

EVIDENCE LAW

Excluding Defense Exams: The Need for a Certified Interpreter

by Ian Fusselman, Column Editor

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Picture yourself preparing for trial in a personal injury matter and writing your motions *in limine*. One of the big issues in the case is that there are substantial differences between your client's actual subjective complaints and how those complaints were described in the report of results of your client's designated medical exam ("DME"). You've reviewed the DME report and the defense doctor's deposition with your client and learned that your client didn't fully understand what was happening during the DME because he doesn't speak English very well. You then find out that your client was in extreme pain during range of motion exercises but didn't tell the doctor that he was in pain. Now you're faced with truthful testimony by the doctor establishing that your client had full range of motion without complaints of pain. The defense is going to have a field day with this and you don't relish your chances of rehabilitating your client on the stand. Thankfully, there's hope.

Excluding Defense Exams

Evidence Code §777.5 provides:

- (a) During any medical examination, requested by an insurer or by the defendant, of a person who is a party to a civil action and who does not proficiently speak or understand the English language, conducted for the purpose of determining damages in a civil action, an interpreter shall be present to interpret the examination in a language that the person understands. The interpreter shall be certified pursuant to [Government Code §§11435.05, *et seq.*].
- (b) The fees of interpreters used under subdivision (a) shall be paid by the insurer or defendant requesting the medical examination.
- (c) The record of, or testimony concerning, any medical examination conducted in violation of subdivision (a) shall be inadmissible in the civil action for which it was conducted or any other civil action.

"The language of Evidence Code §755.5... is plain. It clearly bans the admission of medical records or medical examinations that defendants or insurance companies conduct for purposes of determining damages in a civil action without the aid of a certified interpreter when the plaintiff is not English-proficient." *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 695. Although Evidence Code §755.5 seems to be unlimited in its scope, in the only reported case interpreting it,

the court determined that not all evidence from a DME without a certified interpreter need be excluded. *Nazari, supra*.

In *Nazari*, the plaintiff was examined by three doctors. Nazari's friend acted as an interpreter, but he was not a certified interpreter. Plaintiff moved *in limine* to exclude the testimony of the three defense physicians. However, for reasons unexplained in the opinion, The plaintiff then stipulated to allow one of the physicians to take the stand.

Despite the very clear language of Evidence Code §755.5, it was apparently incumbent upon the plaintiff to move to exclude the entirety of the testimony relating to the DME. Specifically, the plaintiff moved to "preclude testimony about and records of medical tests for which language or communication is unnecessary to the evaluation and an interpreter is not called upon to translate." *Id.* at 695.

In deciding the motion *in limine*, the trial court concluded that Evidence Code §755.5 "precluded admission of 'anything that involves the language for communication'" and ruled that the two challenged doctors "could not testify about conversations they had with plaintiff or any statement plaintiff made. However, the court allowed the doctors to testify about what they found in their review of the medical records, their observations, and their opinions resulting therefrom and as to opinions reached in the Independent Medical Examination." *Nazari, supra*, at 695.

The appellate court sustained the trial court's ruling by employing some relatively strained logic, explaining:

Logically, the statute prevents the admission of evidence of a defense examination based on a miscommunication. But, not all medical examinations are language-dependent. For example, a phlebotomist can draw and evaluate a plaintiff's blood without ever speaking with the plaintiff. A doctor can silently test a patient's reflex. In the area of criminal law, fingerprinting, photographing, drawing blood, or taking measurements do not violate an accused's Fifth Amendment privilege against self-incrimination [citations] because the privilege protects compelled testimonial or communicative disclosures by an accused, but not "real" or "physical" evidence derived from him. [Citations.] While the language of Evidence Code §755.5 appears more broadly to preclude admission of all records and examinations of a plaintiff conducted in violation of that statute, without reference to or exception for communication, we do not think the Legislature intended the statute to be so wide-ranging as plaintiff suggests. Where no words are exchanged, it would be meaningless to bar admission of the phlebotomist's record and examination of the blood sample, or the results of a reflex test, merely because a certified interpreter had not been present. A holding that Evidence Code §755.5 precludes testimony about medical examinations that do not require any communication with the plaintiff would be absurd because no translation would be necessary. We avoid construing a statute in a way that would lead to absurd results. [Citation] Accordingly, we hold that Evidence Code §755.5 does not

prohibit admission into evidence of the record of, or testimony concerning, evidence derived from tests or examinations that require no communication with the plaintiff.

Id. at 796.

It is difficult to understand exactly how the court could reach this conclusion despite observing that Evidence Code §755.5 “appears more broadly to preclude admission of all records and examinations of a plaintiff conducted in violation of that statute.” If the Legislature had intended to allow evidence and testimony relating to “non-testimonial” portions of an examination, then quite certainly the Legislature could have and (hopefully) would have explained that intent. But the Legislature did not express any such intent and, instead, specifically stated that “the record of, or testimony concerning, any medical examination conducted in violation of subdivision (a) shall be inadmissible in the civil action for which it was conducted or any other civil action.” Unfortunately, *Nazari* is the only case interpreting Evidence Code §755.5, so until there is further guidance by the appellate court or the Legislature, it will be controlling.

Practice Pointers

“As a cautionary note, it is only reasonable to require plaintiff to alert the defense to the need for a certified interpreter under Evidence Code §755.5 as early in the litigation as possible so that prophylactic measures may be taken. To do otherwise, would promote sandbagging and gamesmanship.” *Nazari, supra*, at 696. In order to establish that your client is not proficient in English, respond appropriately to Form Interrogatories 2.9 and 2.10, and advise the opposing party of your client’s lack of proficiency prior to a deposition. While the *Nazari* court specifically suggested that you alert the opposing attorney of the “need for a certified interpreter,” I would argue that you need only provide notice that your client is not proficient in English in order to trigger Evidence Code §755.5.

While the *Nazari* decision appears to allow a defendant to retain some ability to present evidence of a DME completed without a certified interpreter, it would still seem prudent to attempt to exclude all evidence of a DME that could have been influenced in any manner by a miscommunication. As part of your motion *in limine*, explain how each and every aspect of the examination might have been tainted by the lack of an interpreter and consider supporting your motion with a declaration from your client. While you may not be able to exclude the entirety of an examination, each item you can keep out will almost certainly represent an advantage in your case.