



# EFFECTIVE USAGE OF COMPULSORY MEDICAL EXAMINATIONS

## *Avoiding tricks and traps of the Plaintiff's Bar in the age of Nuclear Verdicts*

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A Compulsory Medical Examination ("CME") can be a useful tool in defending and/or resolving a personal injury case. While CMEs, also known as Independent Medical Examinations in some jurisdictions, can bolster your defenses as to medical causation, that is not their only use. An effective CME can not only support causation defenses, it can also serve as a benchmark to help determine value of a claim, thereby facilitating negotiation.

### **IDENTIFYING THE NEED FOR A CME**

It is imperative for the defense team to

begin its review of a case with an eye to what expert testimony may be required, including when to incorporate a CME into the defense plan. It is important to have clear communication between client and counsel as to the goal of the CME, as well as how that integrates with the larger trial preparation strategy. The most obvious example of when to use a CME is where your personal injury plaintiff has a prior history of similar complaints. In this case, an effective CME can be used to delineate any potential change between the claimant's pre-existing health and any potential new injury. Or, al-

ternatively, a CME can be used to confirm that the claimant's current complaints are, in fact, symptoms of the natural progression of their prior pathologies.

Another instance where a CME is likely to be beneficial is when a claimant is alleging injuries that either appear to be out of proportion with the subject incident or a novel condition. For example, claims of traumatic brain injury (TBI), even after minor incidents, are increasing in many states. In previous years, claims of a TBI would be limited to incidents with visible, severe injuries and/or property damage. In

these cases, it can be difficult to formulate a defense where a sympathetic plaintiff has alleged that his personality has irrevocably changed due to a TBI. In these cases, a thorough neurological or neurophysiological evaluation often disproves the plaintiff's claims of cognitive deficits associated with the subject accident. In cases of alleged TBIs, neurological and neuropsychological testing is effective in identifying the claimant's baseline level of function and compare it to the current level of cognitive functions. The tests are also designed to identify malingering or exaggerative behavior. In effect, it pays (or, more accurately, saves) to be curious when determining what kind of experts to retain and rely upon for CMEs, particularly when faced with novel and/or subjective complaints.

#### **BANG FOR YOUR BUCK: USING YOUR EXPERT TO HIS OR HER FULLEST POTENTIAL**

In recent years, we have identified increased instances of obstructive behavior by opposing counsel during CMEs. In order to ensure that the defense expert is able to obtain the necessary information to conduct his evaluation, it is important to prepare him for anticipated tactics from the plaintiff's counsel. Likewise, the expert needs to be aware of jurisdictional rules relating to the presence of court reports and videographers. The presence of outside participants can be a large point of contention during neuropsychological examinations and needs to be addressed in advance of the examination. It is also critical that your chosen expert is familiar with any jurisdictional limitations imposed on what kind of examination may be conducted, or if there are any controversies over the type of inquiries the expert may make of the plaintiff during the exam. In this vein, it can be helpful to provide any initial paperwork or written histories that your expert may want completed as part of the CME to the plaintiff's attorney in advance of the examination. Additionally, should the plaintiff issue any objections to the CME, provide and discuss those with your expert prior to the examination as well.

It is equally important to have your medical expert prepared for what the rest of his or her involvement in this litigation will look like. Prior to the CME, discuss the plaintiff's theory of liability with your expert to ensure that he or she is aware of the claimed injuries. Ask him or her detailed questions about what the expected treatment for such injuries would be, and be prepared to speak intelligently with regard to the plaintiff's medical records to direct

your expert's attention to any prominent inconsistencies that you believe exist.

After the CME, confer with your expert and obtain his or her impressions. If the expert cannot be supportive, you will want to know prior to the issuance of any medical report. In many jurisdictions, it is required that the expert issue a report and that the report be provided to opposing counsel. If you are facing the receipt of a harmful report, consider whether you can resolve the case before the report is issued.

#### **Defer to the Experts: Valuation Benchmarks Increase Negotiation Efficiency**

An effective CME is not simply an opportunity for a doctor to provide a blessing for your defense strategy. Rather, a CME can provide a baseline as to the severity and/or veracity of the claims asserted which in turn allow both the client and the defense attorney to determine an informed, reasonable negotiation standard. An important component of this strategy is to find medical experts who can be forthcoming with you and inform you as to what the potential exposure could be at a potential trial. Effective CMEs rely on finding and cultivating relationships with medical experts who not only understand the process, but who are also not afraid of being honest with you about the strength of your case.

#### **Cost-Saving Alternative: CMEs vs. Records Reviews**

CMEs are not the sole way to effectively utilize medical experts, though. Another, at times more cost effective, way to obtain expert opinions is to obtain a records review. This is useful particularly if you are seeking expert opinions early in the case and/or if you are working on a tight timeline. In many cases, as soon as defense counsel can provide comprehensive records to a medical expert that expert can begin formulating opinions. Another benefit of obtaining an early records review is that there is no signaling event to opposing counsel that you are obtaining these opinions. As such, you have the ability to conduct depositions or written discovery with a more targeted plan of attack. Moreover, you can always discuss the usefulness of a subsequent CME with your retained expert after a records review.

Records reviews can also be helpful in the event when you are seeking to confirm the extent of causation, rather than dispute it entirely. In this scenario, the records review could serve as barometer to ensure informed reserves are placed on the case and provide an educated background from which to negotiate a resolution. In addition,

an early records review can provide a baseline for intelligent questioning during a plaintiff's deposition to determine whether or not the plaintiff's testimony comports with medical science. This is doubly useful if the plaintiff later submits to a CME, as the expert will have the plaintiff's own testimony to point to should the expert's opinion be supportive.

#### **Other considerations: Timing and Expense**

While the cost of defending claims is certainly at the forefront of the minds of clients, it behooves both attorneys and clients to begin the defense work up of a case with the end in mind. Each case will be different regarding what kind of expert review is the most helpful. Often, obtaining objective medical opinions early in the life cycle of a case provides a strong footing from which to combat a plaintiff's subjective complaints. This is particularly true where a case involves a novel injury, prior history of similar complaints, or subsequent complication; it may be necessary to invest in a well-credentialed expert (sometimes at a steep price) early on.

Early retention of experts in complex cases or cases involving a novel or unique injury can provide direction to defense counsel relating to investigation, written discovery, questions for depositions, and even deposition questions for the plaintiff's treating physicians. In many cases, the best defense is putting on a strong offense. The added value of having a seasoned expert on the defense team early on often outweighs the cost.



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