

Ten Tips for Completing Your Civil Rule 35 Medical Examination

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One of the tools of discovery (the means by which each party to a legal case learns facts from the other party) is the Physical or Mental Examination authorized by Civil Rule 35. Usually defense counsel in a personal injury case will retain a physician or physicians in appropriate specialties to evaluate the records of the plaintiff and to conduct a physical (or, when appropriate, mental) examination of the plaintiff. Such examinations may not be painful, injurious or unduly intrusive, although blood draws have been approved when appropriate. You are entitled to have a representative present during such examinations, but the representative is not permitted to disrupt the examination. The representative may be a family member or, as is often the case, a representative from the office of your attorney. It is a mistake to regard these examinations, sometimes called IMEs (Independent Medical Examinations) by the defense, as independent. The examining physician is likely to be called by the defense as a witness, is paid by the defense, and may, in fact, derive a substantial portion of his income from conducting such examinations for insurance companies and defense lawyers. Such physicians are not your treating doctor and are not examining you for the purpose of treatment or rendering a diagnosis. It is not their place to offer treatment recommendations, issue prescriptions, to give you advice, or to offer comfort, sympathy, or critiques of your care providers. They are simply examining you at the request of the defense with a view towards offering testimony for the defense. This examination is part of the *legal* process, *not* part of your medical care.

With this as background, the following tips may prove helpful in setting your expectations with respect to your Civil Rule 35 examination or defense medical examination:

(1) These examinations typically take about an hour. The first 50 minutes is an oral medical history and review of records. The last 10 minutes is an examination. Allow enough time before and after the examination so that you can arrive early and so that you do not experience stress during the examination about being able to make your next appointment. Stress leads to impatience and inattentiveness and you may feel pressure to answer questions incompletely if you are in a hurry. Allow enough time so that you can be relaxed and at your best. Make sure you know how to get to the office for the examination in advance – don't leave it for the last minute. The examinations may be conducted in a medical office where the examiner has his or her private practice (if any), but on occasion they may be conducted in a shared office of a company in the business of hosting medical examiners or even (rarely) in a hotel room rented for the purpose.

(2) Many times the examiner will dictate the report in your presence. This may make things confusing because the examiner might ask you a question, then talk over you when you start to answer. Medical examiners do not need to have a

good “bedside manner.” They are, after all, *not your doctor*. Do try to make sure that you make yourself understood if you feel the doctor is not accurately recording what you have said.

(3) You should answer the questions as fully and honestly as you can in a spirit of straightforward cooperation – not with an adversarial or hostile attitude. As is always the case, being honest may also mean appreciating the limits of your own knowledge of details and may mean giving yourself “an out” when appropriate. For example, if you are asked a question that requires detailed memory of your past medical records or medical history, you should refer the doctor to your medical records where appropriate. For example, if they ask, “How many times did you see Dr. Smith?” You should say, “I am not sure exactly how many times I saw him/her, but I am sure that is reflected in his/her records.”

(4) Do not make yourself into a medical expert. We will have your doctors testify regarding your diagnosis, the exact nature of your injury, and your prognosis. You should stick with your area of expertise – namely how *you* felt. Remember, you are the world’s greatest expert on how you feel. You should testify about things like, “It hurt here.” “It felt like burning.” “It felt like stabbing.” “I cannot bend over without feeling pain.” “I get headaches more frequently than I used to.” “I become nauseated when I pump gas.” You should *not* testify about things like, “My tendon separates from my ligament.” “The scar tissue in my neck prevents me from moving it.” “I have toxins in my system.” In other words, describe your pain as you feel it, see it, taste it, hear it, or smell it. Do not testify based upon what you “think” is going on based on what others have told you or what you have read after-the-fact.

(5) Do not minimize or exaggerate your pain. Be as honest and fair as you can be. If you are asked to use pain scales to rate your pain, make sure that you understand the time frame (pain during examination or pain right after the collision) and what the scale represents (is 10 the worst pain imaginable, the worst pain from the collision, or the worst pain I have ever felt?)

(6) If you are asked things that you do not know, it is okay to say that you do not know. If you are asked things that you once knew, but now forgot, it is okay to say I don’t remember. Remember, although you are not “under oath,” you are in a legal proceeding and what you say in the medical examination can and will be used in court. It is vital that you be truthful *and* accurate, so only answer questions to which you know the answer.

(7) Try to make a personal connection with the doctor. Doctors are much more likely to right a favorable report if they see you as a real person. Smile. Be polite. Dress appropriately. This includes clean clothing and undergarments that preserve your dignity and privacy.

(8) You are allowed to have an observer there, but you cannot ask the observer questions and the observer is only permitted to observe and take notes. Audiotaping is generally permitted; videotaping of the examination requires court approval or the agreement of the parties. Under very rare circumstances only will the observer interrupt or disrupt the examination; generally, the observer is not permitted to interfere at all. For your part, you should conduct yourself as if the observer is not present.

(9) When asked about whether treatment was effective, do not fall into the trap of becoming an “expert” in what should have been done (see (4) above) and do not criticize your own treating doctors. The judge or jury will decide the credibility of witnesses and you are not supposed to be or expected to be an expert on medical care. Do not make yourself into an expert or make yourself “judge and jury” as to whether your doctor was good or not. .

(10) If you do not understand what is going on or you feel the doctor is confusing you with questions, please ask for clarification. If you answer a question, the doctor will assume that you understood it. Do not answer any question until you are satisfied that you understand what you are being asked.

We hope that this provides you with some level of increased comfort with your upcoming medical examination. You should always feel free to discuss this proceeding with your attorney in the context of the specific facts of your case.