

# Barley Snyder LLC

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June 8, 2007

The Honorable Richard D. Bennett  
United States District Court  
District of Maryland  
U.S. Courthouse - Chambers 5D  
101 W. Lombard Street  
Baltimore, MD 21201

Re: **Snyder v. Phelps, et al.**  
**Civil No. RDB 06-1389**

Dear Judge Bennett:

This letter is submitted in response to defendants' letter concerning a discovery dispute. In particular, defendants requested a medical examination for plaintiff. In general, plaintiff does not object to a medical examination but, under the circumstances, plaintiff's counsel should be present for the examination.

By way of background, defendants requested that Dr. Blumberg be able to examine Mr. Snyder for a period of six plus hours (excluding breaks). Plaintiff questioned the necessity of the excessive amount of time for an examination, and in response was told that the types of tests being conducted cannot be disclosed in advance and that six hours was a minimum. In response, plaintiff did not require defendants to seek an Order for the examination pursuant to Rule 35 but did however notify defendants that counsel would be present for the examination.

Dr. Blumberg's curriculum vitae indicates that he has extensive experience in evaluating criminal defendants in capital cases or in matters where mental competency is in question. The mental competency of Mr. Snyder is not in dispute. To further complicate matters, Dr. Blumberg intends to evaluate Mr. Snyder concerning matters from birth to present. See Blumberg Declaration ¶ 6.

Importantly, defendants have already demonstrated a pattern of asking irrelevant and harassing questions during Mr. Snyder's deposition. By means of example only, defendants asked how Mr. Snyder's divorce affected him, whether Mrs. Snyder dated other men prior to her separation from Mr. Snyder, whether Mrs. Snyder dated men after her divorce from Mr. Snyder, how old Mr. Snyder was when he began dating, how old Mr. Snyder was when he began sexual intercourse, whether Mr. Snyder has erectile dysfunction problems, and how old Mr. Snyder was when he reached puberty.

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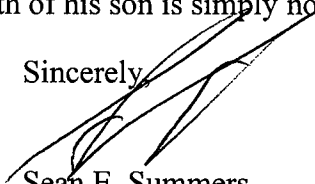
In addition, Mr. Snyder was asked about childhood girlfriends and the emotional effect of breaking up with girlfriends while he was a child. Mr. Snyder was asked whether his ex-wife ever had any abortions or miscarriages. Mr. Snyder was even asked whether any former girlfriends ever had any abortions. With this background, defendants have requested that Dr. Blumberg be able to examine Mr. Snyder for a minimum of six hours. This Honorable Court has already granted a protective order concerning some matters. Given the endless list of examination topics identified by Dr. Blumberg, it is imperative that plaintiff's counsel be present for this excessive examination and for the undisclosed tests.

Admittedly, there is a "split in case law in the United States [that] has lead basically to three general approaches to this issue. First, some courts have held that there is an absolute right to have an observer present during an examination, as a Rule 35 examination (or comparable procedure) is merely a continuation of the adversary process." Galieti v. State Farm Mut. Auto. Ins. Co., 154 F.R.D. 262, 263 (D. Colo.1994)(Internal citations omitted.) "A second line of cases holds that there is no presumptive right to have an observer present at an examination." Id. "A third line of cases basically grants discretion to a trial court to examine each case and make an appropriate decision." Id.

Notwithstanding the split in case law, defendants request that the Court follow McKitts v. Defazio, 187 F.R.D. 225 (D. Md. 1999). Even assuming *arguendo* that the Court decides to follow McKitts, as defendants urge, plaintiff has demonstrated a "compelling determination of need." Defendants refuse to limit the extent of the examination in time or scope. The only time limitation is placed on plaintiff -- i.e., it will last longer than six hours, excluding breaks. There is no limitation on the scope -- i.e., from birth to present. Based upon defendants' history of asking questions concerning irrelevant matters -- puberty, abortion, first girlfriends, impotence, etc. -- there is a compelling determination of need.

If the Court refuses to allow counsel's participation in the lengthy examination with undisclosed tests, plaintiff, alternatively, requests that limits be placed upon the time and scope. Plaintiff suggests that three hours is adequate for an examination. As far as scope is concerned, the general tort rule is that a defendant takes the plaintiff as he or she finds the plaintiff. Therefore, Mr. Snyder's psyche before the death of his son is simply not relevant.

Sincerely,



Sean E. Summers

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cc: Rebekah Phelps-Davis  
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Jon Katz, Esquire