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TURNING THE TABLE: CROSS EXAMINATION OF AN IME DOCTOR USING A VIDEO OF THE EXAM

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In all personal injury actions, the plaintiff bears the burden of proof regarding the nature and extent of that injury. To rebut the plaintiff's claims of injury, the defense is entitled to have the plaintiff examined by a physician of its choosing. Typically, these examinations are referred to as independent medical examinations (IMEs) or what might more properly be referred to as defendants' medical examinations. For years, these examinations have been part and parcel of every personal injury claim.

Recently, the credibility of certain physicians who conduct these examinations has been called into question. As has been suspected for many years, certain highly paid yet unethical doctors have been less than thorough and honest in conducting these examinations, rendering reports and providing opinion evidence in court. While insurance companies continually plaster advertisements suggesting that certain plaintiffs have been exaggerating their injuries for money, the ugly secret that a number of insurance companies do not want made public is

that certain examining physicians have provided phony opinions for money on an ongoing basis to defeat or diminish legitimate claims.

ONE SOLUTION? RECORDING THE EXAM WITHOUT THE DOCTOR'S KNOWLEDGE

One of the most egregious examples of such unethical behavior on the part of a defendants' examining doctor took place recently in Supreme Court, Queens County[1]. In this case, a "regular" in the business, Dr. Michael Katz, testified, in part, that he conducted a follow-up IME that lasted approximately 10 to 20 minutes. Unlike the typical case in which the examining doctor could testify as to the length of his examination and maintain that position even if challenged on cross examination, the plaintiff's attorney in this case did something unusual: He videotaped the examination without the doctor's knowledge. That video revealed that the total time of the examination was one minute and 56 seconds -- a far cry from the 10 to 20 minutes stated, under oath, by the examining doctor.

At no time prior to cross examination did the plaintiff's attorney reveal that he was in possession of the video. His position was clear: The examining doctor was not a party to the lawsuit; there was no requirement to disclose its existence; and there would never be any reason to reveal the existence of the video if the examining doctor told the truth. It was only when the examining doctor told less than the truth that the video would become relevant.

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[1] Bermejo v. Amsterdam & 76th Associates, LLC, Index. 23985/09 (Sup. Ct. Queens).

Needless to say, the trial court was understandably outraged upon learning of the doctor's lie. The Court made clear that the doctor's medical-legal practice, in which he made more than $1 million a year conducting IMEs, was probably over. For his apparent perjurious testimony, the doctor was referred to the Queens County District Attorney's Office.

The Court was also troubled by the plaintiff's attorney's failure to disclose the tape at any time prior to cross-examining Dr. Katz, and declared a mistrial. Thus, not only is the saga regarding Dr. Michael Katz far from over, its impact on IME's going forward and the courts' views regarding the propriety of videotaping a doctor's examination remain to be seen.

There is no specific statute governing the appropriateness of surreptitious videotaping of independent medical examinations. Moreover, the ethical opinions regarding secret video recording specifically fail to provide clear guideposts for attorneys. For example, the American Bar Association, in opinion 01-422, found that, in general, undisclosed taping by an attorney or his agent was not in and of itself prohibited. In accordance with that opinion, The Association of the Bar of the City of New York modified its previously held position that undisclosed videotaping was unethical, holding that such conduct was permissible, but only where the lawyer "has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good." Thus, one may fairly conclude that if the attorney has reason to believe that the testimony will be perjurious, video recording is permissible.

Clearly, the use of videotaping has long been used by attorneys in a wide range of cases -- from matrimonial actions to corporate claims to criminal cases. As it relates to personal injury actions, defense attorneys have become well versed in the use of videos to discredit a plaintiff's claim of injury. While the law regarding the surreptitious taping of a plaintiff in a personal injury action has developed over many decades[2] the issue of the propriety of the taping in the first instance and its disclosure seems to have been answered: There is no prohibition against such taping and there are now definitive time periods in which disclosure of the video must be revealed.[3]

When it comes to the videotaping of the IME, however, the law is not so clear. In New York not only is there no statute directly on point but there is a paucity of case law supporting or prohibiting such conduct. The question that will likely be addressed in the near future is whether the plaintiff's attorney or his agent should be permitted to videotape the independent medical examination, and if so, when disclosure should be made. Many see no difference between the defendant's right to surreptitiously video the plaintiff and the plaintiff's right to surreptitiously video the IME. Both the plaintiff and the defendant are seeking to use the video for a similar purpose: to discredit the credibility of an individual through the use of extrinsic proof.

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[2] See DiMichel v. South Buffalo Ry. Co., 80 N.Y.2d 184 (1992) and its progeny.

[3] Tai Tran v. New Rochelle Hosp., 99 N.Y.2d 383 (2003).

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WORKING WITH A VIDEO RECORDING ON CROSS-EXAMINATION

The goal of the cross examiner, at all times, is to attack in such a manner so as to create a powerful argument for summation. The difference in cross examining an expert witness as opposed to a lay witness is that much more care and effort needs to be put into the development of the set up before the witness is knocked down. When dealing with an experienced, yet unethical IME doctor, the challenge on cross is even greater. Clearly, this is a witness who is willing to lie to defeat a legitimate claim. Not only must the attack focus on the substantive medical proof but the attack must address the collateral matters such as the witness' desire to continue earning significant amounts of money by conducting IMEs year after year.

Take the scenario in which the IME doctor is an orthopedist examining a plaintiff who claims to have suffered a lumbar herniated disc. Assume the same set of facts as above. The doctor claims to have conducted a 10 to 20 minute examination of the plaintiff in which he conducted numerous tests. In actuality, the examination lasted one minute and 56 seconds. The entire examination was, unbeknownst to the doctor, secretly videotaped.

While the plaintiff's attorney could move in for the kill immediately, that tactic might not get the desired punch the attorney thought it would:

Q: Doctor, you just testified that the exam lasted 10 to 20 minutes, correct?

A: Approximately.

Q: Isn't it a fact that the exam lasted less than 2 minutes?

A: I don't believe so but it wasn't a long exam.

Q: I'm going to ask that this be marked as plaintiff's exhibit 52 for identification. Doctor I am showing you what has been marked as exhibit 52 for identification. Take a look at the video and let us know when you have finished reviewing it. Isn't it a fact that this is a fair and accurate video recording of your examination of (my client)?

A: Yes.

Counsel: I offer exhibit 52 in evidence.

Q: Isn't it true that the examination was less than 2 minutes?

A: As I testified, it wasn't a long exam.

Needless to say, the "gotcha" moment was diffused by the failure of the cross examiner to conduct a meaningful set up before moving in for the kill. By paying attention to detail, and learning the essential substantive components of the exam, the cross has the potential to completely discredit the doctor and make meaningless any opinion offered by this so called "expert." Consider a more appropriate set up.

Q: Doctor you conducted a full examination of (my client), true?

Q: Certainly your examination was a complete one, right?

Q: The exam was fairly conducted?

Q: We can agree it was a thorough one, right?

Q: No one forced you to take short cuts?

Q. You performed all the necessary tests, right?

Q: And that's how you can offer a legitimate opinion to the jury, right?

Next, continue the set up with the "negatives" -- those things that if not done would challenge the legitimacy of the expert's opinion:

Q: To the extent that you didn't conduct a full and fair examination your opinion would be less than valid, true?

Q: To the extent that you didn't conduct a thorough exam you would agree your opinion wouldn't have a solid factual foundation, right?

The attorney should never be afraid to tackle the expert on the substantive issues before moving to the collateral attack. By learning the various tests necessary to conduct a clinical examination the cross examiner can expose the lie in exquisite detail:

Q: Doctor you've told us about various tests you performed to determine whether (my client) was suffering from a herniated lumbar disc, true?

Q: You mentioned about 10 such tests, true?

Q: One of them was the "Straight Leg Raising Test", right?

Q: That's a test where you had (my client) lay on the examining table face up with both hips and knees extended, true?

Q: You then slowly raised her leg until pain was noted, correct?

Q: You were in no rush to conduct this exam, right?

Q: You then slowly raised her other leg until pain was noted, correct?

Q: You then performed this same test while (my client) was sitting and you extended each of her knees?

While it is usually preferable to lead on cross, there are times when low risk open-ended questions can be very powerful:

Q: How long did these straight leg raising tests take in total?

A: I would say about 3 - 4 minutes.

Here, the cross examiner must resist the temptation to move in for the kill. Although the attorney could prove the lie at this time, it is far more effective to wait and bring out all the tests, and attach specific time periods to each. For example, the same type of cross could be conducted with the Thomas Test, Kemp's Test, Trendelenburg Sign, Milgram's Sign, Bechterew's Test, Valsava Maneuver, etc.

Q: Doctor, in total this exam took approximately 20 minutes to complete, true?

Q: That's the way you always conduct such exams, right?

Q: After all, if you didn't take the necessary time your opinion wouldn't be as valuable, right?

Q: And it certainly wouldn't be legitimate, true?

Q: That's why you can offer your opinion with such certainty, right?

At this point the video can be introduced to impeach the credibility of the doctor in much the same manner as in the prior example. Additionally, the doctor can be cross examined on collateral matters to expose the reason for the lie:

Q. Doctor, we now know the exam lasted less than 2 minutes, true?

Q: Do you agree that's a far cry from a full and fair 20 minute exam?

Q: How much we're you paid to conduct that 2 minute exam?

Q: Did anyone force you to conduct the exam in less than 2 minutes?

Next, with a touch of righteous indignation and a hint of disgust the cross can bring home the point:

Q: That was your decision and yours alone to take short cuts and then offer an opinion to this jury, true?

Needless to say, the collateral attack could continue by pointing out the amount of money the IME doctor makes on a weekly and yearly basis, further exposing his motivation to continue providing less than honest reports to ensure future business.

CONCLUSION

Just as defendants use surreptitious video recording in an attempt to capture images of unsuspecting plaintiffs engaging in activities which they claim their injuries restrict, in fairness, plaintiffs should be afforded the same opportunity when it comes to challenging the weight of the opinions offered by defendants' examining doctors at trial. If armed with such

indisputable proof of the doctor's inadequate exam, the skilled litigator must be patient during cross-examination to allow the jury to perceive the full weight of the expert's attempted deception. By questioning the doctor in detail about the complete scope of his alleged exam, the revelation of the physician's actual exam will resonate strongly with the jury.

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