

## Trial Techniques

# The Not-So-Independent Medical Examiner

by John P. Harris, III

**W**ash your mouth out with soap if you ever call the defense medical examiner an "independent medical examiner" or "IME" again. Even Rule 4:10 of the Rules of Court doesn't call him that. "IME" is something made up by the defense for the sole purpose of prejudicing your client. Enough said. Let's look at some techniques for dealing with a "defense medical examiner" which are easy to use. We will explore (1) bias, (2) lack of knowledge of pertinent information, (3) explanation of or clarification of medical terms and procedures, (4) bolstering the testimony of the treating physician, and (5) obtaining concessions.

You will have no trouble adapting these sample cross-examination vignettes to your cases.

### The Not-So-Independent Medical Evaluation

In the case on which this article is based, the defense doctor actually testified that he "was to act as an independent — totally independent medical evaluation." I think that in every case you can safely bring out, and should bring out, that he is employed by the defense and there is nothing independent about it.

**Q** Doctor, I don't mean to be in any way disrespectful or anything but you said that you were here as an independent, and, in fact, you were retained by Mr. Defense; am I correct?

**A** Correct.

**Q** You were paid by Mr. Defense?

**A** Correct.

**Q** You talked to Mr. Defense in the hall?

**A** Yes.

**Q** You wrote a report to Mr. Defense?

**A** That's correct.

**Q** And you knew you would probably be coming here to testify against Mr. Frye before you ever saw him; am I right?

**A** I don't testify against anybody, Mr. Harris.

**Q** You knew that you would be testifying for the defense from the moment you were contacted; am I right?

**A** I think I testify according to the facts.

**Q** Yes, sir, but the defense is who brought you here to testify; right?

**A** Independent, Mr. Harris, means that when I go into it, I try to do the facts, whoever asks me, whether it would be you or anybody else.

**Q** Like I said, I didn't mean any disrespect by it.

**A** It didn't sound that way.

By the time you finish this routine you can feel sure the jury no longer thinks he is "totally independent."

### Send The X-rays

When the plaintiff is going to an IME, I always send all his X-rays with him with specific instructions that he is to take them with him when he leaves. This is very important. If your client takes them with him when he leaves, he can tell you if: (1) the defense doctor looked at the X-rays and (2) how long he looked at the X-rays and (3) whether he put them in a view box to look at them or simply held them up to the light.

(In this case, the plaintiff took the X-rays to the doctor, but there were so many X-rays the doctor did not take the time to

look at any of them.)

**Q** Now, did I understand correctly that you never saw the X-rays?

**A** Correct.

**Q** And so any information that would come from looking at the X-rays itself has totally escaped you?

**A** Correct.

Even if the defense doctor does look at the X-rays, he is vulnerable unless he spent what the jury believes is an appropriate amount of time looking at the X-rays in a view box. Juries do not like the "flash the X-ray up to the light and go to the next X-ray" approach doctors so frequently use.

#### Pre-existing Disease Defense

It helps if you are not afraid of the "pre-existing disease" defense. Put in its proper prospective, any pre-existing disease is the reason your client was so easily hurt. It is also the reason it took your client so long to get well. If you keep these two things in mind you will feel a lot more confident when, on direct examination by the defense lawyer, the defense doctor testifies that the accident aggravated the plaintiff's pre-existing degenerative disc disease or pre-existing degenerative arthritis.

(In this case, the defense doctor testified that the plaintiff had a pre-existing diseased lumbar spine. Let's take the mystery out of that testimony.)

**Q** You said that there was a diseased lumbar spine?

**A** Correct.

**Q** Disease of the lumbar spine in medical terminology may simply mean arthritis; am I right?

**A** Correct.

**Q** And, in this case, the type of arthritis that you're talking about is "wear and tear" arthritis?

**A** Correct.

**Q** Probably every person over 50 years of age in this room has some degree of wear and tear arthritis, right?

**A** I think the key word is some, yes, sir.

(While we're at it let's show the jury that the medical evidence proves Mr. Frye is a hard worker.)

**Q** The harder a person has worked, the more likely they are to have more of it?

**A** That's probably a fair statement, although there are exceptions.

(It's also important for the jury to understand that "wear and tear" arthritis is not necessarily painful.)

**Q** And "wear and tear" arthritis in and of itself does not necessarily cause pain?

**A** Correct.

**Q** A person might have "wear and tear" arthritis and go to their grave at age 75 and never even know they had any wear and

tear arthritis?

**A** That's correct.

(Let's fix it so the jury will know what a "differential diagnosis" is. Then, they will be able to make their own differential diagnosis after closing argument.)

**Q** Now, I'd like to talk about the term "differential diagnosis." The medical term "differential diagnosis" means using the process of elimination to determine what the problem is; am I right?

**A** I think that's correct.

**Q** And what you do is you say for these symptoms it could be this, this, this, or this?

**A** (Nodding head).

**Q** And then through the process of differential diagnosis you say if it's not this one, that means it is one of the other and so on until you chose the cause. That's how it works; isn't it?

**A** Hopefully that's how it works.

**Q** That is how it is supposed to work?

**A** That's how it is supposed to work, correct.

**Q** Sometimes, one thing will look like something else and that is the whole purpose for differential diagnosis?

**A** (Nodding head).

(Let's also teach the jury what a straight leg raising test is and what it is used for. Then, they can decide for themselves if the first treating physician was concerned whether there were any symptoms of a disc injury shortly after the accident.)

**Q** Now, does Dr. Johnson's note of September 2nd mention that straight leg-raising is positive. I believe you told the defense lawyer it was positive.

**A** Yes, sir.

**Q** Now, the straight leg-raising test is designed to be specific for a protruding disc; isn't it?

**A** That's probably a little too exact. I think you feel like it hopefully will help you with nerve root irritation. I'm not sure what it is due to. Obviously, a tumor could do the same thing. Anything that impresses on the nerve or compresses the opening if you bowstring it is going to hurt. Obviously you're not looking for bone tumors or tumors, but I think it would be not correct to say it is specific for a ruptured disc, no, but at least pressure on the nerve root.

(Let's get rid of the red herring he just threw out there to distract the jury. This type question really works when a test is used to show two or three things and there is nothing to support the "red herrings.")

**Q** Is there anything to suggest to you he had a bone tumor?

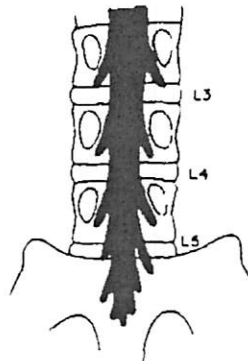
**A** No.

**Q** So it is specific to determine if there is pressure on the nerve root?

- A Yes.
- Q And one of the things that causes pressure on the nerve root would be a bulging or protruding disc?
- A Correct.
- Q And a bulging or protruding disc would cause lumbar radiculitis; am I right?
- A That's correct.
- Q Doctor Johnson, he is known to be a good orthopedist?
- (He would not dare say a fellow doctor is a quack, and this sets up the next question.)
- A Good orthopedist.
- Q He knows how to do a straight leg raising test?
- A I guarantee it.
- Q On the very first day he got a straight leg raising test?
- A Correct.
- Q And on the very first day the straight leg raising test was positive?
- A Yes.
- Q A myelogram is a test that is used to prove that a disc is irritating a nerve root, am I right?
- A Yes.
- Q Now, ultimately there was a myelogram done by Doctor Difallo?
- A Yes.

(A myelogram sounds like an innocuous test. Let's make sure the jury know it's far from innocuous.)

- Q What a myelogram is — is you take the patient and you put a needle right into the sac that holds the spinal cord and the nerves that come out and feed the legs; isn't that right, sir?
- A Correct.
- Q And you drain off a little bit of spinal fluid and you inject the dye because without that dye, that what is shown here schematically doesn't show on X-ray; right?



DIAGRAM

- A That's correct.
- Q You have to put them in the hospital just to

do a myelogram, don't you?

- A Yes, you do.
- Q Now, if there's nothing touching those roots, it might schematically look like that. (Pointing to the diagram).
- A That's correct.
- Q There is no mashing or pushing out of shape? (Pointing to the diagram).
- A That's correct.
- Mr. J. HARRIS: Could I have plaintiff's exhibit 5?

(This is one of the actual myelogram films which was introduced through the surgeon).

THE COURT: (Handing the exhibit.) Here.

BY MR. J. HARRIS: (continuing)

- Q Right there it's pushed out of shape; isn't it, sir?

(While showing in an X-ray view box the actual myelogram of Mr. Frye. The jury has already seen this myelogram. They saw it during the direct testimony of Dr. Dilallo, the surgeon who operated on Mr. Frye's back. However, because the "IME" doctor did not look at the X-rays when he examined Mr. Frye he does not realize it is Mr. Frye's.)

A Correct.

- Q And if that is Doctor Difallo's X-ray of Mr. Frye, then that shows that a disc is protruding; doesn't it?

A That is not what the radiologist said. I don't know the radiologist, but their reports are well written. There are severe stenotic changes in the thecal sac, which is another word saying what you see there, markedly decompressed in all directions due to large posterior spurs of the end plates along the bulging annulus and marked hydro — degenerative osteoarthritic changes of the step joints with a ligmentus. Translated, that means arthritis and the secondary changes to it.

When you study X-rays of this sort, you never look at one. These are taken in multiple directions. They're taken this way. They're taken sideways. To take one out of context doesn't mean anything, frankly.

- Q What is that right there? (Pointing to the myelogram which is in the X-ray view box.)
- A It looks like a bulging of the disc.
- Q That would be consistent with having lumbar radiculitis; wouldn't it, sir?
- A I don't think I explained myself adequately, Mr. Harris. To look at one view like that, there isn't a doctor in the world that could give you an opinion on one view.
- Q Then you're not in a position to express an opinion as to whether there is or is not a bulging disc?
- A I would have to assume that the radiologist who did these did that, and the doctors used his opinion to operate. I would have to go on that basis.

(Frequently, you can get the defense doctor to defer to the treating physician. If he does so, it is a good place to quit. In closing argument, remind the jury the last thing the defense doctor said during cross-examination was that he deferred to the treating physician.)

**Q So you would have to defer to them?**

**A Yes, sir.**

**MR. J. HARRIS:** No further questions.

#### **Conclusion**

We have at least made the jury suspect that the doctor might be biased. We have shown he had a complete lack of knowledge of any information that might be gained from looking at the X-rays themselves. We have used him to explain that a myelogram is not an innocuous test. He re-enforced for the jury that the first straight leg raising test indicated a herniated disc. He also re-enforced the diagnosis of a disc injury made by the myelogram in spite of his efforts to the contrary. He has bolstered the diagnostic ability of the treating physician and deferred to the treating physician who really is in a better position to both make the correct diagnosis and establish causation.



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