

**American Trial Lawyers Association
Annual Convention, July 2003
San Francisco, CA**

**“UNETHICAL DEFENSE WITNESSES -
HOW TO EXPOSE THE ‘HIRED GUN’”**

**Thomas C. Doehrman, Esq.
CONOUR-DOEHRMAN-CHAMBERLAIN
Three Meridian Plaza, Suite 100
10333 North Meridian Street
Indianapolis, IN 46290
800-269-3443
tcd@indianalaw.com**

INTRODUCTION

Medical doctors, psychologists, and psychiatrists are often called upon by the defendants in a brain injury case to conduct a “independent” medical examination (IME). These experts will then render expert opinions and will typically opine that the injured plaintiff’s symptoms are not causally related to a brain injury and/or that the patient’s symptoms are unrelated to the injury producing incident in question. The purpose of this article is to offer suggestions as to how to expose the bias and vested interests many of these experts have in providing IME examinations and testimony. The starting point is a review of the ethical standards that professional associations have promulgated for their members.

PROFESSIONAL CODES OF ETHICS

The American Medical Association’s (AMA) ethical guidelines for physicians who are involved in litigation as expert witnesses can be found at <http://www.ama-assn.org/ama/pub/category/2503.html>. Section E-9.07 outlines a treating physicians duty to assist a patient’s attorney in the legal process.

[T]he physician has an ethical obligation to assist in the administration of justice. If a patient who has a legal claim requests a physicians assistance, the physician should furnish medical evidence, with the patient’s consent, in order to secure the patient’s legal rights. . . the medical witness must not become an advocate or partisan in the legal proceeding. The medical witness should . . . testify honestly and truthfully.

Section E-9.07, American Medical Association Code of Medical Ethics

The AMA’s guidelines specifically address the ethical obligations of the IME examiner. Note that the following standard places the onus on the IME examiner to fully disclose any potential or perceived conflict of interest which he or she may have.

Despite their ties to a third party, responsibilities of IEP's and IME's are in some basic respects very similar to those of other physicians. IEP's and IME's have the same obligations as physicians and other contexts to: evaluate objectively the patient's health or disability . . . and disclose fully potential or perceived conflicts of interest. . .

Section E-10.03 American Medical Association Code of Medical Ethics

The American Psychological Association (APA) also has ethical guidelines for its members who serve as expert witnesses. These guidelines can be found at <http://www.apa.org/ethics/homepage.html>. The APA's guidelines include the obligation to "promote accuracy, honesty and truthfulness" in their members assessments and examinations. Principle C, American Psychological Association Ethics Code. Like the AMA guidelines, the APA guidelines emphasize the importance of avoiding a conflict of interest for any psychologist serving in a professional role:

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial or other interests or relationships could reasonable be expected to impair objectivity. . .

Standard 3.06, American Psychological Association Ethics Code

The APA guidelines also require its members to conduct legal evaluations in a thorough manner and to personally examine the injured person, if at all possible. This ethical standard requires the psychologist who only does a record review (as opposed to an actual examination of the injured person) to make it clear in his report the "probable impact of their limited information" and further requires the psychologist conducting only a record review to "appropriately limit the nature and extent of their conclusions. . . "

Except as noted in 9.01(c), psychologist provide opinions. . . only after they have conducted an examination of the individual adequate to support their statements and conclusions. When, despite reasonable efforts, such an examination is not practicable,

psychologists document the efforts they made and the results of those efforts, **clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions.** . (c) when psychologists conducts a record review or provides consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information in which they based their conclusions and recommendations.

Standard 9.01, American Psychological Association Ethics Code

Finally, the APA ethical guidelines require the IME examiner to defend the validity and reliability of the assessment tools they use in conducting their examinations. This section is particularly relevant to IME neuropsychological examinations wherein defense neuropsychologists often use a wide variety of testing measurements, some of which may have little validity or reliability to the particular case in question. Section 9.02 of the APA's Ethical Guidelines for psychologists who serve as forensic experts states as follows:

Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.

Standard 9.02 American Psychological Association, Ethics Code

The American Academy of Psychiatry (AAP) has issued ethical guidelines for the practice of forensic psychiatry. These guidelines can be found at <http://www.emory.edu/AAPL/ethics.htm>. The AAP's Ethical Guidelines, like those promulgated by the AMA and APA, emphasize the importance of objectivity and honesty for the forensic psychiatrist.

Forensic psychiatrists function as experts within the legal process. Although he may be retained by one party to a dispute in a civil matter. . . they adhere to the principle of honesty and they strive

for objectivity. Their clinical evaluation and the application of the data obtained to the legal criteria are performed in the spirit of such honesty and efforts to obtain objectivity. Their opinion reflects such honesty and efforts to attain objectivity.

Section IV, AAP's Ethical Guidelines.

**ESTABLISHING THE IME EXAMINER'S BIAS, CONFLICTS OF INTEREST,
AND LACK OF OBJECTIVITY**

Despite the lofty ideals expressed in the ethical guidelines of the AMA, APA, and AAP, every experienced litigator knows that oftentimes, the IME examiner fails miserably in exhibiting objectivity and neutrality in their evaluation of the injured person. Through the use of formal discovery techniques and informal investigation, plaintiff's counsel can often establish the bias of the IME examiner. The following steps should be taken to find out as much as possible about the IME examiner with an eye towards challenging at deposition and trial the examiner's objectivity, and establishing the financial incentive for the opinions he is explaining.

1. Obtain the IME examiner's complete CV/Resume. As soon as the IME examiner is disclosed by defense counsel, you should obtain the examiner's latest CV/resume. This will give you a quick overview of the examiner's background and in particular any articles or publications that the examiner has authored. If there are such articles, you should consider getting a copy of all of them and taking the time to either read them yourself or have a law clerk or paralegal read them to see what positions regarding brain injury the expert has taken in written form. Surprisingly, I have had the experience of using an expert's own prior publications to impeach the credibility of the conclusions he was expressing in a case.
2. Send interrogatories and a motion to produce to defense counsel regarding the

IME examiner in question. The following are interrogatory questions you may want to consider:

(A) with respect to Dr. X, who you have identified as your Trial Rule 35 IME examiner/evaluator in this case, please state the following:

- i. the substance of the facts to which Dr. X is expected to testify;
- ii. the substance of the opinions to which Dr. X is expected to testify;
- iii. summary for the grounds for each opinion;
- iv. the identity of each and every document or thing Dr. X inspected or examined

that is related in any way to this case;

v. the name, address and telephone number of each person with whom Dr. X discussed his opinion or any other matter related to this cause; and

vi. the identity (including description and date originate) of each and every document or thing prepared by Dr. X regarding his opinion or any other matter related to this case.

(B) Identify each and every matter in which Dr. X has provided consulting services in a legal or insurance matter involving a claim for damages or personal injury, a claim for benefits under an automobile insurance policy, and Indiana Trial Rule 35 Medical examination, or a similar medical examination done at the request of the insurance defense attorney and/or an examination of medical records and report thereon done at the request of an insurance defense attorney or insurance company. Included in this request are any such services performed for any lawyer of a lawfirm, insurance company or medical review service. In responding to this interrogatory, you are requested to identify any report prepared, the state and county in which the lawsuit was filed in the identified matter, and the identity of the individual or entity, attorney, lawfirm or insurance company which retained Dr. X for consulting services as described above.

(C) Identify and list the fee schedules and any contracts or agreements existing

between Dr. X and any of the individuals, entities, attorneys, lawfirms or insurance companies identified in your answer to subpart (B) above.

(D) Identify any legal case in which Dr. X has given legal depositions or court testimony in the past four (4) years, including the identity of the parties, the state and county, the court, the approximate date of the deposition or testimony, and the present custodians of the original or any copy of a transcription of the testimony.

(E) Has Dr. X filed tax returns, state and federal, for the past four (4) years which reflect any income Dr. X has generated as a result of providing consulting services as identified in your answer to Interrogatory B above? If so, identify any 1099 and/or W-2 Forms that the witness has received representing income from the matters identified in your answer to subpart (B) above, including the source of the 1099 and/or W-2 Forms and the amount reported.

(F) Specify the total amount of money Dr. X has received from each of the following sources in the past four (4) years for consulting services described and identified in your answer to subpart (B) above:

- i. Any attorney or lawfirm;
- ii. Insurance company;
- iii. Medical review service;
- iv. Met Workers Compensation Insurance Company, if records are separate from one through iii above; and
- v. The percentage of Dr. X's total income derived from sources i through iv above.

After preparing these interrogatories, you will also want to prepare a Request for Production of Documents for the information which each of the Interrogatories seeks.

3. Whether the interrogatories and request for production of documents suggested above will be answered depends on the jurisdiction and trial judge in question. If the Court does not allow the extensive discovery of the IME examiner suggested above, plaintiff's counsel can use state and national listserves in an effort to obtain information about the IME examiner's financial bias, lack of objectivity and past track record as an expert defense witness. For example, I had a case in which a neuropsychologist from the State of Oregon was listed as an IME evaluator for the purpose of examining all the medical records, depositions, and evaluations in my injured party's case. Based on his record review the IME expert offered his opinion as to the nature and extent of the brain injury sustained by my client. Through the use of an ATLA listserve, I was able to obtain prior depositions of this expert and a packet of information from the Oregon Trial Lawyers Association which included an affidavit of the expert filed in a workers compensation deposition. This affidavit established that the defense expert had performed 113 independent psychological examinations in the first nine months of 1995 at an average cost per case for an examination and report of \$1,100. This expert had generated an income of \$124,300 in the first nine (9) months of 1995 for "independent" psychological examinations, all but two of which were conducted for the defense. In addition, I also obtained a newspaper article entitled *Doctors For Sale* published by the Willamette Week, a Portland, Oregon weekly newspaper. In this article the neuropsychologist was identified as making a "comfortable income" from conducting IME examinations/evaluations and providing IME testimony almost entirely for the insurance industry. The article further stated that the doctor in question earned approximately \$180,000 a year

for such consultation and testimony. Although I could not introduce the newspaper article at trial because of hearsay problems, the article led to the discovery of the affidavit detailing this expert's experience as a "hired gun".

4. Move the Court for an Order Allowing the Videotaping of the IME Examination/Evaluation

When the defense requests an actual examination by their IME expert, I typically file a motion with the trial court to allow for the videotaping of the IME examination. The Indiana Supreme Court has recognized the conflict of interest which any IME examiner has between the person being examined and the party for whom he or she has been retained.

The defendant's expert is being engaged to advance the interests of the defendant; clearly, the doctor cannot be considered a neutral in the case. There are numerous advantages, unrelated to the emotional damage issue, which the defendant might unfairly derive from an unsupervised examination.

Jacob v. Chaplin, 639 N.E.2d 1010 (Ind. 1994), quoting the Federal Court decision of Zabkowicz v. West Bend Co., 585 F. Supp. 635 (E.D. Wis. 1984).

In its decision in *Jacob*, the Indiana Supreme Court held that electronic recordings of the IME examination were permissible.

The T.R. 35 Medical Examination is a Court-Ordered medical evaluation of a person whose health status is at issue in a case. Examination, by its nature, requires a verbal exchange between examiner and examinee. The purpose of the examination is to further the litigation process. An opinion arrived at by the examiner is intended to aid the trier of fact in making a damages assessment. Statements made by the examinee are intended to aid the examiner in arriving at a proper opinion, and, by necessity, are material to such trial issues of proximate cause. It is inherent at such an important meeting that both examiner and examinee be permitted to choose whether or not to make written notes of the

verbal exchange. It follows from this conclusion that both should as well be permitted to choose whether or not, in lieu of the laborious process of making notes, totally record the verbal exchange by electronic means. In permitting an examination ordered in this case to be recorded, the Trial Court properly exercised its discretion and recognized the justness of permitting a recording to take place in an open manner, in the absence of some overriding reason to prohibit that recording. We also fail to see any reason why an electronic recording examination would in and of itself impede an examiner's ability to conduct a fair and complete examination.

Jacob v. Chaplin, 639 N.E.2d 1010 (Ind. 1994), at 1013.

The Motion for Permission to Videotape can be supported by a Brief Memorandum of Law citing the *Jacob* decision. See also, Roehen v. Huang, 558 A.2d 1108 (Del. Super. 1988), in which the Delaware appellate court allowed for the audiotaping of an IME exam.

The following are example paragraphs from a Motion to allow for the videotaping of an IME examination. Note the distinction made between an audio tape and video tape which highlights the advantages of the latter recording.

1. Defendant has requested the opportunity to have his expert examine the plaintiff, and perform an independent medical examination. The defendant can present trial testimony of his expert based upon physical examination which has been requested.
2. Defendant's expert can testify at trial concerning his visual observations of plaintiff that can only be recorded by videotape.
3. Defendant's expert can also testify to the physical tests performed on plaintiff and the results of these tests. These tests can only be accurately and fairly preserved by videotaping the exam.
4. An audio recording will only preserve what is verbalized by defendant's expert and the plaintiff. The verbalization will contain only the defendant's expert's version of the tests and cannot record the visual portions of the testing to preserve an unbiased record of the exam.
5. Plaintiff has agreed to this examination conditional upon the examination being videotaped.

6. The parties disagree regarding the right of the plaintiff to have the examination video recorded.
7. Besides plaintiff's counsel's letter of _____m and defendant's counsel's letter of _____, which defendant has included in his Motion, plaintiff's counsel sent a reply to defendant's counsel's letter of _____, on _____. Attached hereto as Exhibit "A" is a true and correct copy of plaintiff's counsel's letter of _____.

CONCLUSION

Medical examiner's have an inherent conflict of interest between objectively reporting about the person they are examining, and at the same time providing their service to the adverse party who hired them. Through the use of aggressive discovery and informal investigation, plaintiff's counsel can often find the necessary information and documentation that can provide the basis for undermining the IME examiner's deposition/trial testimony by establishing the examiner's bias, financial conflict of interest, and lack of objectivity.