

DON'T DREAD THE DME –
Strategies to Defeat the Beast

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So you've received word from defense counsel that they want to have your client examined by a physician of their choosing. Perhaps you've been provided with a proposed order pursuant to Rule 4:10 ordering the exam to take place. Don't dread the inevitable conclusion that will likely be reached by this defense doctor that your client's injuries couldn't possibly have come from the automobile collision, or that your client does not suffer from a traumatic brain injury. Rather, begin your preparation of what can and should be a lively and fact-filled cross examination at trial that just might reveal the desperate measures that the defendant is taking to avoid responsibility for the injuries he or she caused. Your preparation and strategies begin the moment you learn about the 4:10 exam and which doctor has been hired by the defense. The following steps and strategies should be considered in every case.

I. The Order

Perhaps you realize that any judge presented with a defense motion to conduct the exam is going to permit it. Probably so, but that doesn't mean that you just sign the proposed Order setting forth the date, time and location your client is to appear. Rather, recognize the various options available to establish parameters and conditions right

from the start. Rule 4:10 of the Rules of the Supreme Court of Virginia states as follows:

Rule 4:10. Physical and Mental Examination of Persons.

(a) *Order for Examination.* When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending, upon motion of an adverse party, may order the party to submit to a physical or mental examination by one or more health care providers, as defined in § 8.01-581.1, employed by the moving party or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties, shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and shall fix the time for filing the report and furnishing the copies.

(b) *Out-of-State Examiners.* Examiners named in such an order shall be licensed to practice in, and shall be residents of or have an office in, this Commonwealth. However, notwithstanding the reference to licensure by this Commonwealth in the definition of health care providers in § 8.01-581.1, the court may, in the exercise of its sound discretion and upon determining that the ends of justice will be served, order an examination by one who is not licensed to practice in, is not a resident of, and does not have an office in, this Commonwealth but who is duly licensed in his or her jurisdiction.

(c) *Report of Examiner.*

(1) A written report of the examination shall be made by the examiner to the court and filed with the clerk thereof before the trial and a copy furnished to each party. The report shall be detailed, setting out the findings of the examiner, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition.

(2) The written report of the examination so filed with the clerk may be read into evidence if offered by the party who submitted to the examination. A party examined who takes the deposition of any examiner who shall have conducted an examination ordered pursuant to this Rule, waives any privilege that might have been asserted in that action or in any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examination made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does

not preclude discovery of a report of a health care examiner or the taking of a deposition of such examiner in accordance with the provisions of any other Rule.

Paragraph (a) should be utilized to ensure that the Order does specify the “time, place, manner, conditions, and scope of the exam.” For example, is the examiner permitted to ask questions or have your client fill out forms and questionnaires? Can someone be present with your client or should the exam be videotaped? Will xrays be permitted or any invasive testing? The following limitations and conditions have been set in various Orders from around the Commonwealth, all of which can be found on the VTLA website in the Hot Docs section:

1. DME doctor “shall not be permitted to provide any biomechanical testimony, including testimony concerning the force of the motor vehicle crash or the damage to the accident vehicles as they may relate to plaintiff’s injuries.”
2. DME doctor “shall not be permitted to testify about the credibility or veracity of the plaintiff or any other witness, including testifying that there is a functional component to plaintiff’s complaints of pain beyond July 2007 which may be explained by malingering, lying or a motivation for secondary gain, a history of depression, or any other psychiatric or psychologic trait or condition.”
3. “No invasive testing will be conducted. The examination may be videotaped by counsel for the Plaintiff. [Plaintiff] may be accompanied by a friend or family member, who may observe, but not interfere, with the examination...”

4. "Copies of [DME doctor's] report, his CV, all raw data generated by the examination (including notes) and a copy of his charges will be furnished to counsel for the Plaintiff within 30 days after the exam."
5. DME doctor "will not refer to his evaluation in Court testimony as an independent evaluation He will acknowledge that he was hired and paid by the defendants."
6. "Questions pertaining to extraneous matters, such as when the Plaintiff hired her attorney or who referred the Plaintiff to any doctor, are not permitted."
7. "The examinee will not be required to complete any lengthy information forms upon arrival at the examiner's office."
8. "Plaintiff shall not be required to bring anything to the exam other than valid identification."
9. "If the Plaintiff believes the examiner is seeking information not permitted by this Order, Plaintiff may contact her counsel."
10. "In testifying [DME doctor] will not use the term "independent" (as in "independent medical examination") since he has not been selected by this court."
11. "No reference shall be made at deposition or trial of this case, by counsel, the Defendant or the examiner, to the examination as "independent", or "court ordered" and no representation shall be made, explicitly or by implication, that the result of the examination has been sanctioned by the Court or that the Court accords the examination any greater weight than other evidence."

12. "The examiner may ask the Plaintiff for a brief description of the accident and pertinent medical history, but not interrogate the Plaintiff, at length, as to the facts or circumstances of the injury at issue, the manner in which it occurred, or other issues concerning liability."
13. "Either party may have a court reporter to observe during the examination and may record the examination at their expense."
14. "There will not be any invasive testing, films, nerve conduction studies or other invasive or painful requirements or stimuli."
15. "The Plaintiff need not provide any documents, x-rays, MRI films or any other item to the examiner on the examination date, as this is the responsibility of the Defendant's counsel."
16. "This medical examination is not a deposition. Any questioning of the Plaintiff shall be limited to matters reasonably related to Plaintiff's current medical condition and necessary for the examiner to evaluate the Plaintiff's current medical condition."
17. DME doctor "is a physician and is not qualified to testify as to energy levels or the forces involved in collisions and the Defendant will not offer testimony from him on these issues."

These are just a sampling of the various ways that judges around the Commonwealth have provided for the manner, conditions and scope of the examination as required by Rule 4:10. Your job is to determine which conditions and limitations are appropriate and necessary in your particular case and absent agreement from defense

counsel, object to entry of a more generic Order that fails to include appropriate language.

Importantly, unless you are very familiar with the particular physician being proposed, research the individual as much as possible prior to entry of any Order pertaining to the exam. A wealth of information is available by searching through the listserve databases about the doctors most often utilized by defense counsel and the insurance companies. Prior depositions and trial testimony can be gathered in order to find any pattern of questionable areas of testimony or tactics employed by that expert. If you find where the expert has provided impermissible testimony in the past, seek to establish a limitation right in the initial Order. Protecting your client begins at this early stage of the DME process.

Also, the time for filing the report should be set forth in the order as directed by paragraph (a). Numerous Orders can be found wherein the Court has given the examiner a limited time to prepare the report after completion of the exam. Ask that the report be produced to all counsel and the court simultaneously, rather than allow for a draft to go to defense counsel first.

Does the doctor proposed by the defense meet the criteria of paragraph (b)? Recently, we see more attempted use of doctors from Maryland or the District of Columbia. If they are not residents of Virginia and do not have an office in the Commonwealth, a challenge to that physician may be appropriate.

II. Prepare Your Client

We have a pretty good idea of what will happen during a Rule 4:10 exam, but our clients will not know what to expect. Of course, they are accustomed to being examined

and questioned by a doctor who wants to help them and will be treating them. Be certain that your client understands the purpose of the DME exam and that the doctor has been hired by the defense and will likely find the injuries aren't as severe as claimed, weren't caused by the collision, or that medical treatment was unnecessary.

Instruct your client to take notes immediately after leaving the examiner's office. Encourage the plaintiff to note how long they were in the examiner's office, specifying how much time was spent being physically examined, answering questions or providing history, and waiting. Did the DME doctor spend time reviewing records or films while in the presence of your client? Did the doctor seem prepared for the exam and familiar with the circumstances of the injury? You may want to ask your client to call you after the exam is concluded to go over details while it is fresh.

Most importantly, where the court has established limitations and conditions on the scope of the exam, be sure your client is familiar with these so that he or she will know and be able to address any issue when the DME doctor exceeds the scope allowed.

III. Report is In Your Hands - Now What?

In the rare instance that the report is actually favorable to your client, be certain that it has been appropriately filed with the clerk of court. Pursuant to paragraph (c)(2) of the Rule, you may read the report into evidence but only if it has been filed.

More likely, you will need to begin your preparation of cross-examining the DME doctor at trial. What part of the report will you challenge? Resist the temptation to challenge the expert on every point made. Rather, choose those points that are most significant to your case and easiest to refute. Provide a copy of the report to the experts

that you plan to call at trial. Very often the DME report will include some criticism of the treating providers by characterizing your client's past medical care as unnecessary in some respects. The DME doctor will disagree with the diagnoses made and treatments recommended. Your own doctors need to be prepared during their direct testimony to address these issues. Allowing them to review the report will best demonstrate to them where they need to focus and prepare. Additionally, they may be able to assist you in preparing your own cross exam of the DME doctor.

Is medical literature available that might refute certain points made by the DME doctor? Ask your own experts, and do your own research. If you do find appropriate articles that will support your case and refute the DME, they must be produced 30 days prior to trial pursuant to 8.01-401.1 of the Code of Virginia.

The big question at this stage of the process is: To depose or not to depose? Hopefully, by now you will have done a thorough job investigating and researching the particular DME doctor. You will have prior depositions and transcripts, and possibly recent financial records indicating the amount of money the doctor has earned from his work as a medical-legal expert. As held by the Court in Lombard v. Rohrbaugh, 262 Va. 484; 551 S.E.2d 349 (2001), the DME doctor can be cross-examined regarding the amount of money he has been paid by the defendant's insurance company for similar work in the past. Citing Henning v. Thomas, 235 Va. 181, 366 S.E.2d 109 (1988), the court held:

The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness... . [O]n cross-examination great latitude is allowed and ... the general

rule is that anything tending to show the bias on the part of a witness may be drawn out.”

Availing yourself of the opportunity to show the bias of the DME doctor in favor of the defense is imperative. If financial records are not available from other sources, or if they are outdated, issue a subpoena duces tecum to the expert and the insurance companies to obtain 1099's, lists of cases, billing records and other documents that might reveal this bias.

Seek other reports that the DME doctor has prepared. Remarkably, with many of the “frequent flyers”, the reports are virtually identical. This can be a useful tool in cross-examination to show the jury that the doctor has reached the same conclusions with a different plaintiff in a different case. Demonstrate how “reliable” this expert is to the insurance company or defense firm that has hired him.

With regard to the question of whether to depose or not to depose, I am in the camp of those who avoid deposition unless absolutely necessary because I simply cannot find adequate information from other sources. Deposing the expert will only serve to prepare him for trial, allow him to learn your style, and to learn your strategies to attack his opinions. Rarely is cross-examining the DME expert on the medicine particularly fruitful. Rather, the best cross-exam focuses on the following:

1. Credentials

Is this expert best suited to challenge the plaintiff's treating providers?

Perhaps your case involves shoulder surgery and the plaintiff's own doctor has done a fellowship specific to shoulders. The defense doctor has not and

this can be emphasized. Is a neurologist seeking to offer opinions about the necessity of an orthopaedic surgery?

2. Lack of contact with the plaintiff

Almost never will the DME doctor have had as much opportunity to observe the plaintiff as will his or her own treating physicians. The treater may even have performed surgery and “seen” the injury itself.

3. Relationship with defense counsel

Has the expert testified for the defense firm numerous times in the past?

Does the defense firm represent the doctor in any personal matters?

4. Relationship with insurance company/financial bias

How much money has been paid from the company to the doctor for past examinations and testimony?

5. Lack of familiarity with the facts of the case

Listen carefully during the direct exam and review the expert’s report carefully to discern where he or she may not have a good command of the details of the plaintiff’s prior medical condition or the circumstances of the collision or the treatment received for the injury.

Sample cross-examination is beyond the scope of this outline, but numerous resources are available that demonstrate excellent cross-examinations of an adversarial expert without delving too deeply into the medicine itself.

Finally, as you review the report, consider whether any Motions in Limine need to be filed to limit impermissible opinions that have become evident since you sought to

limit the scope of the exam. Has the DME doctor referenced in his report opinions that are beyond his or her expertise? Has he raised issues that were in fact limited by the initial Order entered by the court allowing the exam? Is the report replete with hearsay opinions and references from other medical records? McMunn v. Tatum, 237 Va. 558, 379 S.E.2d 908 (1989) held that a testifying expert could not refer to opinions expressed in medical records by other providers. The court held:

“The admission of hearsay expert opinion without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party. No litigant in our judicial system is required to contend with the opinions of absent “experts” whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination.”

More recently, in Commonwealth v. Wynn, 277 Va. 92, 671 S.E.2d 137 (2009), the court clarified that the holding in McMunn was not limited to “hearsay matters of opinion” but other issues raised by absent individuals as well.

Each of these cases should be in your trial notebook to ensure that the DME expert does not testify as to extraneous matters of hearsay.

In conclusion, the DME is certainly not to be feared, but embraced. With adequate preparation and armed with information to challenge the credibility of the witness, you may be able to go a step beyond merely neutralizing this witness. You may be able to demonstrate to the jury just how far the defense will go to allow dangerous behavior by the defendant to go unchecked.