UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

	:	
DUANE ZIEMBA	:	
	:	
V.	:	CIV. NO. 3:98CV2344 (JCH)
	:	
JOHN ARMSTRONG, ET AL	:	
	:	
	:	

RULING ON PLAINTIFF'S MOTION FOR PROTECTIVE
ORDER CONCERNING MENTAL EXAMINATION **[Doc. #249]**

A telephone conference was held on February 24, 2004, to
discuss plaintiff's motion for protective order. After discussion,
the Court issued an order on February 27, 2004, asking defendants'
counsel to find out if there is a room with a one-way mirror at any
appropriate DOC facility that would permit unobtrusive observation of
plaintiff's mental health examination. Defendants' counsel reported
back that no such facility exists.

Plaintiff states he has "real cause to be concerned about the
fairness of the examination, the bias of the examiners and the
examiner's possible ulterior motives to conduct the examination
unfairly or to stray into the merits of the case for purposes of
building a record for improper use at trial." [Doc. #249 at 3-4].
Plaintiff argues that defendants' proposed examiners, NCCI
Psychologist Paul Chaplin and the DOC's Director of Mental Health

Services Suzanne Ducate, are: (1) current employees of the Department of Correction; (2) clients of the Attorney General's Office; (3) colleagues of the defendants in this case; (4) persons with past and ongoing treatment and supervisory responsibilities for the plaintiff, and; (5) persons about whose psychiatric care the plaintiff has complained in the past. Id. at 3. Defendants do not dispute these facts.

Plaintiff contends that, "given the examiner's extremely close ties to the defendants and their counsel and the examiner's own prior treatment contact with the plaintiff, that they have already formed an opinion about the plaintiff's mental state, and that the "examination" is merely the defendants' attempt to cloak this already-formed opinion with a veneer of fairness and neutrality." Id. at 4.

A court has broad discretion whether to order a mental examination under Fed. R. Civ. P. 35, "[a]lthough the rule is to be construed liberally in favor of granting the examination." 7 James Wm. Moore, Moore's Federal Practice § 35.05[1] (3rd Ed. 2003). "In exercising its discretion, the court may set terms and conditions for the examination. In fact, Rule 35 requires the examination order to "specify the time, place, manner, conditions, and scope of the examination and the person or persons whom it is to be made."" Id. § 35.05[4]. Defendant will provide the court with its proposed terms

and conditions for the examination of Mr. Ziemba withing ten (10)
days.

The Court notes that "courts usually honor the examining
party's choice of an examiner. Alleged bias on the part of the
proposed examiner is not a reason for rejecting the party's choice
and the fact that the examining physician is regularly funded or paid
by the moving party goes to the issue of the physician's credibility
as a witness and not to the issue of qualification to conduct the
examination." Id. § 35.07[2]. If plaintiff continues to assert an
objection to the defendants' choice of examining physicians, he
should do so in writing within ten (10) days and cite any case law in
support of his position.

Defendants will report on the feasibility of an audio recording
of the mental examination in writing within ten (10) days.

If the mental examination goes forward, the Court will
consider plaintiff's request that plaintiff's counsel or
representative attend the examination or, in the alternative, that a
court reporter record the examination.

This is not a recommended ruling. This is a discovery ruling
and order which is reviewable pursuant to the "clearly erroneous"
statutory standard of review. 28 U.S.C. § 636 (b)(1)(A); Fed. R.
Civ. P. 6(a), 6(e) and 72(a); and Rule 2 of the Local Rules for
United States Magistrate Judges. As such, it is an order of the

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Court unless reversed or modified by the district judge upon motion timely made.

SO ORDERED at Bridgeport this 15th day of March 2004.

___/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE