

Your Client's Privacy Is Not a Myth: How to Protect Your Client's Privacy – And Your Case – in Discovery

By Jeremy D. Pasternak

Three common myths in civil litigation:

- 1) The plaintiff has no privacy rights. After all, the plaintiff filed suit and claims emotional distress.
- 2) Discoverability is always broader than admissibility.
- 3) Whatever negative facts that might come out in discovery can just be dealt with in a motion in limine.

The truth:

- 1) Plaintiffs only minimally waive their privacy rights by bringing suit. There is substantial authority that they only waive it on matters which can be shown to be directly related to the litigation.
- 2) When it comes to private matters, discoverability is *not* broader than admissibility. The standard of "reasonably calculated to lead to the discovery of admissible evidence" ceases to be the standard, and, as is referenced above, a defendant seeking to discover information of a private nature must *first* show that the discovery *will* (not *might*) elicit (not lead to) relevant evidence.
- 3) The motion in limine is too late. By properly asserting privacy rights, plaintiffs' counsel can block the discovery of evidence which, if discovered, would later be deemed admissible.

The second myth is probably the most widely held among plaintiffs' lawyers, defense lawyers, and, unfortunately, the bench as well. But it is the third which most frustrates me, because it is far too often the default position of the plaintiff's bar. Taking this position is not only lazy,

but misses out on a significant opportunity to gain a strategic advantage (or at least not let the other side do so) and at the same time misses an opportunity to protect your clients.

In short, by properly asserting your client's privacy rights, you can prevent a defendant from finding out information which is harmful to your case, even if that information, if it were discovered (and even if it is suspected to exist), would be admitted. This has three powerful effects on the case.

- 1) It prevents the admission of evidence which directly harms your case;
- 2) It avoids the demoralizing effect on your clients of having their privacy invaded, which the defense knows can bring down a settlement value (which is why they pry in the first place);
- 3) Defendants and particularly their lawyers hate "not knowing." Instead of your client being demoralized, "blocking" personally invasive discovery can very quickly alter the other side's attitude toward your case.

Because of the generally accepted attitude that discovery is broad, defense counsel get access to personally invasive evidence all the time. They then use it as a "wedge" issue, to keep pushing further and further into your client's life and to find "problems" with your case. This information may or may not ultimately be inadmissible, but because you will not know that until the eve of trial, the information has a negative affect on settlement. And even once you get to trial, you have to worry about the judge being prejudiced against your client.

The solution, then, is a *procedural* one. This article will provide you with the



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authorities you need to block these inquiries at the *discovery stage*, rather than waiting for trial, where 1) you actually stand a *lesser* chance of prevailing, and, 2) strategically, it is probably already too late.

Plaintiffs Have Privacy Rights, Even When they Allege Emotional Distress

The California Constitution, Article I, section 1, states:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

The California Courts have repeatedly held that merely because an individual files a lawsuit in which emotional distress is claimed, the plaintiff is not opened up to wholesale discovery of every aspect of their life, even if it might have some bearing on emotional distress. (See, e.g., *Britt v. Superior Court* (1978) 20 Cal.3d 844.)

How then do the courts decide what is and is not discoverable, and how can you protect your client and your case?

A Compelling Need for Discovery Must Be Demonstrated *Before* Privacy Rights Are Invaded

Relevance (much less “reasonably calculated”) is *not* the standard when privacy rights are at issue. The defendant’s legitimate need for discovery must still be balanced against the individual plaintiff’s privacy rights, and the defendant must show a *compelling interest* for the discovery.

1. Objection:

The objection is easy: “Plaintiff’s Privacy Rights. Defendant has failed to show a compelling need for this discovery.”

2. Authorities

a. *Compelling Interest Required*

Although the constitutional right of privacy is not “absolute,” the California courts have held that it may be abridged only when the party seeking the discovery (for ease and out of respect for reality, this party shall be hereinafter referred to as “the defense”) has *first* shown a “compelling interest.” (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 524 [addressing privacy rights in the context of personnel documents].)

The court further held:

In an effort to reconcile these sometimes competing public values, it has been adjudged that inquiry into one’s private affairs will *not* be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered *might* lead to other, and relevant, evidence. (*Id.* at 525.)

In *Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 10, the court cited *Board of Trustees, supra*, and held:

The court there noted that California courts have generally concluded that the public interest in preserving confidential information outweighs the interest of a private litigant in obtaining the confidential information.

Note that the cases above deal with the privacy rights of third parties. For an application of the same standards to a litigant (specifically a plaintiff), see *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853. In *Lantz*, the plaintiff, a

victim of sexual harassment, testified that the sexual harassment had focused largely on her breasts, and that this was particularly upsetting to her as she had previously had breast surgery. The defense wanted to know if the surgery was elective or because of a medical condition; the trial court refused a motion to quash and the appellate court reversed. (*Id.* at 1844-45, 1858.) Even under those circumstances, where the defendant had shown such a connection between the information sought and the claims being made, the trial court’s order was reversed and the discovery quashed.

Relevance Must Be Shown *First*

The fact that the discovery “may lead to the discovery of admissible evidence” is not enough. Before a defendant can seek discovery of private information, it must first show that the information is directly relevant to the litigation.

Petitioner’s objections are grounded upon the constitutional right to privacy contained within article I, section

1 of the California Constitution. Therefore, real parties’ argument relating to the scope of discovery and the ability to undertake a fishing expedition misses the mark. While the filing of the lawsuit by petitioner may be something like issuing a fishing license for discovery, as with a fishing license, the rules of discovery do not allow unrestricted access to all species of information. *Discovery of constitutionally protected information is on a par with discovery of privileged information and is more narrowly proscribed than traditional discovery.* (*Hunter Tylo v. Spelling Entertainment Group* (1997) 55 Cal.App.4th 1379, 1387, citing *Britt v. Superior Court* (1978) 20 Cal.3d 844, 852-853, emphasis added.)

The *Hunter Tylo* court then ruled that when privacy rights are at issue, the discovery sought must be “directly relevant to the litigation.” (*Id.* at 1387.) The court said:

In those situations where it is argued that a party waives protection by filing

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a lawsuit, the court must construe the concept of “waiver” narrowly and a compelling public interest is demonstrated only where the material sought is directly relevant to the litigation. [Citation omitted.] The party seeking the constitutionally protected information has the burden of establishing that the information sought is directly relevant to the claims.

This showing must actually be made, not merely by speculation, before the discovery can be compelled. The practical effect of this is powerful: *Defendants are precluded from fishing expeditions when privacy issues are involved.*

This puts the defense in a Catch-22. Obviously, they want to go on a fishing expedition. Ostensibly, they are looking for “alternative stressors.” Of course this is nonsense. What they are really doing is looking for things which will embarrass your client, make the plaintiff look “bad” to the jury, and hopefully make the client walk away from the case cheap. The “first must show relevance” tool stops this. Unless the defendant knows and can demonstrate to the court that the discovery will elicit relevant evidence, that discovery is supposed to be denied.

The *Hunter Tylo* case is illustrative of how the principle works in practice. The plaintiff, an actress, brought suit for pregnancy discrimination; she had been fired from “Melrose Place” when she became pregnant. Defense counsel had asked a variety of questions pertaining to the plaintiff-actress’s marital difficulties (which had been reported in the press). The court held:

There can be no doubt that the marital relationship serves as a foundation for an assertion of the right to privacy, and real parties do not claim otherwise. Petitioner has tendered her psychological condition in this litigation only as it relates to termination of the employment contract. Therefore, discovery is limited to those injuries resulting from termination of the contract. Before real parties can obtain information regarding emotional distress from the marital relationship, they must first identify the specific emotional injuries which petitioner claims resulted from termination of the contract and then demonstrate there is a nexus between damages from termination and

those which may arise out of the marital relationship. Real parties have failed to do either. They merely assert the conclusion that there are “other stressors that *might* have caused, or contributed to, [petitioner’s] alleged emotional injuries,” a true fishing expedition. (*Id.*, at 1388.)

In sum, before the defendant could explore the problems in plaintiff’s marriage (even though it knew them to have existed), it first had to show that they were necessarily related to her emotional distress from the termination. Obviously, that is what the defense was ostensibly trying to show; but because they could not do so on their own, they were denied the discovery.

Sidenote: the case is also worth reading (and citing) for the appellate court’s sharp words towards a particularly obnoxious defense counsel and implicit praise for a plaintiff’s lawyer who knows how to hold her ground and protect her client (and her case).

Other cases which are useful in this context are: *Barrenda L. v. Superior Court* (App. 2 Dist. 1998) 65 Cal.App.4th 794, 76 Cal.Rptr.2d 727; *Knoettgen v. Superior Court* (App. 2 Dist. 1990) 224 Cal.App.3d 11, 273 Cal.Rptr. 636; *Mendez v. Superior Court* (App. 5 Dist. 1988) 206 Cal.App.3d 557, 253 Cal.Rptr. 731.

To recap:

- 1) if it’s private, the normal broad rules of discovery do not apply;
- 2) the defendant must show a “compelling interest” in the discovery;
- 3) the defendant must also first show that the discovery *will* (not *might*) elicit (not just lead to) evidence directly relevant to the matter at hand.

The “Less-Intrusive” Option

If you are fighting a motion with the authorities referenced above, but are concerned you may lose it, there is still a back-up argument: the “less-intrusive means” solution. The California courts have held that when privacy rights are at issue, even if a compelling interest and direct relevance are shown, if there is a less intrusive means of obtaining the discovery, it will be preferred to the more intrusive means.

This is also a powerful affirmative argument, in that it can be used to force the

defense to prove that they have no other less-intrusive means of obtaining the information they seek.

In *Allen v. Superior Court* (1984) 151 Cal.App.3d 447, 449, the court held that when privacy rights are implicated, the party seeking the discovery must also show, in addition to a compelling interest, that there is no other, less intrusive means of obtaining the necessary information:

However, real party made no showing that the information sought or substantially equivalent information could not be obtained through other means, such as by conducting a deposition without production of the records. Nonetheless, the court permitted disclosure. The court abused its discretion when it failed to require a less intrusive method of discovery. (*Id.* at 529.)

This creates a very useful back-up position. For example: a court decides that it is going to allow inquiry into some private aspect of your client’s medical history. Instead of the defense being provided access to the medical records, it can be forced to limit its discovery to questioning your client on the subject at deposition. Does this arguably deny the defense a right to attempt to impeach with third-party materials? Yes. But the courts have held that protecting privacy rights outweighs this competing interest.

Specific Private Matters and How to Protect Them

There are a variety of specific matters, often sought in discovery, which are objectionable (but far too often not objected to). A few of them are discussed below, along with authorities to support your objections.

A. Character Evidence

This is another one which is too often reserved only for the motion in limine. But remember the standards set forth above: when private matters are at issue, compelling interest and direct relevance must be shown. If you can argue that the information the defense seeks is inadmissible character evidence, you eliminate their ability to argue there is a “compelling interest” in its discovery. Remember, compelling interest is a balancing test, and if the defense has nothing on its side

of the balance, the discovery should not be permitted.

California Evidence Code § 1101, "Evidence of character to prove conduct" states:

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

This is useful in a variety of circumstances. Example: prior car accidents. Who among us, handling an automobile personal injury case, has not had the defense ask about prior car accidents? It is certainly a "private" issue. And there can be no doubt that it is covered by the prohibition against character evidence.

B. Unemployment Insurance

In any case involving lost earnings, the defense is likely to ask for documents pertaining to applications for or receipt of unemployment insurance. The unemployment benefits are obviously objectionable pursuant to the collateral source rule, and should be addressed in a motion in limine. But there is more that you can and should do.

First, an example to demonstrate the importance of this issue: injured plaintiff loses his job because he is out for a month

and cannot work. The employer, trying to do him a "favor" to help him get another job in the future, records the termination as a "job elimination." The plaintiff parrots this to the EDD (the Employment Development Department, the state agency which processes unemployment insurance claims). The defense obtains these records in discovery. Now you are faced with your client having made a statement to a government agency which undercuts the basis for your lost earnings claim. Worse, your client is now a "liar." And even if the benefits themselves are excluded, these facts probably won't be.

The best bet, of course, is to know the bases for objecting to discovery of any of these records. Both the amount of benefits received and communications with the Unemployment Development Department can be protected from discovery.

1. Amount of Unemployment Insurance Benefits

a. Objection:

Inadmissible pursuant to the collateral source rule, and therefore irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

b. Points and Authorities:

Collateral Source Rule Generally:

"Where a person suffers personal injury or property damage by reason of the

wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer." (*Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 349, 170 P.2d 448.)

The collateral source rule "is firmly established as the California rule." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1388, p. 857. See *Helpend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 84 Cal.Rptr. 173.)

2. Communications With the EDD Regarding Unemployment Benefits

a. Objection:

"Governmental Reporting Privilege" or "Official Information" Privilege.

b. Points and Authorities:

An applicant's communications with the Employment Development Department are privileged and are not discoverable. A statutory privilege exists pursuant to Evidence Code § 1040 and Unemp. Ins. Code §§ 2111.

This means that not only can you block information about the amount of the benefits, but more importantly, anything your client may have said about why they are not working, as well.

California Evidence Code § 1040 reads in pertinent part:

RETAIL INDUSTRY EXPERT WITNESS

EVALUATE ALL ISSUES OF INDUSTRY STANDARDS OF CARE IN:

* SUPERMARKETS
* RESTAURANTS
* SPECIALTY STORES

* GENERAL MERCHANDISE STORES
* FAST FOOD OPERATIONS
* CONVENIENCE STORES

* HOME IMPROVEMENT CENTERS
* WAREHOUSE STORES
* SMALL BUSINESS OPERATIONS

INDUSTRY STANDARDS ISSUES INCLUDE:

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* ADA Compliance
* Food Handling Procedures

* Floor Care & Maintenance Procedures
* Merchandising Procedures
* Internal Operation Procedures

* Store Security
* Loss Prevention
* Wrongful Termination

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(a) As used in this section, “official information” means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

California Unemployment Insurance Code § 2111 states:

Except as otherwise provided in Section 1094, and except with respect to information furnished by the department in connection with its participation as a party or as a lien claimant in a judicial or administrative proceeding, information obtained in the course of administration of this division is confidential and shall not be published or open to public inspection in any manner.

In *Crest Catering v. Superior Court* (1965) 62 Cal.2d 274, the California Supreme Court held that “*These provisions manifest a clear legislative purpose to preserve the confidentiality of information submitted to the Department of Employment.*” (*Id.* at 277.) There, the court allowed that the party providing the information could claim the privilege. (In *Crest* the information was disclosed only because the privilege had been waived.) Therefore, even though Evidence Code § 1040 references the privilege as being asserted by the government entity, it may also be asserted by an individual.

Note that the EDD knows this rule and follows it. If the defense subpoenas these records, the EDD is almost sure to deny the discovery. If the defense moves to compel, it will almost certainly find that motion opposed by the Attorney General’s office. Obviously, you should object yourself, but you will almost certainly find that you have the State on your side.

C. Disability Benefits and Records

Depending on the type of case, the amount of disability benefits may be discoverable; however, as with unemployment records, the communications with the EDD regarding those benefits and the disability are not.

a. Objection:

“Governmental Reporting Privilege” or “Official Information” Privilege.

b. Points and Authorities:

Evid. Code section 1040 and Unemp. Ins. Code sections 2111 and 2714.

In *Richards v. Superior Court* (1968) 258 Cal.App.2d 635, the court found that a defendant could not discover disability records because of the “official information” privilege created by the above-referenced statutes. The public policy set forth in those statutes is that the public agencies gathering the information have an interest in the information remaining confidential, as this encourages honest communication with the agencies. This public policy is superior to a defendant’s interest in discovery. The court held:

[H]ere section 2714 provides that “All medical records of the department ... shall be confidential and shall not be published or be open to public inspection in any manner revealing the identity of the claimant, or the nature or cause of his disability. Such records are not admissible in evidence in any action or special proceeding other than one arising under this division. ...” *Id.* at 637. (See also *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 513, 319 P.2d 621.)

Crest Catering v. Superior Court (1965) 62 Cal.2d 274, 277: “*These provisions manifest a clear legislative purpose to preserve the confidentiality of information submitted to the Department of Employment.*”

As is referenced above, *Crest* also sets forth that an individual – rather than the government entity exclusively – may claim the privilege.

D. Employment Records

These fall into two categories: past and present. The latter is of larger concern.

Employment records are *per se* protected by your clients’ privacy rights. C.C.P. 1985.6 (consumer notice) specifically refers to employment records. This is powerful authority to counter any suggestion that employment records are not private. See also, *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 529, affirming that employment records are private and will not be ordered disclosed absent a “compelling need” for the discovery.

Generally, the only basis that defendants will be able to articulate for the discovery of records of present employment is mitigation of lost wages from the injury (P/I context) or a termination (employment context).

1. Objection to Requests for Contact Information or Work Records

Plaintiff objects on the basis that her employment following her termination from the defendants is relevant only to mitigation. Plaintiff has already provided W-2s, pay stubs, and other documents demonstrating her earnings from this employer. Therefore, this [interrogatory, request] seeks information already in the hands of Defendants.

This is particularly useful in conjunction with the “less intrusive means” rule. If you have already provided wage records, the defense really has no need to press any further.

2. Good Point to Make in Meet and Confer

Though not a “legal” argument, make it: Please also consider that Ms. [Plaintiff] is currently mitigating some reasonable portion of her damages. If [Defendant Employer] does contact Ms. [Plaintiff]’s current employer, and if that has an adverse affect on her employment, [Defendant Employer] will lose whatever damages offset they might otherwise have.

3. If You Really Want to Be Aggressive

Make this objection when they ask for employer identity or records:

Please note that plaintiff considers her employment subsequent to be private and confidential. Plaintiff will object to any attempts to discover any information from her employers.

Further, should defendants or anyone acting on their behalf contact plaintiff's current employer, plaintiff will consider this to be a course of conduct not subject to the litigation privilege constituting harassment and retaliation motivated by her having brought this action.

This argument may or may not prevail; the litigation privilege is obviously broad. But this argument may nevertheless may dissuade opposing counsel.

E. Psychological Records

The authorities already provided cover the legal objections. The following are applications.

1. Overbreadth

Even if your client testified that they saw a therapist solely because of the conduct which is the basis for the suit, a wholesale request or subpoena for *all* the documents may still be overbroad – after all, you don't know what's in there. In its overbreadth, the discovery is likely invasive of privacy rights.

2. Third-Party Privacy Rights

The documents may refer to third parties – patients virtually always discuss their relationships with others. This may provide a further basis to prevent immediate disclosure and either get a “first look” or give cause for the documents to be redacted.

3. Get a “First Look”

In light of the above objections, offer to review the documents by obtaining them with a release, before they are produced to opposing counsel. Perhaps there is nothing in there to worry about, and if there is, at least you know what it is.

F. Sexual Conduct

This is a favorite area for defense “prying,” particularly in cases involving sexual battery, sexual harassment, and the like. In cases which do not involve such allegations, the compelling interest and “directly relevant” tests outlined above should preclude this kind of discovery. But even in cases involving sexual offenses, there are a number of protections for your client and your case.

1. Precluding Discovery of Sexual Activity with Persons Other than the Defendant

In cases involving allegations of sexual harassment, battery, or other sexual misconduct, no discovery may be taken into sexual activity with persons other than the individual defendant/perpetrator. This is basically the “civil rape shield” law.

The starting point is C.C.P. § 2017(d):

In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, *any*

party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by noticed motion and shall not be made or considered by the court at an ex parte hearing. This motion shall be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion. (Emphasis added.)

The rule this section articulates is consistent with the authorities above. In short, it prevents fishing expeditions, because before defendants can even seek the discovery, they must have good cause for getting it. It therefore fits perfectly with the “compelling interest” test and the requirement that a showing of relevance first be made. Along with the other authorities above, it provides an excellent

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means of preventing discovery into this most personal area.

Further authority can be found in Evidence Code § 783. Although section 783 is really for use at trial, it reinforces the notion that there is a presumption against the admissibility of this evidence.

§ 783. Sexual harassment, sexual assault, or sexual battery cases; admissibility of evidence of plaintiff's sexual conduct; procedure

In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, the following procedures shall be followed:

(a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant.

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

G. Defense Medical Examinations – Psychological

Entire articles have appeared in these pages on how to handle demands for physical DMEs, and this article's purpose is not to revisit this subject in that level of detail. However, it is worth touching on the subject of *psychological* DMEs. Though less

common, their uses are probably even more sinister. Although the authorities below are presented in the context of the psychological DME, they may also be useful to attack claims for physical DMEs.

1. Authority for Examination

C.C.P. § 2032(d) states in relevant part: "The court shall grant a motion for a physical or mental examination *only for good cause shown.*" (Emphasis added.) In other words, you should not just assume that the defense has a right to an IME.

2. First Defense: Waive "Extraordinary Claims"

If a party stipulates that (1) no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages, a mental examination of a person for whose personal injuries a recovery is being sought shall not be ordered except on a showing of exceptional circumstances.

If your client has not seen a therapist and you do not intend to present one as an expert at trial, you can simply waive "extraordinary claims" pursuant to Section 2032(d). If in fact your client has not seen therapist and will not be seeing one, there is very little you will lose by agreeing to this waiver.

If you client *has* seen a therapist, the issue is obviously more complicated. If it makes strategic defense to do so, first agree that none will be called at trial. If this fails, you will have to move on to the second defense.

3. Second Defense: No Continuing Injury

If you are not claiming an ongoing mental injury, the defendant has no right to take a DME.

Where plaintiff alleges that he or she is not suffering any current mental injury, but only that he or she has suffered emotional distress in the past arising from defendant's misconduct, a mental examination, pursuant to statute providing for discovery by means of mental examination of party in

action in which mental condition of that party is in controversy, is unnecessary because such allegation alone does not place nature and cause of plaintiff's current mental condition in controversy. (*Doyle v. Superior Court* (App. 6 Dist. 1996) 50 Cal.App.4th 1878, 58 Cal.Rptr.2d 476.)

4. Authorities on Privacy Specifically in the Context of DMEs

As always, be prepared to counter the oft-repeated defense mantra that "a plaintiff waives privacy rights by filing suit."

Vinson v. Superior Court (1987) 43 Cal.3d 833, 840: "While a plaintiff may place his mental state in controversy by a general allegation of severe emotional distress, the opposing party may not require him to undergo psychiatric testing solely on the basis of speculation that something of interest may surface." (Id. at 841.)

Merely by filing a lawsuit in which emotional distress is claimed, plaintiffs do not open themselves up to wholesale discovery of every aspect of their lives, even if it might have some bearing on emotional distress. (See, e.g., *Britt v. Superior Court* (1978) 20 Cal.3d 844.)

5. If the DME Is Going Forward

a. Privacy rights still apply – be sure the client knows their rights

In *Vinson*, above, the plaintiff had to go through the DME. But the court ruled that her privacy rights – including those regarding sexual activity, although it was a sexual harassment case – still applied.

This is obviously a tricky business. Your client is not a lawyer, and you cannot be present at a psychological DME. There are two ways to handle this. First, if you think your client is competent to handle it themselves, teach them these rules and be sure they are ready to tell the examiner that there are questions they will not answer. Strategically, this is the best option, because the examiner is going to be flummoxed by your client's refusal to answer questions.

Also note that this is particularly important when written psychological testing is being conducted. One of the most commonly-used tests, the Minnesota Multiphasic Personality Inventory

(MMPI), now the “MMPI-2,” contains a number of questions which are invasive of privacy rights, including questions regarding sexual activities and feelings.

If you are not confident in your client’s ability to handle themselves and make judgements on what questions they will and will not answer, then you are going to have to address these issues up-front, through meet and confer, and probably through a motion to the court.

b. Privacy rights still apply – get it in the order or stipulation

If you have to go the meet and confer and motion route, be sure that the stipulation or order regarding the DME specifies that the plaintiff’s rights under § 2017(d), the California Constitution, etc. will not be violated. Even if you do not go that route, be sure that you don’t sign off on an DME stipulation in which you waive your client’s privacy rights.

c. Audiotape it

Give your client a tape recorder and be sure they use it. Section 2032(g)(2): “The examiner and examinee shall have the right to record a mental examination on audio tape.”

d. No psychologists; only psychiatrists

One nice bit is that you can force the other side to pay the extra expense of retaining a psychiatrist (or get some concession with a stipulation to the contrary): “A psychologist is not a ‘physician’ as defined in this section providing for physical, mental and blood examinations and may not conduct a mental examination compelled under that statute.” (*Reuter v. Superior Court, San Diego County* (App. 4 Dist. 1979) 155 Cal.Rptr. 525, 93 Cal.App.3d 332.)

H. Workers’ Compensation Documents – Medical Records

Many plaintiffs also have workers’ compensation actions if the injury occurred on the job. If your client has a workers’ compensation case, the files – including medical records – are in the hands of the workers’ compensation defense counsel, who are often far too eager to turn it over to defense counsel in civil litigation cases.

This is a violation of the Confidentiality of Medical Information Act. If opposing counsel obtains information in violation

of the act, move to disqualify them and/or to exclude the evidence.

1. Authority:

California Civil Code § 56.10

(a) No provider of health care, health care service plan, or contractor shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization, except as provided in subdivision (b) or (c).

(b) A provider of health care, a health care service plan, or a contractor shall disclose medical information if the disclosure is compelled by any of the following:

(1) By a court pursuant to an order of that court.

(2) By a board, commission, or administrative agency for purposes of adjudication pursuant to its lawful authority.

(3) By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency.

....
§ 56.13. Further disclosure by recipient of medical information

A recipient of medical information pursuant to an authorization as provided by this chapter or pursuant to the provisions of subdivision (c) of Section 56.10 may not further disclose that medical information except in accordance with a new authorization that meets the requirements of Section 56.11, or as specifically required or permitted by other provisions of this chapter or by law.

You also need to be prepared to object to questions at deposition on this basis. If your client is presented with a medical record that you know was not previously subpoenaed, and you know there is or was a workers’ compensation claim, you can bet this is where it came from. Ask defense counsel for an offer of proof or simply ask, “Where did you get this? This is my client’s private medical record and I have seen no subpoena for this.”

Defense counsel, probably unaware of the above statute, may just tell you. At that point, you have a basis to refuse to answer questions. Finish out the deposition and then make your decision how to proceed.

I. Financial Information

1. Tax-Payer Privilege

Tax returns are not discoverable. (*Sav-On-Drugs v. Superior Court* (1975) 15 Cal.3d 1; *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509.) Nor are the documents related thereto. (*Id.*)

2. Limit Inquiries to Wages

Defendants frequently ask for documents and information relating to income from any source, claiming relevance to lost wage claims and even emotional distress claims.

a. Objection:

Irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Any relevance is outweighed by Plaintiff’s privacy rights and no compelling need for the information has been shown.

b. Argument:

The defense may have a right to look at lost wages-related documents if there is a lost wage claim, and plaintiff may have a duty to mitigate her lost wages. If she happened to make some money in the stock market, that’s not relevant to wage mitigation. See also collateral source rule, above.

Again, this is surely a fishing expedition; assert your client’s privacy rights to prevent it.

Last Words

All too often, both defense and plaintiff’s counsel simply do not understand the rules regarding discovery of private information. In addition to protecting your clients’ rights, there are two overwhelming reasons that knowing these rules can provide you with a tremendous advantage in your cases: 1) it is actually easier under the law to win these battles in discovery, and 2) strategically, a motion in limine is probably too late. ■