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Defense mental examinations: Don't let them make you crazy

Claims for emotional distress form an important component of many employment-discrimination and harassment lawsuits. Often in these cases, the damages for emotional distress will equal or surpass the employee's economic damages. Inevitably, when a lawsuit alleges damages for emotional distress, the defendant will seek to obtain a mental examination.

Mental examinations are extremely intrusive. The California Supreme Court has recognized that "[i]f there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality." (*Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal.3d 937, 944 [227 Cal.Rptr. 90, 93].)

Therefore, it is important for plaintiff's employment practitioners to be aware of the situations in which mental examinations are proper and in which they are not, and if an examination is likely to occur, what steps must be taken to protect the client as much as possible. This article discusses the protections available to employees when the employer seeks to compel a mental examination.

An employer's mental examination is not independent. It is simply another method in the defense arsenal to try to defeat liability, limit damages or demoralize the plaintiff

Somehow, the term *independent mental examination* has made its way into the vernacular. It is important for plaintiff's counsel to remember that, far from being independent, this is an examination being conducted by an agent of the defendant for the purpose of helping the defendant defeat liability or at least limit damages. The courts have recognized that a medical examination is simply another discovery tool, and that the physician hired to conduct such an examination is not required to be impartial:

> [T]he physician appointed to conduct a medical examination under Code of Civil Procedure section 2032 is not hired for the purpose of being impartial. The medical examination provided for in section 2032 is a discovery tool, just as depositions (Code Civ. Proc., § 2016 et seq.) interrogatories (Code Civ. Proc., § 2030), requests for inspection and production of documents (Code Civ. Proc., § 2031) and requests for admissions (Code Civ. Proc., § 2033) are discovery tools. (*Mercury Casualty Co. v. Superior Court* (1986) 179 Cal.App.3d 1027, 1033 [225 Cal.Rptr. 100, 102].)

What the employer is seeking is a *defense* mental examination, and that is the terminology that should be used.

Unlike an ordinary physical examination, a mental examination requires a court order and a showing of good cause

Mental examinations are governed by Code of Civil Procedure sections 2032.310, et seq. A party seeking a mental examination is required to obtain leave of court. (Code Civ. Proc. § 2032.310(a).) This differs from the procedures for physical examinations in personal injury cases, where the party seeking an ordinary, non-intrusive examination has the right to simply demand the examination and the party to whom the demand is directed must respond as to whether it will comply or not. Only if the party refuses to comply with the demand as stated is court intervention necessary. (See Code Civ. Proc., §§ 2032.220 et seq.)

In contrast, leave of court is required to compel a mental examination. (Code Civ. Proc., § 2032.210(a).) The party seeking the mental examination is required to meet and confer with the party whose examination is sought. (See Code Civ. Proc., § 2032.310(b).) If the parties agree on the terms of the examination, a stipulation and order should be prepared.

If the parties do not agree that an examination should go forward, or do not agree on its terms, the party seeking the examination must file a motion with the court. (Code Civ. Proc., § 2032.310.) The party seeking to compel the mental examination bears the burden of establishing good cause for the exam. (Code Civ. Proc., § 2032.320(a).) This rule fully applies in employment cases where the defendant employer seeks to compel a mental examination of the plaintiff employee.

A mental examination is only appropriate where there is ongoing emotional distress

A mental examination of a plaintiff is only permitted where the plaintiff's mental condition is "in controversy." (Code Civ. Proc., § 2032.020(a).) One's mental condition is only "in controversy" when that person is still suffering emotional or mental distress. (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1886 [58 Cal.Rptr.2d 476, 481].) Thus, if the plaintiff is no longer suffering emotional distress at the time the defendant seeks to compel the mental examination, the defendant is not entitled to the examination. (*Ibid.*)

In *Doyle*, the plaintiff brought suit against her supervisor for, among other things, sexual harassment and creation of a hostile working environment. She alleged that she had suffered and continued to suffer, severe emotional distress and mental anguish. She later claimed that her emotional distress ended in October, 1994. Despite the plaintiff's contention that her emotional distress had ended, the defendant brought a motion to compel a mental examination. The plaintiff opposed the

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motion on the grounds that (1) her mental condition had not been placed in controversy, (2) the defendant had failed to show good cause, and (3) the defendant had failed to give the notice required by Code of Civil Procedure section 2032(d) regarding the conditions, scope and nature of the exam.[1] The court agreed that the plaintiff's mental condition was not in controversy because she was not alleging that her emotional distress was "ongoing," finding instead that her emotional distress had ended in October 1994. (*Id.* at 1885-1886 [58 Cal.Rptr.2d at 480-482].) As a result, the defendant was unable to show good cause for the mental examination. (*Ibid.*)

When seeking to compel a mental examination, defense counsel will almost inevitably cite *Vinson v. Superior Court* (1987) 43 Cal.3d 833 [239 Cal.Rptr. 292], in which a mental examination in a sexual harassment case was compelled. In *Vinson*, the plaintiff sued her former employer for sexual harassment and intentional infliction of emotional distress. The plaintiff claimed ongoing distress as a result of the employer's conduct, including sleep problems, appetite changes, anxiety and other symptoms of severe emotional distress. The California Supreme Court ruled that the defendant was entitled to compel the plaintiff to submit to a mental examination because by alleging ongoing, severe emotional distress caused by the defendants' conduct, the plaintiff had placed her present mental condition "in controversy." (*Id.* at 839-840 [239 Cal.Rptr. at 297].)

The Court emphasized, however, that its conclusion was "based solely on the allegations of emotional and mental damages in this case." (*Id.* at 840 [239 Cal.Rptr. at 297].) The Court's ruling makes clear that a mental examination is not appropriate where the plaintiff's mental condition is not in controversy. Thus, *Doyle* easily harmonizes with *Vinson*. In a case such as *Doyle* where the plaintiff is not claiming ongoing distress, the plaintiff's mental condition is not in controversy and a mental examination is not appropriate. (*Doyle, supra,* 50 Cal.App.4th at 1885-1886 [58 Cal.Rptr.2d at 480-482].)

Plaintiff's counsel should constantly reassess with his or her client and, where applicable, the client's treating physician to determine whether the plaintiff's distress is ongoing or has subsided. Often, the severity of emotional distress will subside when the terminated plaintiff finds a new job, or as a result of ongoing therapy, or perhaps due to the passage of enough time. Where emotional distress has ceased, the plaintiff should so notify the defendant, either through an amendment to the complaint, verified discovery responses or stipulation with the defendant. This will render the plaintiff's mental condition no longer in controversy and will preclude the defendant from being able to compel a mental examination.

A plaintiff may be able to enter into a stipulation to bar a defense mental examination

Absent exceptional circumstances, Code of Civil Procedure section 2032.320 allows the plaintiff to avoid a defense mental examination by stipulating to both of the following:

> (1) A stipulation that no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed.
>
> (2) A stipulation that no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.

(Code Civ. Proc., § 2032.320(c).)

Thus, where a plaintiff only suffered "garden variety" emotional distress from the employer's wrongful act, as opposed to severe emotional distress, and does not plan on presenting expert testimony at trial, such as from his or her treating psychologist, the court may not order a mental examination, absent "exceptional circumstances." (*Ibid.*) Even though the wording of the statute refers to physical injuries, the intent of the statute is clear: Where a party alleges only garden variety emotional distress and does not intend to present expert testimony regarding emotional distress at trial, the defendant should not be entitled to compel a mental examination. Therefore, even though in an ordinary wrongful termination or discrimination lawsuit the plaintiff will generally not be alleging physical injuries, that should not prevent him or her from obtaining the benefits of this section.

The courts have recognized that victims of workplace harassment or discrimination routinely experience some form of distress, and the existence of that distress alone does not render the victim's mental state at issue. For example, in *Vinson,* the California Supreme Court recognized that:

> A simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not normally create a controversy regarding the plaintiff's mental state. To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable position.

(*Vinson, supra,* 43 Cal.3d at 840 [239 Cal.Rptr. 292 at 297].) *(See also, Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 573 [253 Cal.Rptr. 731, 740]. ("An essential aspect of the damage in any case of sexual harassment, sexual assault or sexual battery is the outrage, shock and humiliation of the individual abused. We cannot conceive of a circumstance where a cause of action for sexual assault, battery, or harassment could accrue devoid of any consequential emotional distress. (Citations Omitted) Thus, the average or usual case would normally carry with it a concomitant claim for emotional upset inflicted by the conduct.")

Where faced with the argument by defense counsel that the stipulation provided for in Code of Civil Procedure section 2032.320(c) does not apply to the plaintiff in a wrongful termination lawsuit who has not suffered physical injury, plaintiff's counsel should argue that

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when a plaintiff asserts only garden variety emotional distress, coupled with an agreement not to present expert testimony at trial, there is no good cause for a mental examination. Although there appear to be no published California cases on point, at least one unpublished decision recognizes the right of a plaintiff in a wrongful termination lawsuit who has not suffered physical injuries to benefit from the provisions of Code of Civil Procedure section 2032.320(c). (*See Chaichi v. Superior Court* (2005) 2005 WL 2284204, but see Cal. Rules of Court, rule 8.1115.)

Published federal authority also supports this position. Plaintiff's counsel may rely on federal cases interpreting Federal rule 35, which governs mental examinations in federal court cases.[2] For example, in *Turner v. Imperial Stores* (S.D. Cal. 1995) 161 F.R.D. 89, 98, the district court refused to compel a mental examination. The plaintiff in *Turner* was claiming damages for humiliation, mental anguish and emotional distress, but did not claim to have suffered unusually severe emotional distress, did not bring a cause of action for intentional or negligent infliction of emotional distress, did not allege that she suffered from a specific psychiatric injury or disorder, and did not intend to offer expert testimony regarding her emotional distress at trial. The court found that a party does not place his or her mental condition in controversy simply by claiming emotional distress. (*Id*. at 97.) The fact that the plaintiff in *Turner* made a claim in her complaint for $1 million in emotional distress damages did not alter the court's conclusion that her claim for emotional distress damages was basically a "garden variety" one, not warranting a mental examination. (*Ibid.*)

The result might be different where the plaintiff has alleged a cause of action for intentional infliction of emotional distress. Such a cause of action requires as one of its elements that the plaintiff have suffered severe emotional distress. (*See e.g., Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 617 [262 Cal.Rptr. 842, 857].) A court could find that maintaining an intentional infliction claim is inconsistent with a stipulation that the plaintiff only suffered garden variety distress, and it could then use that conclusion to find exceptional circumstances warranting a mental examination. In such a case, plaintiff's counsel should consider whether it is worth dismissing the intentional infliction claim to avoid the plaintiff having to undergo a mental examination.

Defense counsel may try to use *Doyle* as a sword to argue that the plaintiff must agree not to allege ongoing emotional distress as part of the stipulation. However, this is *not* a requirement to avoid a defense mental examination under Code of Civil Procedure section 2032.320(c). Whether or not emotional distress is in controversy is a distinct issue from whether the plaintiff has stipulated to claim only garden variety emotional distress. (*Compare* Code Civ. Proc., § 2032.020(a) with Code Civ. Proc., § 2032.320(c).) The issues are not linked, but form two separate and distinct bases for disallowing a defense mental examination.

Where a defense mental examination cannot be avoided, the order compelling the examination must be properly tailored

Where a defendant seeks a stipulation to permit a mental examination, it needs to provide certain basic information to allow the plaintiff to make an educated decision as to whether or not to stipulate to the exam. The party seeking the examination is required to meet and confer with the proposed examinee before bringing its motion to compel the exam. (Code Civ. Proc., § 2032.310(b) ("The motion shall be accompanied by a meet and confer declaration under Section 2016.040").) Code of Civil Procedure sections 2032.310(b) and 2032.320(d) specify the minimum terms that must be included in a motion to compel a mental examination and in the order granting a mental examination. As part of the meet and confer process, these minimum terms should be addressed by the parties. The particular circumstances of the case may dictate additional terms that should be addressed.

Following are the terms that should be addressed at the outset:

• *The time of the examination*. Obviously, the date and time of the examination must be specified. However, other issues include the length of the examination, how long the plaintiff needs to sit and wait for the examination to begin, and that reasonable breaks will be allowed, including a lunch break if the examination is expected to last more than a few hours, and reasonable rest and bathroom breaks. The maximum length of time that the examination will take should be specified. It is also a good idea to specify how long the plaintiff must sit in the waiting room before he or she can presume that the examination is not going forward. Just as a deponent and his or her counsel would not wait around an unreasonable amount of time for a deposing attorney who did not timely show up to take the deponent's noticed deposition, a plaintiff should not be required to wait around for an unreasonable amount of time for the defense medical expert to begin the examination. What constitutes an unreasonable amount of time is something that should be addressed in the stipulation or order.

• *The place of the examination*. The location of the examination should be specified. The location must be within 75 miles of the residence of the party to be examined. (Code Civ. Proc., § 2032.320(e).) If the defendant seeks to compel the examination at a farther location, it must show good cause and must advance the reasonable costs and expenses for the plaintiff to travel to the more distant location. (*Ibid.*)

• *The identity and specialty of the person(s) who will perform the examination*. The defendant must specify exactly who will be performing the examination and

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his or her area of specialty. (Code Civ. Proc., §§ 2032.310(b) & 2032.320(d).) Thus, a generic statement that the members of the psychiatrist's staff will assist in the examination is not sufficient. The specific name of such staff members and their specialty must be specified.

• *The tests to be taken*. Code of Civil Procedure section 2032.320(d) also requires the court order compelling a mental examination to specify the diagnostic tests and procedures to be conducted. The clear wording of the statute has not prevented defendants from arguing that they do not need to specify in advance exactly what tests would be taken as part of the mental examination. The California Court of Appeal was thus recently called upon to clarify that specifying the diagnostic tests and procedures means that the diagnostic tests and procedures must be itemized by name:

> The word *specify* means to speak of fully or in detail. (Oxford English Dict. (2d ed. CD-ROM 1989).) The plain meaning of section 2032.320, therefore, is that the court is to describe *in detail* who will conduct the examination, where and when it will be conducted, the conditions, scope and nature of the examination, *and* the diagnostic tests and procedures to be employed. The way to describe these 'diagnostic tests and procedures' – *fully* and *in detail* – is to list them by name.

(*Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 260 [45 Cal.Rptr.3d 821, 827] (emphasis in original).)

As part of the meet and confer process, plaintiff's counsel should insist that the defendant specify what tests and procedures it intends to conduct. This will allow plaintiff's counsel the opportunity to consult with an expert and determine the appropriateness of the proposed tests. The parties can then try to agree on which tests will be conducted, and, if unable to agree, the plaintiff can submit his or her arguments to the court as part of the plaintiff's opposition to the motion to compel the mental examination. (*See Carpenter, supra*, 141 Cal.App.4th at 267 [45 Cal.Rptr.3d at 833].)

• *The conditions, scope and nature of the examination*. Plaintiff's counsel must take steps to ensure that the examiner does not delve into matters protected by the plaintiff's constitutional right to privacy or the attorney client privilege. Thus, for example, in a sexual harassment case, an order compelling a mental examination should specify that the plaintiff cannot be questioned about her sexual history or sexual relationships with individuals other than the alleged perpetrator of the harassment. (*See* Code Civ. Proc., § 2017.220(a).) Plaintiff's counsel may also want the order to specify that the plaintiff cannot be questioned about reproductive history and past medical history unrelated to the claims asserted in the plaintiff's lawsuit, which is governed by the right to privacy. (*Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 679 [156 Cal.Rptr. 55, 60].) It may also be a good idea to specify that the plaintiff cannot be questioned about his or her conversations with counsel, to ensure that the attorney client privilege is not violated.

An exhaustive list of every issue to be addressed in the order is beyond the scope of this article. The above are some examples of issues that routinely arise in sexual harassment and discrimination cases. Counsel should carefully assess the particular facts and circumstances of the case, and determine what areas of inquiry should be addressed in the court's order.

The conduct of the examination

Unlike in the case of a physical examination, counsel may not be present during the mental examination, absent agreement or court order. (*Golfland Entertainment Centers, Inc. v. Superior Court* (2003) 108 Cal.App.4th 739, 747 [133 Cal.Rptr.2d 828, 833].) However, the plaintiff is entitled to audiotape the examination, and it may be a good idea to do so to have a record of exactly what transpired. (Code Civ. Proc., § 2032.530(a).)

The party submitting to the mental examination has the right to demand a copy of a "detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner," as well as "a copy of all reports of all earlier examinations of the same condition of the examinee made by that or any other examiner." (Code Civ. Proc., § 2032.610(a).) This has been held to require the examiner to prepare a report if one has not already been prepared. (*Kennedy v. Superior Court* (1998) 64 Cal.App.4th 674, 678 [75 Cal.Rptr.2d 373, 375].) If such a demand for reports is made, the reports must be delivered within the earlier of 30 days after service of the demand or 15 days before trial. (Code Civ. Proc., § 2032.610(b).) Plaintiff's counsel should be sure to make the demand to obtain the results of the mental examination, and to pin down the examining expert's findings. Counsel should be aware, however, that if the plaintiff demands reports pursuant to Code of Civil Procedure section 2032.610(b), the plaintiff then has an obligation to provide any written reports prepared by other physicians, psychologists, or licensed health-care practitioner who examined the plaintiff for the same condition. (Code Civ. Proc., § 2032.640.)

Conclusion

With proper planning and diligence, plaintiff's counsel can limit the intrusiveness of defense mental examinations, either by making strategic decisions that allow the examination to be avoided altogether, or by ensuring a properly tailored court order to minimize the invasiveness of the exam.

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Endnotes:

[1] The text of former section 2032(d) is now codified at Code of Civil Procedure sections 2032.310 and 2032.320.

[2] Code of Civil Procedure section 2032 (the predecessor to Code Civ. Proc., §§ 2032.210 et seq.) was based on federal rule 35. Therefore, judicial construction of the federal rule may be useful in construing Code Civ. Proc., § 2032. (*Reuter v. Superior Court* (1979) 93 Cal.App.3d 332, 337 [155 Cal.Rptr. 525, 528-529].)