

DEFENSE MEDICAL EXAMS (“DME’s”),
PROTECTING YOUR CLIENT’S RIGHTS

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I. PHYSICAL AND MENTAL EXAMINATIONS

A. Examinations in General

The statutory procedure for a compelled mental or physical examination requires that the mental or physical condition or blood relationship of a party be “in controversy” and that “good cause” be shown for the examination. ORCP 44 A. The order may be made “only on motion for good cause shown.” ORCP 44 A. In addition, the requesting party must give notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons to do the examination. ORCP 44 A.

ORCP 44 A provides for physical or mental examination of a party, an agent or employee of a party, or any person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury of the spouse). A physician may perform the physical or mental examination, and a psychologist may perform the mental examination. ORCP 44 A.

PRACTICE TIP: The party to be examined is not required to attend an examination unless there is a “condition in controversy” and only if “good cause” is shown by motion. If physical or mental condition is arguably not in controversy or the requesting party has not shown good cause for the examination, then the party to be examined should not agree to an examination. The requesting party is then required to file a motion and has the burden to clearly articulate that there is good cause for the examination. However, in most instances, where good cause is

apparent, the parties should mutually agree as to time, place, manner, conditions, and scope of the examination to avoid burdening the courts.

Oregon statutes and insurance contracts also provide for a compelled medical examination (“CME”) in certain circumstances (sometimes outside the scope of ORCP 44 A). *See, e.g.*, ORS 656.325(1) and ORS 742.524 (policyholders receiving first party medical or disability benefits under workers’ compensation and personal injury protection (“PIP”) statutes); and ORS 107.425 and ORS 109.342 (parents and children in domestic relations actions and adoption proceedings). If a party or an insurer questions the reasonableness and necessity of medical treatment or disability, it may request that the injured person be examined at a CME and/or have an examiner review the medical records. ORS 656.325(1); ORS 742.524; *Robinson v. Nabisco, Inc.*, 331 Or 178, 11 P3d 1286 (2000); *Foltz v. State Farm*, 326 Or 294, 297, 952 P2d 1012 (1998) (policyholder sued insurer based on alleged scheme by insurer and medical examination review company to deny personal injury protection benefits based upon fraudulent review company report). If the request for CME complies with statutory and policy language, the insured “must comply with a request or face suspension of the right to [benefits]. In no sense is the [injured person’s] participation in a CME a voluntary act carried out for personal reasons.” *Robinson v. Nabisco, Inc., supra*, 331 Or at 187. The insurance contract or statute typically “gives claimants [insureds] no role in selecting the person who performs the CME but, by implication, leaves that matter to the person or entity that requests the examination”. *Robinson v. Nabisco, Inc., supra*, 331 Or at 187.

NOTE: The compelled medical examination (CME) is used extensively in the first-party insurance context in Oregon. The CME is conducted in much the same manner as an examination under ORCP 44. Insurers routinely use CMEs to evaluate the medical condition of its insureds during the actual treatment period. The CMEs and record reviews are frequently used to terminate or limit medical care, and accordingly, much litigation has ensued. For example, under automobile insurance contracts, PIP CMEs are routinely requested by insurers to evaluate the reasonableness and necessity of medical treatment and disability. ORS 742.524-742.524 (although a CME is not mandated by statute in the PIP context, policyholder often agrees to attend CME at the request of an insurer). Similarly, in the workers' compensation context, CMEs are used extensively to evaluate medical treatment for injury and the extent of disability. ORS 656.325(1); *See also Robinson v. Nabisco*, 331 Or 178, *supra*.

B. When Examination May be Requested

A physical or mental examination may be requested in a civil action as long as mental or physical condition or blood relationship is in controversy and the requesting party shows "good cause" for the examination.

The term good cause is not defined. Good cause probably can be shown in the pleadings when the plaintiff claims physical or mental injuries, or when the defendant alleges a mental or physical condition as a defense.

PRACTICE TIP: Some courts may require the requesting party to file a separate affidavit showing good cause. Check the local practice on this point.

C. Who Is Subject to Examination

Any party, or agent or employee of a party, or person in the custody or under the legal control of a party may be subject to a mental or physical examination so long as physical condition or blood relationship is in issue and good cause is shown. This includes the spouse of a party who is seeking to recover for injury. ORCP 44 A.

In domestic relations actions, the court or a party may request and the court may order physical or mental examination of a party to the action or of the parties' children. See ORS 107.425.

D. Who May Conduct Examination

ORCP provides for a physical or mental examination by a physician or mental examination by a psychologist subject to the restrictions contained therein. The term physician is not defined by the rule and is defined in various ways by other Oregon statutes, depending on the context. The rule does not specifically address other forms of examination, for example, DNA laboratory testing, audiology, speech pathology or occupational therapy. In practice, such examinations are often stipulated to among the parties. The court likely has discretion to order examinations by an appropriate professional other than a physician or psychologist pursuant to ORCP 36, which sets forth the general provisions governing discovery.

E. Procedure for Examination

The specific procedure for resolving “good cause” or “time, place, manner, conditions, and scope of the examination” disputes is by motion by the requesting party for court order. The party who seeks a court order must show good cause for the examination (by pleading or affidavit) and give notice. The motion must include a certificate of counsel that a good faith effort was made to confer with the other parties concerning the issues in dispute. UTCR 5.010. The party to be examined will then submit a response objecting to the motion and/or stipulating as to time, place, manner, conditions, and scope of examination. *See Stipulation Regarding Time, Place, Manner, Conditions, and Scope of Examination at Exhibit 1.*

The court’s order will direct the party either to submit to an examination subject to conditions or produce the person who is under the party’s control for an examination. ORCP 44 A.

QUERY: ORCP 44 A refers to examination by “person or persons.” Does this require the person to be examined to submit to more than one examination, e.g., an orthopedist and a neurologist? Does ORCP 44 A permit referring a party to a panel of doctors within the same field of medicine? Although not expressly decided, the requesting party would need to demonstrate good cause for the second examination.

In practice, most examinations are conducted by stipulation or informal agreement of the parties. The stipulation should include time, place, manner, conditions, and the scope of the examination. ORCP 44 A. The stipulation can and often times does extend to topics not covered by ORCP 44 including, but not limited to

the presence of a representative of the examinee and some means of recording the examination (such as audio, visual or stenographic means).

PRACTICE TIP: Pursuant to UTCR 5.010, attorney must confer regarding any request for an examination prior to the filing of any motion. In any such conference, consideration should be given to the procedure to be followed.

However, in many instances, the courts are asked on a case by case basis to decide issues not resolved by stipulation. *See Tri-met v. Albrecht*, 308 Or 185, 777 P2d 959 (1989) (“I do not find much merit in the objections raised by the proposed examiners in this matter. * * * Claimant’s attorney has agreed to do nothing more than observe. The examiners’ suggestion that an attorney’s mere presence would taint the examination is patently absurd and only bolsters concerns over examiner objectivity”); *See also Pemberton v. Bennett*, 234 Or 285, 381 P2d 705 (1963) (Pre-ORCP, this court held that attendance by counsel at compelled examination is largely within the discretion of the court.). Unfortunately, most judges in Multnomah County, for reasons that are not clear, have sided with the defense bar and denied representation of individuals subject to a CME.

F. Notice Requirements

The party who requests the examination must give notice to the person to be examined and to all other parties. The notice must specify the time, place, manner, conditions, and scope of the examination, and the person or persons who will conduct the examination. ORCP 44 A. The specifics of the notice should be incorporated in the motion for examination.

The party who requests the examination must give notice to the person to be examined and to all other parties. The notice must specify the time, place, manner, conditions, and scope of the examination, and the person or persons who will conduct the examination. ORCP 44 A.

G. Presence of an Attorney or Representative During Examination

ORCP 44 is silent regarding the attendance of an attorney or representative at an examination. However, recent developments are instructive.

1. Multnomah County Motion Panel Consensus Statement

The Multnomah County Motions Panel (the “Panel”) revised its consensus statement regarding ORCP 44 examinations in March, 2000. The consensus statements (previously referred to as “rulings”) are published by the court as a service to the bar. The consensus statements are not binding but provide guidance on how the Panel generally rules on matters. The Panel rejected its former ORCP 44 A consensus statement that plaintiff’s counsel could not be present at examination and rejected the position that the examination could not be recorded. *See Multnomah Lawyer*, Volume 46, Number 3, March, 2000.

The Panel stated:

“There has been much discussion recently about the motion panel’s advisory statements concerning recording ORCP 44 exams (“IME’s” or “DME’s”), and having plaintiff’s counsel present. That issue has been taken up by the Oregon Council on Court Procedures.

The motion panel has withdrawn its consensus statements on these two subjects. (The advisory or consensus statement on vocational

rehabilitation exams remains unchanged.) All of the letters and materials sent to the motion panel on the ORCP 44 exam issue have been forwarded to the Council on Court Procedures.”

Multnomah Lawyer, Volume 46, Number 3, March, 2000.

2. Council on Court Procedures

The Council on Court Procedures (the “Council”) of the Oregon State Bar did address the issues of right to assistance of counsel and recording of compelled medical examinations. The Council is comprised of plaintiff’s lawyers, defense lawyers and judges from across the state of Oregon. The Council proposed an amendment to ORCP 44 (two other proposed amendments were rejected without vote). The amendment provided for the attendance of an attorney or representative and recording by audiotape or stenographically. The proposal was approved by a majority of the members of the Council. However, because proposals of the Council must be approved by a “supermajority” of two-thirds of the members, the proposal was not adopted (15 votes were needed to pass the proposal and the proposal received 14 votes).

3. Current Multnomah County Consensus Statement

The current Multnomah County Consensus Statement provides for recording of the CME, but no attorney attendance. The judges appear to be blindly following this rule unless overwhelming need is shown for attorney attendance. Apparently, the right of every individual to have assistance of counsel at any court proceeding is not sufficient. I am not aware of any procedure in the civil law where an individual is denied representation by counsel by court order. Moreover, it is ironic that the Multnomah County panel of judges has created a rule that is contrary to the vote of the

majority of members of the Council of Court Procedures. As stated above, a majority of the Council members voted for both recording and attendance of counsel at CMEs.

There are arguments advanced on both sides of the issue regarding attendance by an attorney at a compelled medical examination. Two Oregon Supreme Court decisions have addressed the issue of an attorney's attendance at an examination. In a 1963 decision written before ORCP 44 was adopted, *Pemberton v. Bennett*, 234 Or 285, 381 P2d 705 (1963), the court held that right to counsel at a compelled examination is a matter largely within the discretion of the trial court. In *Tri-met v. Albrecht*, 308 Or 185, 777 P2d 959 (1989), the court found that having an attorney present when the insured was examined by a designated physician did not constitute obstruction of medical examination requiring suspension of insured's rights to compensation.

TRI-MET v. ALBRECHT, 308 Or 185, 777 P2d 959 (1989). In a workers' compensation CME, the insured consented to an examination by the insurer's designated physicians, but the worker insisted that his attorney be present at the examination. The physicians refused to examine the insured with the attorney present. The insurer asserted that the insured's demand constituted an obstruction of the examination requiring suspension of his right to compensation. The referee rejected the insurer's objection and made an award of benefits and the Workers' Compensation Board affirmed. The Court of Appeals reversed the award and remanded the claim to the referee, holding that it was an abuse of discretion to allow the insured's demand for his attorney's

presence at a medical examination. The Oregon Supreme Court reversed the decision of the Court of Appeals and reinstated the board's award. The Court found that the insured's insistence on having an attorney present when he was examined by a designated physician did not constitute obstruction of medical examination requiring suspension of insured's rights to compensation. In rejecting the lower court's assertion that the presence of an attorney might affect the "neutral setting" and the "objective environment" of an independent medical examination, the Court quoted the referee: "I do not find much merit in the objections raised by the proposed examiners in this matter. * * *

Claimant's attorney has agreed to do nothing more than observe. The examiners' suggestion that an attorney's mere presence would taint the examination is patently absurd and only bolsters concerns over examiner objectivity." (emphasis added)

In *Pemberton*, the court set forth a number of factors favoring or disfavoring the presence of counsel at a CME. The most compelling ground favoring attorney presence was the right of counsel to be present at all times to advise the client in any matter affecting his or her legal rights. On the other hand, the court commented, a medical examination is not ordinarily an occasion when the assistance of counsel is normally necessary. The court highlighted an ongoing focus of controversy:

"This is so because of the nature of a medical examination, which is very different, for example, from an oral discovery examination by opposing counsel. It is also not ordinarily regarded as an adversary

proceeding because a medical examiner is not supposed to be, and ordinarily is not, seeking to establish facts favorable to the party who engaged him to make the examination. This is the case even though the examining physician is selected and compensated by the opposing party. Unfortunately, such objectivity is not always present.” 234 Or 285, 288 (footnote omitted).

QUERY: In today’s medical/legal environment, can it be said that a compelled medical examination (whether by court rule, statute or contract) is not an “adversary proceeding”? In most compelled medical examinations, a potential award, medical benefits, or disability benefits are at stake. The requesting party is seeking to reduce or terminate the award or amount of benefits. On the other hand, the party to be examined is seeking to increase the amount of the award or continue benefits. Furthermore, the examiner is paid by the requesting party to do the examination and report thereon; the examiner will testify on behalf of the requesting party and against the party that was examined if hearing or trial is necessary; the examiner typically derives a substantial portion of his or her income by performing compelled medical examinations. Unless the court appoints the examiner or the examiner is agreed to by opposing parties, is the proceeding non-adversarial? *See Carnine v. Tibbetts*, 158 Or 21, 34, 74 P2d 974 (1937) (“If the plaintiff has any objection to being examined by the doctor suggested by the

defendant, the court should designate some physician of competent skill, indifferent between the parties.”)

The *Pemberton* court further noted that the presence of an attorney in an examination would probably tend to prolong the examination and could create an atmosphere in which it would be difficult to determine the examinee’s true reactions. “This would result in it becoming more difficult to secure a medical examination by the kind of physician whose opinions are particularly desired by the court, i.e., those who regard the examination as an objective attempt to find the facts, regardless of the consequences to any party.” *Ibid.* The court noted, however, that there might be certain occasions when a trial court might determine that the attorney’s presence at all or part of an examination would be reasonable. In the *Pemberton* case, however, no reason was advanced why it was desirable or necessary that the attorney for the plaintiff be present and, thus, the trial court had no basis for determining whether or not the examination should have been conducted with or without the presence of plaintiff’s counsel.

COMMENT: Oregon courts providing for the assistance of counsel or a representative at compelled medical examinations generally make clear that the attorney or representative is not permitted to interfere with the examination. Accordingly, the risk that an attorney’s presence would prolong the examination or interfere is remote. Furthermore, neighboring jurisdictions such as Washington and California specifically provide for attendance of counsel and recordation of compelled examinations by court rule and statute with no such

problems. *See* Washington Court Rule 35(a); *See also* California Code of Civil Procedure 2032(g).

The majority of jurisdictions, either by written court rule, statute or case law, mandate the right to counsel or a representative during compelled physical or mental examination. In the absence of a court rule, statute or case law, the courts are divided or decide the issue on a case by case basis. *See Annot. Right of Party To Have Attorney or Physician Present During Physical or Mental Examination At Instance Of Opposing Party*, 84 ALR 4th 588.

- Washington Court Rule 35(a) (“the party being examined may have a representative present at the examination, who may observe the examination but not interfere with or obstruct the examination.”)
- California Code of Civil Procedure §2032(g) (“the attorney for the examinee or for a party producing the examinee, or that attorney’s representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audiotape any words spoken to or by the examinee during any phase of the examination.”)
- *Gensbauer v. May Dept. Stores Co.*, 184 FRD 552 (ED Pa 1999) (although FRCP 35(a) is silent on the issue of right to counsel at a compelled medical examination, the United States District Court followed the current trend to permit the assistance of counsel and recording of the medical examination)

- *U.S. Security Co. v. Cimino*, 754 So 2d 697 (Fla 2000) (“absent a valid reason for denial, an insured is entitled to have an attorney or videographer present at a [PIP] physical examination”)
- *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P2d 1144, 1146 (Alaska 1989) (“there is a constitutional right to counsel in civil cases arising from the due process clause. We recognize that the right to counsel in civil cases is not co-extensive with the right to counsel in criminal proceedings, but in the area of compelled examinations we see no reason to draw a distinction.” (omitting citations))
- *Chicago M.S.P. P.R. Co.*, 353 NW2d 195 (Minn. App. 1984). (A personal injury plaintiff has no general right to his attorney’s presence during a physical examination by the defendant’s chosen physician although the final decision whether to allow attendance by counsel rests in the trial court’s sound discretion.)
- *Jensen v. Wallace*, 671 SW2d 331 (Mo. App. 1984). (A personal injury plaintiff is not entitled to have his attorney attend a court ordered physical examination by the defendant’s physician. The court explained that while a party does have a constitutional right to be represented by retained counsel at all stages of litigation, the denial of a party’s request to be represented by counsel at a particular stage of the proceeding is a violation of due process only if the particular stage is one of “litigation” and the refusal is arbitrary. The court commented that a medical examination is not

per se an adversary proceeding, or a stage of litigation presumptively requiring the presence of the party's attorney. The court concluded that the presence of a lawyer for one side would inject a partisan note into what should be a wholly objective inquiry.)

H. Record of the Examination

ORCP 44 is likewise silent with regard to audiotaping, videotaping or stenographically recording the examination. The Multnomah County Motion Panel rejected its previous position that the examination could not be recorded. The Motion Panel currently allows recording of examinations.

PRACTICE TIP: If the examination is recorded, the stipulation or order should give consideration to the process for retaining the original tape and providing a copy to those interested.

I. Cost of Examination

The cost of the examination is usually the responsibility of the requesting party.

J. Use and Admissibility of Examination Findings At Trial

The trial judge has broad discretion in determining whether evidence obtained from a physical or psychological examination may be admitted at trial. *Smith v. State of Oregon, Children's Services Division*, 120 Or 506, 852 P2d 957 (1993). A party who seeks to bar the introduction of evidence obtained from an examination, including the report of the physician's findings, bears the burden of establishing that undue prejudice will result if it is introduced.

K. Sanctions for Failure to Comply

A person who fails to comply with the court's order for a mental or physical examination may be subject to sanctions under ORCP 46 B. The court may:

- Order that the matters regarding the physical or mental examination, or any other designated facts, will be deemed established in accordance with the claim of the party who requested the examination, ORCP 46 B(2)(b);
- Refuse to allow the noncomplying party to support or oppose designated claims and defenses, ORCP 46 B(2)(b);
- Prohibit the noncomplying party from introducing designated matters into evidence, ORCP 46 B(2)(c);
- Stay the proceedings until the order is obeyed, ORCP 46 B(2)(c);
- Dismiss the action or any part of it, ORCP 46B(2) (c);
- Render a judgment by default against the noncomplying party, ORCP 46 B(2)(c).

Contempt is not available as a sanction. ORCP 46B(2)(d). Also, when a party fails to comply with an order to produce another person for examination, and the party shows an inability to produce that person, the court will not impose sanctions. ORCP 46B(2)(e).

The court may order the noncomplying party or that party's attorney (or both) to pay reasonable expenses, including attorney fees, caused by the noncompliance. This sanction is not invoked, however, if the court finds that the failure to comply was substantially justified or that circumstances make an award of expenses unjust. ORCP 56B(3).

II. MEDICAL REPORTS

A. Required Medical Report Following Examination

The party causing or requesting an examination under ORCP 44 A “shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician’s or psychologist’s findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition” if requested. ORCP 44 B. As a result, the party who seeks to introduce evidence obtained as a result of the examination must make sure that such a report is prepared and shared with the opposing party. *See Smith v. State of Oregon, Children’s Services Division*, 120 Or App 506, 852 P2d 957 (1993).

SMITH v. STATE OF OREGON, CHILDREN’S SERVICES DIVISION, 20 Or App 506, 852 P2d 957 (1993). In a personal injury action, defendant had plaintiff submit to an independent medical examination conducted by a physician who was also a quadriplegic. Defense counsel had to provide the physician with a stenographer in order for the physician to obtain notes from the examination. Before trial, plaintiff’s counsel requested that defendant provide the physician’s “report”. Defense counsel provided the verbatim transcript prepared by the stenographer. During opening arguments at trial, plaintiff heard for the first time that defendant intended to introduce medical evidence to show that at least some of plaintiff’s problems existed before the accident. Three days later, plaintiff objected to the physician’s testimony at trial under ORCP 44 D, based on defendant’s failure to provide a copy of the

physician's report. The trial court overruled the objection, finding that the transcript substantially complied with the rule. *Held: Affirmed.* The verbatim transcript of the examination was not a "detailed report" within the meaning of ORCP 44 B because it did not set out findings, diagnoses, or conclusions. The court abused its discretion in finding that there was substantial compliance. However, because plaintiff failed to show that she was prejudiced by the trial court's error, and because plaintiff's counsel waited three days before challenging defendant's failure to comply with ORCP 44 B, the error did not require reversal.

B. Cost of Preparing Medical Report

If no report has been made, the court may require the party who caused the examination to be made to have the physician or psychologist prepare a report. The party who requested the report must then pay the reasonable costs and expenses, including the examining physician's or psychologist's fee, necessary to prepare the report. ORCP 44 D(1).

PRACTICE TIP: Do not allow your client to be examined without stipulating in advance with the requesting party that the examining physician or psychologist will provide a detailed report at no charge. Failure to request the report may force you to pay the expenses for preparing the report if the physician did not prepare it at the time of the examination. Be sure to reach agreement with the opposing lawyer that you will receive a written report at no charge in exchange for making your client available for examination.

C. Exchange of Medical Reports

After delivering the report, the party that caused the examination is entitled to receive from the other party similar reports of any examination (previously or thereafter prepared reports) relating to the same condition. ORCP 44 B.

On the defendant's request, the plaintiff in a personal injury case must deliver copies of all "written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply". ORCP 44 C. If no report has been made, the defendant may ask the plaintiff to require the physician or psychologist to prepare a report, and the defendant must pay the cost of preparing that report. ORCP 44 D(1).

D. Failure to Make Report or Request Report

The court may require the physician or psychologist to appear for deposition or may exclude his or her testimony at trial if:

- A party fails to provide a report under ORCP 44 B or 44 C;
- A physician or psychologist fails or refuses to make a detailed report within a reasonable time;
- A party fails to request that the examining physician or psychologist prepare a report within a reasonable time. ORCP 44 D(2).

A party may avoid the obligation to provide medical reports only by showing actual inability to obtain the reports. ORCP 44 B-C. The trial court has discretion to order appropriate sanctions, and the court's exercise of that discretion will not be overturned on appeal absent manifest abuse. *Barry v. Don Hall Laboratories*, 56 Or App 518, 524-525, 642 P2d 68 (1982).