spend a lot of time reviewing, summarizing, and tabbing out the medical records so you can know more than he does.
• Do spend time understanding the affected area so that you know when the examiner is full of it, and when he’s not.