Discovery

Surviving the Defense Medical Examination

by Anthony M. Russell

One of the strategies defendants employ when the mental or physical condition of a plaintiff is in controversy is the defense medical examination. This should not be referred to as an "independent medical examination" because there is nothing independent about it.[1] The defense is paying a cherry-picked healthcare provider to offer testimony harmful to the plaintiff's case. It is your obligation to protect the truth when a defense medical examination is performed.

The first notice of a defense medical examination typically occurs when plaintiff's counsel receives communication from defense counsel requesting that the plaintiff submit to an examination. Most of the time counsel can agree upon a defense medical examination but any agreement must protect the plaintiff's interests. Any agreement should specify in detail (1) the time, place, manner, conditions, and scope of the examination, (2) the person or persons who will be performing the examination, (3) the person or persons who will be present for the examination, and (4) the time for filing and serving the examiner's report. Additionally, the agreement should provide for reimbursement of the plaintiff's costs for attending the examination.

The person or persons who will conduct the examination are usually chosen by the defense. In Virginia, defendants usually are able to use healthcare providers of their choice for an examination. In *Perkins v. Lillich*, a circuit court outlined the applicable procedure:

> Once good cause is shown, the physician selected to conduct the examination will be initially determined by the defendant. If the adverse party objects to the physician named and thereafter the parties fail to agree on an alternative, then the matter should be scheduled for a hearing, at which time the objecting party is permitted to demonstrate the basis for objection on grounds such as bias, prejudice, or the like. If the objection is sustained, then the court would require each side to submit names to the court and the court will select from the lists.[2]

It bears repeating that a plaintiff need not agree to any healthcare provider chosen by a defendant. At the very least, examiners should be licensed to practice in, and residents of or have an office in the Commonwealth of Virginia. Also, a plaintiff may wish to challenge an examiner who has demonstrated a history of bias or unfairness, but for strategic reasons it is oftentimes best to deal with a known quantity.

It is well-established Virginia law that a party has an absolute right to show that a witness is biased. As the Court stated in *Henning v. Thomas*, 235 Va. 181, 188 (1988) *quoting Henson v. Commonwealth*, 165 Va. 821, 825-26 (1936):

> The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness . . . On cross-examination great latitude is allowed and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out.

There are multiple ways for a plaintiff to prove bias between a defendant and examiner.

In *Lombard v. Rohrbaugh*, 262 Va. 484, 495 (2001), the Court held that the circuit court did not err in permitting a plaintiff to cross-examine the defendant's expert witness to show that the witness had received more than $100,000 per year in payments for the years 1998 and 1999 from the defendant's insurance company. The Court held that

> testimony concerning liability insurance may be elicited for the purpose of showing bias or prejudice of a witness if there is a substantial connection between the witness and the liability carrier. If a substantial connection is demonstrated, its probative value concerning potential bias or prejudice outweighs any prejudice to the defendant resulting from the jury's knowledge that the defendant carries liability insurance.[3]

Similarly, in *Sawyer v. Comerci*, 264 Va. 68, 79 (2002), the Court held that the plaintiff had the right

> to cross-examine the defendant's expert witness, Dr. Lander, to show that he had previously testified as an expert witness on behalf of Dr. Comerci and that he had been compensated. The amount of money that Dr. Comerci paid Dr. Lander in a prior case was a relevant area of inquiry because that testimony may have indicated to the jury that he was biased in her favor. The probative value concerning this potential bias outweighed any prejudice to Dr. Comerci resulting from the jury's knowledge that she had been a defendant in an unrelated lawsuit. Therefore, the circuit court abused its discretion in failing to permit the plaintiff to elicit this testimony.

The agreement should discuss the examination itself. It should specify the manner, conditions, and scope of the examination, identifying the person or persons who will be involved in the examination, any other people who will be present, and the precise tests and examinations to be performed.

The agreement should also describe the contents of the examiner's report, as well as the time for filing and serving that report. As an initial matter, the examiner must be required to prepare a written report of the examination that is filed with the court and served on plaintiff's counsel. The report must be detailed, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. It is prudent to include in the agreement a provision requiring the actual production of all tests performed so that the plaintiff will have the underlying test data to evaluate the examiner's conclusions. Also, it is wise to require the examiner's report to be prepared, filed, and served within a time period that allows the plaintiff sufficient time before trial to analyze and respond to the report. If no time limit is set, Rule 4:10 only requires the report to be filed and served "before the trial," while Federal Rule of Civil Procedure 35 sets forth no time limit and only requires the report to be delivered to plaintiff's counsel if requested.

If an agreement concerning the examination between the parties cannot be reached, the defendants' only relief is to move the court to order an examination.[4] Under Rule 4:10 of the Supreme Court of Virginia and Federal Rule of Civil Procedure 35, the defense can request a court ordered examination by showing good cause. This is a low threshold because good cause exists whenever the plaintiff's condition is relevant and examination is necessary.[5] Whether an examination will be ordered rests within the court's discretion.[6]

One major issue that arises in defense medical examinations is whether the plaintiff may record the examination or have a third party attend it. Though there is no right to a recording or third-party presence, plaintiff's counsel may move for either with a showing of good cause.[7] It is within the court's discretion to allow either option.[8] Third-party attendants will only be allowed if they will not interfere with the examination, and can be family, friends, court reporters, plaintiff's counsel, or medical professionals.[9] In *Thorpe v. Poore*, the court not only allowed a recording of the examination, but also allowed a third party to be present.[10] Variations can be ordered, as in *Lester v. Allied Concrete Co.*, where the court prevented video recording and the presence of counsel at the plaintiff's examination, but allowed audio recording of it.[11]

It is up to plaintiff's counsel to prove to the court that his or her request to record the examination, or have a third party present, is reasonable.

Numerous factors can support the reasonableness of such a request, depending on the facts of the case. For example:

- The plaintiff's age and/or physical or mental condition may be such that recording the examination and/or the presence of a third party is mandatory;
- Recording the examination will aid all parties by preventing anyone from taking any words or actions out of context, as well as ensuring that there is an unbiased and accurate depiction of what occurred and did not occur;
- Recording or observing the examination will promote the free exchange of appropriate information because the examiner will not be fearful of subjective allegations that anything inappropriate was done or said. In *Harris v. Kreutzer*, the Supreme Court of Virginia held that a cause of action can be brought if a negligent performance of a Rule 4:10 examination results in a harm to the plaintiff;[12]
- Recording the examination will prevent, or at the very least decrease, the potentially adversarial nature of the examination by ensuring that there will be an unbiased and objective recording of what was done and said;
- Recording the examination will be unobtrusive because a recorder is small and can be placed where it is practically unnoticeable.

In response to such requests, defendants typically marshal a fairly predictable series of arguments. For example, they suggest that the only goal of videotaping the examination is to develop more material for cross-examination. This argument is flawed for two reasons. First, as explained above, this is not the goal of recording the examination. Second, if the examiner is honest, the plaintiff will not be able develop any substantive cross-examination material by recording the examination.

Defense counsel may also point out that plaintiff's counsel will be present for the examination. While this may be true, neither plaintiff's counsel nor defense counsel wants to be put in a position of having to be a witness as to what occurred or did not occur during the examination. An accurate recording of the examination will protect counsel from both sides.

The defense may claim that recording the examination is unfair because the defense did not have an opportunity to record the plaintiff's interactions with his treating physicians. However, it is not usual or customary for treating healthcare providers to videotape examinations, and defense medical examinations are not similar to treatment provided by the plaintiff's treating healthcare providers. The purpose of a treater's examination is to provide care and treatment to the patient. Care and treatment are utterly irrelevant to a defense medical examination. In *Maldonado v. Union Pac. R.R. Co.*, 2011 U.S. Dist. LEXIS 23507 at *13 (D. Kan., May 4, 2011), the court rejected the defendant's attempt to equate a visit to a treating healthcare provider to a defense medical examination:

> Defendants' first argument against the recording of their examination is that such a requirement makes the playing field uneven. This argument has two parts: the first is that it is unfair that Plaintiff's experts' examinations were not recorded, while their expert's will be, and the second is that there is a very real possibility that only Plaintiff's experts will be able to testify at trial. Beginning with the first part, while it is true that it appears that Plaintiff's experts' examinations were not recorded, thus depriving Defendants of the ability to learn everything that was said and done at these examinations, this fact does not necessarily lead to the conclusion that allowing Plaintiff to record defense counsel's examination makes this proceeding unjust. As noted by this Court previously, defense counsel has a plethora of tools available to them to prepare to cross examine Plaintiff's experts – e.g., they can obtain a detailed written report from Plaintiff's experts, which must set forth the experts' findings, including results of all tests made, diagnosis, and conclusions and depose Plaintiff's testifying experts.

The defendant may also contend that the presence of a recording device or videographer would increase the adversarial nature of the examination. But an examination should never be adversarial; the fact that the defense anticipates that the examination may be adversarial supports the need to record it. Recording the examination will mitigate any potential conflict by preserving an unbiased and objective recording of what was done and said, which can be provided to the court if an issue arises. Moreover, recording an examination will not be adversarial because the video camera is small and can be placed where it is practically unnoticeable.

The defense may also argue that recording the examination may hamper the examiner's ability or willingness to conduct a full and thorough examination. In fact, recording an examination will promote a full and thorough examination because the examiner will not be fearful of subjective allegations that anything inappropriate was done or said. Similarly, if the examiner conducting the examination is honest, recording the examination will not be any more detrimental to a full and thorough examination than plaintiff's counsel's questioning of the examiner about the examination at deposition or trial. Finally, defense counsel may worry

that the examiner's words and actions may be taken out of context. Again, this concern weighs in favor of recording the examination, because a recording will prevent anyone from taking anything out of context. The recording will be the best unbiased evidence of what was said and done.

Another major source of problems with defense medical examinations is the protection of truth, as examiners may "fudge" the results of testing and examinations. One way to guard against this is to require the production of all underlying testing and examination information such as the actual imaging studies performed or the underlying neuropsychological data. Another is to have a healthcare provider perform a videotaped examination of the anatomy in question just shortly before and/or after the defense medical examination to objectively show the plaintiff's condition. Further, you can have the plaintiff or someone else record the amount of time that the examiner spends with the plaintiff. Some plaintiffs have even surreptitiously recorded the audio of the examination because recording an oral communication where all parties are in Virginia and the plaintiff is a party to the communication is not illegal pursuant to Virginia Code § 19.2-62.

Defense medical examinations are rarely fair, unbiased exercises. A conflicting medical examination is one of the potentially effective tools defendants can create to rebut a plaintiff's injury claim. Plaintiff's counsel must be cautious when a defense medical examination is conducted to protect the truth so that justice may be achieved.

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Endnotes

1. *Potter v. Vernon*, CL10004040-00, "Order for Rule 4:10 Examination" (Richmond Sept. 2, 2011); *Thorpe v. Poore*, 83 Va. Cir. 453 (Hanover Co., October 13, 2011).
2. *Perkins v. Lillich*, 23 Va. Circ. 218, 221, 1991 Va. LEXIS 35 (City of Charlottesville 1991); *Young v. Food Lion Store No. 622*, 70 Va. Cir. 313, 316-317, 2006 Va. Cir. LEXIS 31 (2006); *Stampe v. Noyes*, 17 Va. Cir. 273, 274, 1989 Va. Cir. LEXIS 198 (1989).
3. *Id*. at 497.
4. Va. Sup. Ct. R. 4:10.
5. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964); *Guilford Nat'l Bank of Greensboro v. S. Ry. Co.*, 297 F.2d 921, 924 (4th Cir. 1962); *Machie v. Manger*, 2012 U.S. Dist. LEXIS 119630 (D. Md., August 23, 2012); and *Ricks v. Abbott Labs*, 198 F.R.D. 647, 649 (D. Md. 2001).
6. *Virginia Linen Serv., Inc. v. Allen*, 198 Va. 700 (1957).
7. *United States v. Universal Health Servs.*, 2011 U.S. Dist. LEXIS 75298, *3-5 (W.D. VA. July 31, 2011).
8. For state court cases, *see Allison v. Dufort*, CL09-165, Order for Rule 4:10 Examination (Stafford Co. May 13, 2010); *Solomon v. Mosby*, CL07-559, Order (Spotsylvania Co. Mar. 20, 2008); *Solomon v. Mosby*, CL07-559, Order (Spotsylvania Co. Apr. 8, 2009); *Dick v. Eng*, CL05T02494, Order for Rule 4:10 Examination (Richmond Aug. 22, 2006); *Brown v. Sauvageau*, CL09-1414, Rule 4:10 Order (Spotsylvania July 9, 2010); *Rosas v. Cusmano*, CL2008-10613, Order" regarding Donald Hope, MD (Fairfax Co. Mar. 12, 2010); *Rosas v. Cusmano*, CL20080-10613, Order regarding Thomas Ryan (Fairfax Co. Mar. 12, 2010); *Matts v. Monroe*, CL09000333, Order regarding Dr. Witmer (Pittsylvania Co. July 12, 2008); *Lester v. Allied Concrete Co.*, CL08-150 and 09-223, Order Authorizing Defense Medical Examination (Charlottesville Jan. 25, 2010). For federal court cases, *see, Schaeffer v. Sequoyah Trading & Transp.*, 2011 U.S. Dist. LEXIS 29058 (Kan. 2011); *Maldonado v. Union Pac. R.R. Co.*, 2011 U.S. Dist. LEXIS 23507 (Kan. 2011); *Sidari v. Orleans County*, 174 F.R.D. 275 (W.D.N.Y. 1996); *Di Bari v. Incaica Cia Armadora, S.A.*, 126 F.R.D. 12 (E.D.N.Y. 1989); *Zabkowicz v. West Bend Co.*, 585 F. Supp. 635 (E.D. Wis. 1984).
9. *Masters v. Baltimore Tank Lines, Inc.*, Law No. 219736, Order (Fairfax Co. Oct.10, 2004).
10. *Thorpe, supra*, 83 Va. Cir. at 454.
11. *Isaiah Lester, Adm. of the Estate of Jessica Lynn Scott Lester, Deceased and Isaiah Lester v. Allied Concrete Co., et al.*, Case No. 08-150 and 09-223, Order Authorizing Defense Medical Examination (Charlottesville Jan. 25, 2010).
12. *Harris v. Kreutzer*, 271 Va. 188 (2006).