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Defense exams are not independent

THEY ARE RIFE WITH FRAUD. AND YOU CAN PROVE IT

The fraudulent and slipshod way in which many defense experts perform their "independent" medical or psychological evaluations is shocking. Learning just how bad it actually is may make you more motivated to do what is suggested in the second section of this article. How bad is bad? *One hundred percent* bad.

What is missing in the DME report is as important as what is included

Read the report for what was left out or misrepresented. DMEs leave out facts or findings favorable to the plaintiff and tend to emphasize only those facts helpful to the defense. Frequently, the DME misrepresents what the radiologist found in a scan. For example, in a spine case, a reading radiologist notes a protruded disc – or, in a brain case, white matter changes. The DME refers to the same scans and findings as "normal for age."

The wonder of AI

Run the report through AI. Make sure that the AI program is HIPAA compliant before doing so and then ask the AI to interpret the report for errors, bias, or incorrect, inadequate science.

Do the same for any articles cited by the expert. Perplexity AI can help you analyze articles for weaknesses and inconsistencies. You don't even need the actual article – just input the article title and the journal, and Perplexity will find it for you. You can analyze up to four articles per day in Perplexity's free version. It's incredible. Perplexity Enterprise also offers a subscription version which permits greater ability to upload material to analyze.

Radiology audit trails can expose the truth

Please start subpoenaing or requesting radiology audit trails. Defense experts often author a report claiming the scans are normal. However, I have been demanding the audit trails and what I have found has been game changing.

What is an "audit trail"? Audit trails are information contained in *paid* software used by radiologists to interpret scans. This digital information contains valuable information such as who looked at the scans, when they looked at it and for how long – and it cannot be manipulated by the user.

An audit trail may show that the defense expert spent just 60 seconds looking at an MRI. MRIs contain *thousands* of imaging slices. So, this means the expert spent 60 seconds looking at thousands of images. In other words, they only looked for what they wanted – and are being paid – to find. Hardly the work of a medical professional dedicated to comprehensive and impartial review.

Recently, I worked on a stroke case in which it was alleged that the treating radiologist misread a critical scan. The defense argued that the radiologist had carefully reviewed the scan and missed nothing. The plaintiff's attorney demanded the audit trail. And what did the audit trail reveal? The radiologist *never even looked at the scan* – so, of course, the stroke was missed.

On another case in which I was recently involved, an expert testified that he used the "RadiAnt DICOM Viewer." ("DICOM" stands for digital imaging and communications in medicine.) This is free software. I did a quick internet search and found the user manual – at the bottom of the "Welcome" page, set off in red, is the disclaimer: "RadiAnt DICOM Viewer is not a medical product. It has no FDA/CE or any other certifications and it is not intended for diagnostic purposes." (See https://www.radiantviewer.com/dicom-viewer-manual/index.html) Yet "diagnostic purposes" is exactly what the defense's expert radiologist was using it for!

Always make sure that your own expert is using paid software and is really spending the time looking at the images. (Most certainly, the time they spend looking at the images should match the time they are claiming on their invoices.)

I have spoken with scores of radiologists over the past few years, and it has become clear that a new, dangerous trend is emerging: radiologists depending on AI to read scans for them. As you can imagine, this can be fatal – not just to a case, but to a patient's life.

Run your own analysis

But AI can be incredibly helpful for attorneys. I use Perplexity Enterprise Pro to analyze brain and spine scans. It can be used to screen interpretations from your own expert to determine whether there has been an under-read. It is not perfect but can be enormously helpful as you work up your case and, ultimately, prepare your expert for deposition.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2024

Fraud during the defense physical exam

I often work in conjunction with a physiatrist, Oregon Hunter, M.D. He specializes in watching or listening to recordings of defense medical exams and then making a detailed comparison for me and other attorneys about what he finds in the recordings versus what the defense examiners have written in their reports. He recently published a study based on his review of several consecutive examinations performed and reported by the same defense examiners. (Hunter, *Evaluation of the scientific validity of forensic medical evaluations*, The Physiatrist's Voice (Dec. 2019), pp. 33-39.) All of the examinations were recorded on video. How many of those examiners authored a report that was false or misleading – even though they *knew* the entire examination was being *recorded*? Every single one.

Dr. Hunter found that defense experts frequently claim to have performed tests that were never conducted – for example, range of motion in all planes or checking the cranial nerves. The sad fact is that most doctors – even plaintiff's experts – fail to properly check the first cranial nerve (smell), even though this is the nerve most likely to be damaged in a mild head injury case. (Coello, A., et al., *Cranial Nerve Injury After Minor Head Trauma*, J. Neurosurg. 113, 547-555, 2010.) Research shows that 77% of patients with a minor head injury sustain cranial-nerve injury (*Ibid*.), yet the 12 cranial nerves are rarely systematically checked. If the patient is being evaluated via telehealth, it is virtually impossible to do.

When you screen a client for traumatic brain injury, find out how things are smelling and tasting – are they using more salt or hot sauce? – because this can be an important signal of TBI. If your client gives you a positive response, you can then encourage your client to mention this to their treaters. And be certain to tell your expert so that a smell test can be performed to rule out damage.

Psychological/neuropsychological exams

Malingering tests…. Do not exist

In an exhaustive law-review article published earlier this year, psychology professor Christoph Leonhard and attorney and law professor Chunlin Leonhard analyzed standard malingering tests. (Leonhard and Leonhard, *Neuropsychological Malingering Determination: The Illusion of Scientific Lie Detection* (2024) 58 Georgia Law Rev. 2, pp.483-572; https://georgialawreview.org/article/92796-neuropsychological-malingering-determination-the-illusion-of-scientific-lie-detection). They concluded that none of the malingering tests passed scientific rigor – not a single one. The Leonhards explained that the methodology used by test creators to determine intent does not follow traditional standardized scientific methodology. There is no uniform definition of deception across the studies. Furthermore, using one malingering test to validate another is an inaccurate method of "determining" malingering – this method produces results that are deeply misleading. "There is is…no valid scientific evidence that any of the Malingering Tests accurately classify the presence or absence of malingering among forensic examinees." (*Id*. at 519.)

How accurate is the science of psychology anyway? When polled, a stunning 65% of approximately 2,000 psychologists admitted that, when conducting research, they collected data on different outcomes – *but failed to report those variances in outcomes.* (Richie, Science Fictions: How Fraud, Bias, Negligence, and Hype Undermine the Search for Truth (2020).) This means that the psychological publications that we lawyers review and upon which we rely – for our own education and edification or research for impeachment – are often inaccurate and incomplete. If data is collected that shows malingering tests are not reliable under various circumstances, but that data is left out of a publication, then that article or book is woefully misleading.

Look for a valid reference standard

In order for any test to be valid – medical, psychological, etc. – there needs to be a *valid reference standard*. Let's say you want to create a blood test to diagnose colon cancer. A biopsy is the reference standard because it *definitively* shows how many patients *actually do* have colon cancer. What is the reference standard for a malingering test? *Other malingering tests*. That's like saying, "Oh, I created this blood test to diagnose colon cancer, and I know it's accurate because I compared it to *other* blood tests." But you never confirmed your new blood test's results with a biopsy – so you never actually determined how many patients *truly* had colon cancer.

He's a malingerer – and I can prove it!

I am aware of no study validating these malingering tests on known forensic malingerers. And there is no way anyone actually can get a valid reference standard, because there are too many variables. Many malingering tests are normed on college kids instructed to pretend to behave as though they believe a malingerer would behave – but how would someone who is, presumably, not a malingerer know how a malingerer would behave? (Sheppard, *The reliability of psychological instruments in community samples: a cautionary note* (2016) 21 J. Health Psychol. 9 2016, pp. 2033-2041.)

Further, many studies compare the results to non-forensic populations, which renders the results irrelevant, because the only population we are dealing with in litigation *is* forensic. "[I]nstruments developed on groups such as college students may reference activities or behaviors that have little relevance or meaning to non-college students or to people within the same, larger culture who have different experiences." (*Ibid.*)

The so-called validation of malingering tests does not account for any of the following:

a. Was the patient malingering cognitive problems? Emotional problems? Physical problems?

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2024

b. Does the patient actually have a condition that supports the symptoms, but the frequency or intensity of symptoms varies?
c. Was there surveillance? If so, did it show the patient exaggerated what they were unable to do but not the actual condition itself or symptoms?
d. Was the "exaggeration" continuous or intermittent?
e. Were the conditions the patient had the same in all reference standards? Any one condition can have many different symptoms.

The Leonhard study notes that "there is 'no universally accepted definition of malingering, nor a conclusive estimate of its prevalence.'" (Leonhard and Leonhard at 493.)

And the Leonhard study also lays to rest the common defense argument that certain tests, when combined with other tests, are "99% accurate" in diagnosing malingering. In fact, the existing malingering-test validation studies "fail to comply with applicable scientific standards and suffer from multiple statistical and methodological errors." (Leonhard and Leonhard at 510.)

Some malingering tests are facially unreliable. For example, the Modified Somatic Perception Questionnaire (MSPQ) is often used by defense experts to find exaggeration. However, this "test" is just a series of statements that the plaintiff is asked to endorse or deny. Points are tallied according to what is admitted. For example, the plaintiff:

- **Feels the need to urinate.** This can be caused by age, injury (e.g., brain spinal cord injury affecting bladder) – or even just good hydration.
- **Is hot or sweaty.** If you live in California or Florida – or, thanks to climate change, just about anywhere now – sweating and feeling hot all over – is a common and frequent phenomenon. This can also be caused by medication or menopause or anxiety.
- **Has headache or pounding in the head.** A symptom frequently encountered in those with TBI or cervicalgia.
- **Has dry mouth.** A frequent side effect of medication.
- **Has nausea.** Another frequent side effect of medication.

(See, e.g., Main, *The Modified Somatic Perception Questionnaire* (1983) 27 J. of Psychosomatic Research 6, pp. 503-514.)

Some have suggested that it is actually malpractice to use this test for the purpose of searching out signs of malingering. (Cernovsky, *Inappropriate use of the Modified Somatic Perception Questionnaire to diagnose malingering*. (2020) 3 Arch. of Psych. And Behav. Sciences 2, pp. 10-15.)

The bottom line is: If the plaintiff admits to symptoms – *because the plaintiff has them* – the defense concludes the plaintiff is faking, because "most patients" don't have them. Sort of like pointing at a dead body in the debris of a plane crash and exclaiming, "*Most* people don't die in plane crashes!"

Here is a short list of some reasons your plaintiff may fail a "malingering" test when they are not actually malingering:

- **Fatigue.** He or she failed to sleep the night before due to anxiety about undergoing a test (another common occurrence for those who have been through trauma and consequent medical care).
- **Pain.**
- **Depression or Post-traumatic stress disorder.** These conditions interfere with concentration.
- **Stranger danger.** Feeling uncomfortable being around a stranger – especially one who is being paid to undermine or diminish one's claims.
- **Multiple conditions.** The combination of pain, anxiety, and TBI symptoms and/or medication, each of which can affect focus. To my knowledge, no malingering test has ever been normed on patients with multiple, concurrent conditions, so there is no basis to determine how such patients will score on a malingering test, even when giving best effort. And, again, without proper norms, the tests are useless.
- **Cogniphobia**. This is a condition that often arises in concussion patients – they are told by their doctors to reduce cognitive stress, so they (understandably) become anxious and afraid to push themselves cognitively. Because of this, they may fail effort tests. (See, e.g., Luque-Suarez, (2019). *Role of kinesiophobia on pain, disability and quality of life in people suffering from chronic musculoskeletal pain: A systematic review*. 53 British J. of Sports Medicine 9, pp. 554-559; https://doi.org/10.1136/bjsports-2017-098673).

In summary, in order to know if someone is giving full effort, one must first have norms to which the results can be compared – norms that include other people like your client, i.e., people who have been traumatically injured, who are in litigation, and whose injuries are being disputed by the defense. No such norms exist.

When the defense denies you the psychological test data

The defense will take the position that the plaintiff is malingering based on test questions and the plaintiff's answers to them. At the same time, the defense expert will claim that the raw data is *secret* – so you can never know the questions your client was asked, or the answers given, so that you can explain any of this to a jury. This is fundamentally unfair, because it deprives you of being able to discover the bases of the defense expert's opinions and being able to explain the exam or anything that happened in the exam to the jury. (Sims, *Transparency in Forensic Exams* (2024) 24 Nev. L.J. 2, pp. 531-642; https://scholars.law.unlv.edu/nlj/vol24/iss2/6/)

Importantly, in 2023, the California Court of Appeals (Fifth District) permitted raw data to be shared directly with the plaintiff's lawyers, over the objection of the defense neuropsychologist. The Court indicated that if the Legislature wanted to limit access to such material, then it could have codified an "expert-to-expert limitation." (*Randy's Trucking, Inc. v. Superior Court* (2023) 91 Cal.App.5th 818, 848.)

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2024

Aside from being able to explain the tests to the jury, why is it so important to get this raw data yourself? Because the defense may misrepresent the test results. How do they do it? Here is a short list:

- **Speed up the tests.** This greatly increases the chances your client will fail the test and be (inappropriately) branded a faker. If the defense expert, for example, gives a test that permits the patient to observe 50 simple line drawings for three seconds each and then they are later tested on how many they remember, the defense expert can increase the failure on this test by giving the test too quickly.
- **Change your client's answers.** Yes, defense experts will actually change your client's answers – often unrepentantly so.
- **Mischaracterize the test.** For example, calling a test an "effort test," when the testing manual refers to it as a "cognitive test." This is a win-win for the defense. If the plaintiff does poorly, they are faking. If the plaintiff does well, there is nothing wrong with them.
- **Administer an inappropriate test:** For example, the MSPQ, referenced above.

Compounding these problems is the defense's usual tactics to keep you from recording the exam to ensure the expert didn't alter the test administration or obtaining the test questions and your client's answers, so that your client can explain *why* they answered the way they did (e.g., "I had to urinate because I have a urinary tract infection," or "I have dry mouth from my medication").

You must know *Randy's Trucking*

The defense will claim that neither you nor your client – nor the jury! – can see or know what questions were asked or know your client's answers, because the tests are proprietary material, that the tests will be compromised if laypeople are permitted to view them, or that ethical rules bar the dissemination of the test materials to counsel or even the actual testing subject. They will claim that this information can only be exchanged between experts – which is ridiculous. The cure for this is a protective order in line with that of the *Randy's Trucking* case.

In addition to *Randy's Trucking*, I have co-authored a law review article that analyzes these issues on a national level, along with an extensive list of motions compelling and orders granting the recording of examinations and the release of testing materials. (Sims, *Transparency in Forensic Exams* (2024) 24 Nev. L.J. 2, pp. 531-642; https://scholars.law.unlv.edu/nlj/vol24/iss2/6/)

Let's jump to the next step: You have permission to audio or even video-record the exam. What then? Don't bother asking your own expert to review the recording to see if the tests were given correctly. They won't – at least not the way it should be done. To do it properly, one needs to listen to the instructions and check the test manuals to see if any of the tests were altered. Then check each test to determine if the timing was altered, or if questions were altered, removed, or added. In short, it requires a fine-tooth comb and, in my experience, your own expert will not want (or have the time) to do it. If that is the case, hire a psychometrist to do it. (If you need recommendations, please feel free to contact me.)

If, for some reason, you cannot record the neuro/psychological exam, you should still have the testing re-scored by a qualified psychometrist. You should also consider sending your client in with a form to complete immediately after each test. (See Appendix A.)

Video recording the exam

With regard to physical examinations: when the defense expert authors a report indicating "Cranial nerves 1-12 WNL," you should assume that "WNL" does not mean "Within Normal Limits," but rather "We Never Looked." For those lawyers who are seeking to video record the exam, please contact me directly and I can provide orders and motions on this topic.

While many lawyers in California believe video recording to be a losing battle, I do not. I have had cases where judges have issued tentative orders that they will not permit a video recording, then change their minds after they hear our arguments. Why? How?

Why:

- Your own observer will miss too much. They cannot document if all four planes of motion were measured in any portion of the spine or what the degree of range of motion actually was. There simply is not enough time. In my own experience, observers miss approximately 70% of information contained in a video. They also sometimes miss the doctor's condescending tone or rough treatment of the plaintiff.
- It's their word versus the word of a medical doctor. Typically, the observers are registered nurses or chiropractors and *not* medical doctors.

How:

A. Show the judge that the expert is not trustworthy. In one case, we obtained affidavits from other lawyers regarding the past acts of deceit perpetrated by the defense expert. You can get affidavits from other attorneys, prior patients/plaintiffs, portions of depositions, or other orders reflecting dishonesty.

B. Show the literature cited above such that even *knowing* they are recorded they *still* misrepresent what occurred 100% of the time. My experience with judges is that they honestly believe that medical doctors, including defense experts, are doing their best when they perform an evaluation. Disabuse them of this notion with the facts.

C. Offer to be unobtrusive. Just bring in a videographer with a cell phone. You do not need a large video setup. Just make sure your videographer is constantly visualizing the body part versus letting the doctor stand in front of the camera and block the shot.

D. People are used to being recorded – surveillance cameras abound in the U.S. – so why should this be any different?

E. Point out that the defense expert is a witness. The plaintiff is also a witness. The defense can secretly record your client, a witness –all you are doing is asking to record the defense expert with notice.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2024

F. Cite orders in which the courts have explained that a defense exam is not the same as a treating doctor's exam – therefore, video recording is appropriate.

If you lose

Point out in trial that you tried to record it to show what really happened in the examination, but the defense expert refused – "and, now, the defense expects you to just take their paid expert's word for it."

Conclusion

1. When reviewing a defense report, make sure you get all test data to verify it says what the expert claims it says.
2. Presume the test was not given accurately and if you are not permitted to record the exam, request it anyway. At trial, point out that the expert refused to permit you to record it, so we must take his or her word for what occurred.
3. Do not permit any expert to claim your client is a fraud or malingerer without doing a deep dive into the test. In fact, take the test yourself so you get a deeper understanding of the weaknesses.

Appendix A

Chart on psychological/psychiatric exam:

To be completed after the defense examination. Do not share this with anyone but your lawyer. This is privileged.

Name:

Date of appointment and doctor:

1. Did you sleep well the night before? If not, how many hours did you sleep?
2. What was your pain level on the day of the testing?
3. Did you take medications during the test; if so, what and when?
4. Were there any travel problems getting to the doctor's office?
5. Did the examiner let you break for lunch?
6. Take restroom breaks when you needed to?
7. Was it loud in the room?
8. Was the lighting in the room too bright/too dim?
9. Too hot/cold?
10. Were there disruptions like cell phones going off, papers rustling, doors opening and closing during testing? If so describe your tests taken at the time it occurred and describe the disruption.
11. Did the doctor give you clues or cues on testing? If so, what kind of test was it? Describe as specifically as you can.
12. Did the doctor stop you from taking a test before it was finished? If so, describe the test.
13. Did the doctor change or erase any of your answers?

Dorothy Clay Sims is the founder of Law Offices of Dorothy Clay Sims, Esq. *After seeing clients victimized in medical examinations, she decided to focus her practice on acting as a consultant for other attorneys, helping them to uncover how dishonest doctors spin the science for the defense. In this capacity, Dorothy guides plaintiff lawyers in researching defense expert witnesses, deciphering their reports, understanding the science, and crafting cross-examinations. She is the author of the book "Exposing the Deceptive Defense Doctor."*