“DANCING WITH WOLVES IN DRAG”

A TEXAS PLAINTIFF ATTORNEY’S PERSPECTIVE ON
TACTICS AND STRATEGY INVOLVING
ADVERSE MENTAL AND PHYSICAL EXAMS

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TABLE OF CONTENTS

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"Oh, grandmother, what big ears you have!"

"The better to hear you with."

"Oh, grandmother, what big eyes you have!"

"The better to see you with."

"Oh, grandmother, what big hands you have!"

"The better to grab you with."

"But, grandmother, what a dreadful big mouth you have!"

"The better to eat you with."

The Brothers Grimm
Little Red Riding Hood

"DANCING WITH WOLVES IN DRAG"
TACTICS AND STRATEGY WITH REGARD TO DEFENSE REQUESTED MENTAL AND PHYSICAL EXAMS (DME'S)

1. INTRODUCTION

Many years have passed since I first wrote this paper on, what at the time, I referred to as Defense Medical Examinations (DMEs). Things change, so I decided it could use some updating and refreshing. One of the first things I modified is, what I call, the examinations. Since either party may obtain an examination of the other, so long as the requirements are met, I now referred to the examinations more generally as "Adverse Medical Examinations," or simply "Adverse Examinations." (AMEs or AEs). The basic rule has not changed over the last decade, but additional case law has clarified some of the more disputed aspects of the rule. So, my hope is to provide everyone a fresh and updated perspective on this rule.

For some time, I tried to maintain two separate papers. One, reviewing Texas state practice and another, focusing more on federal practice. Now that the Texas Supreme Court has observed that Texas courts may look to federal practice and decisions to help inform discovery practice in Texas, I feel comfortable combining the two works into one. *See,* ***In re State Farm Lloyds,*** **--S.W.3d --,** 2017 WL 2323099 (Tex. 2017). ("our rules as written are not inconsistent with the Federal Rules or the case law interpreting them," even though they may not "mirror the Federal language."). [1]

The Texas Rule (Tex. R. Civ. P. 204) is very similar to the Federal Rule (Fed. R. Civ. P. 35). The main difference between Federal Rule Civil Procedure 35 and Texas Rule Civil Procedure 204 is that the former has been amended to allow examinations by vocational specialists who are not psychologists or medical physicians, and the Texas rule still only allows examinations by a certified psychologist or medical physician.

The major recent development in Texas practice is that the requirement that the information sought cannot be obtained through less intrusive means, effectively has been eviscerated. The concept still exists, but I am hard-pressed to conceive a scenario in which it will be a key factor. The Texas Supreme Court has ruled that if a party's medical or physical condition has been placed in controversy and there is a demonstration of good causes, then in most cases, to level the playing field, a party is going to be entitled to conduct its own examination of the other party.

The major controversies that have arisen under the rule still vex us. These include whether third parties may attend an examination, or whether such examinations may be recorded, the number of examinations that can be requested and allowed, the

[1] The reader will also note that there is a number of citations to Louisiana state and Federal cases. Since, Louisiana has adopted the Federal Rules and all the jurisprudence interpreting them, these cases also help inform the practice whenever the Federal Rules apply or are used as a model.

timing of requests, the discovery of neuro-psychological testing raw data, the scope and length of testing, and whether a party is always entitled to choose the examiner. I will attempt to gather cases discussing these issues and offer my insights.

This paper is limited to personal injury practice. There will be no discussion of court-appointed experts in areas of law outside of personal injury such as family law, probate law and criminal law. Furthermore, I will not address requests for adverse medical examinations under first party insurance policies.

This paper's focus will be on the mechanics of the rule, what discovery is allowed and what is not. While an important aspect of dealing with adverse medical examinations is the examination of the examiner, that will not be a primary focus of this paper. Others have written extensively on this topic, offering strategies and tactics. I defer to them, particularly Dorothy Clay-Sims, whose book, *"Exposing Deceptive Defense Doctors"*[2] is an incomparable resource for learning how to investigate and impeach the deceptive adverse medical witness.

Disclaimer: This paper admittedly (and unabashedly) is written from the perspective of a Plaintiff's attorney by a Plaintiff's attorney. The paper is intended to be a "practical guide," primarily for an attorney confronting an adverse medical/psychological examiner (although I always have found that a paper written from the perspective of one side of the bar oftentimes tends to be equally or more useful to the opposite side). Many of the suggestions are based on experience. The results in one case, however, are not necessarily transferrable to another. Discovery rulings are left to the discretion of a trial judge, so long as the discretion is exercised with the parameters of the rules of civil procedure. Therefore, the suggestions that I offer are merely recommended for consideration and to stimulate creativity. The reader is urged to take nothing that is offered as gospel and to thoroughly research any approach that is taken.

2. CONFRONTING MYTHS

There are two overriding myths that have developed over time and confused the adverse examination practice:

Myth No. 1: the examination is non-adversarial; and
Myth No. 2: the examination is independent.

It is simply not an independent examination. It is an "adverse" examination.

Although the phrase "independent medical examination" ("IME") might suggest an examination by a Court-appointed physician, an IME in Texas is simply an examination by a physician upon another party's motion. An IME does not entail the Court's appointment of an independent physician. Under Rule 204.1 of the Texas Rules of Civil Procedure, a party may

[2] James Publishing Incorporated, (2009).

> move to compel another party to submit to a medical examination, and the Court may issue an Order granting that motion if certain conditions are met. *See* Tex. R. Civ. P. 2014.1. This is colloquially referred to as an "IME."

Guzman v. Jones, 804 F.3d 707, at footnote 1 (5th Cir. 2015).

Lip service has been paid by some courts around the country that the examination is non-adversarial. However, most courts and practitioners recognize that the examination, like any other procedure in the litigation realm, is adversarial.[3] There is not a procedure for the appointment of an independent medical examiner in Texas. While Fed. R. Evid. 706 allows a judge to appoint experts to assist the Court, such a rule has not been adopted in Texas. Neither Rule 204 nor its predecessor, 167 contain the word "independent."

The controversy is merely semantic. The examiner is considered "independent" from the Plaintiff's caregivers, who because of their special relationship with the Plaintiff, might be considered sympathetic to the Plaintiff's complaints. The examination is not supposed to be an adversarial exercise like a deposition, but it is very difficult for there not to be tension between the examinee and the examiner. No matter what anyone says or does, the participants are not going to have the same rapport as typically exists in a physician/patient relationship. Of course, this reality itself, often complicates and distorts the findings from an adverse examination. The legal system seems to simply filter out this inherent factor. For anyone who has observed that his/her blood pressure is usually sky high at a friendly doctor's appointment, imagine what an examinee's blood pressure is like before an adverse examiner. The ship is off course from the outset.

There are competing policy considerations that create a tension in fairly applying the adverse examination rule. As one Court put it, there is a tension between the sanctity of the body and the right to privacy versus fairness in the judicial quest for truth. *See* ***Alugas v. Halbert*****,** 378 So. 2d 192, 193 (La. App. 4th Cir. 1979)

First, there is the interest of the Plaintiff's privacy. However, in fairness, by asserting a claim, the Plaintiff must be willing to give up a certain degree of privacy at least to the extent of relevancy to the claims and defenses pled in the lawsuit. Plaintiff is required to present for an examination and thereby create potential evidence for the Defendant. This concept arguably is at odds with the general rule, particularly in Texas, that one party is not required to create evidence for an opponent. *See,* ***In Re Colonial Pipeline***, 968 S.W.2d 938, 942 (Tex. 1998). On the other hand, the Defendant should be able to obtain an examination by one or more experts who are not ostensibly biased toward the Plaintiff. While the Plaintiff may not have voluntarily chosen the physicians

[3] Federal judges for the most part reportedly view the examination as non-adversarial. This may be because of the inherent power under the Federal Rules for the trial judge to appoint experts. Regardless, Federal judges typically do not allow the examinee's attorney to be present during the interview or the examination. See, Wright Miller & Marcus, Federal Practice and Procedure §2236 at 500 (West 1994).

who have participated in her care, the physicians with whom she has a patient/physician relationship, reasonably may be expected to be sympathetic toward her (regardless of the reality). Defendant should be allowed to obtain its own independent consultation (independent of the Plaintiffs experts or those presumably sympathetic to the Plaintiff) and appraisal of its exposure. Furthermore, Defendant should be allowed to have one or more experts testify on its behalf who have had the opportunity to personally examine the Plaintiff, if deemed necessary. Trying to reconcile these competing interests fairly is oftentimes difficult.

The reality in most, although not all instances, is that the Defendant does not desire an "independent/objective" evaluation of its exposure. When a Defendant argues that it wants "level playing field," it is saying it wants an expert with as much credibility as it can get. This means that if the Plaintiff is going to be putting experts – retained and non-retained—on the witness stand who have examined Plaintiff on one or more occasions, Defendant at least wants its expert to be able to say that he/she has examined the Plaintiff.

Is it realistic to an expectant litigant to merely roll the dice on selection of an "independent" examiner? Not really. The Defendant is concerned about obtaining viable expert testimony for trial that will rebut the testimony of Plaintiff's treating and retained experts. An expert who has merely reviewed records, stands little chance against an expert who actually has laid hands upon and examined Plaintiff. The examination is not a perfect solution to this mis-match, but it comes close to leveling the field. While some may express righteous indignation, it is good advocacy of the attorney seeking the examination to desire a known quantity, an expert who reliably will agree with and advocate the Defendant's defensive strategy or supplement it with the expert's own bias. An examiner with a strong, well-established opinion may be a good thing. An examiner who merely says whatever the party paying him wants him to say, may not be a good examiner either for the party seeking the examination or for the ends of justice. It is a very thin line.

There is some controversy about whether the party seeking the adverse examination (as will be discussed below, the Plaintiff in limited instances may seek the adverse examination of the Defendant) has absolute right to select the adverse examiners (physician or psychologist). Federal cases have held there is no absolute right for the Court to approve the party's choice of examiner. ***Stinchcomb v. U.S.A***, 132 F.R.D. 29 (E.D. Pa. 1990) citing Wright & Miller, ***Federal Practice and Procedure: Civil*** § 2234. And at least one Court in Texas has held that a party does not have an absolute right to select the examiner. ***Employers Mut. Casualty Co. v. Street***, 702 S.W.2d 779 (Tex. App.--Fort Worth 1986, orig. proceeding). However, in most instances, deference is given to the movant's choice. While a party does not have an absolute right to select the examining physician, in most instances, the Court is going to grant deference to the party's choice***. Shadix – Marasco v. Austin Regional Clinic, P.A***. 2011 WL 2011483 at *4 (W.D. Tex. 2011). The philosophy here seems to be that unless

the proposed examiner can be shown to have abused the system, the qualifications and reliability of the expert can be challenged under ***Daubert/Robertson.***[4]

3. TIMING OF THE ADVERSE MEDICAL EXAM

An issue that often arises in personal injury concerns when a request for an adverse medical/psychological exam is timely. The rule states that a party may - no later than 30 days before the end of any applicable discovery period - move for an Order compelling another party to submit to a medical or psychological exam. Many defense attorneys believe that regardless of the Discovery Control Order entered in a case, this Rule takes precedence and allows the Defendant to request a medical examination after the designation deadline and designate the examiner as a testifying expert after the designation deadline. While there may be situations in which this tactic succeeds, there are ways that should be considered and employed to prevent this type of discovery abuse by this tactic.

Does the medical psychological examination rule trump the rule on expert designation, whether in Federal Court or Texas State Court? I believe the answer is no. While a party, theoretically, could seek a medical/psychological examination solely for consultation, which arguably would not fall under a testifying expert deadline and might even avoid the report requirement, most parties seek an examination by an expert who will be a testifying expert at trial.

The Rule does not afford the party the right to utilize expert opinion testimony that has not been timely and properly designated. While the medical/psychological examination rules may allow a party to seek an adverse examination 30 days before the end of the discovery period, this does not abrogate the timely designation requirement. Arguably, an examination may be sought solely for evaluative or consultation purposes, with no use at trial. If that were the case, then a persuasive argument might be made that the examination might lead to the resolution of the case, without prejudicing Plaintiff's preparation for trial. If a party wishes to retain the right to use the examiner as a testifying expert at time of trial, however, it is strongly recommended that the party file a Motion and obtain a hearing and ruling on such Motion sufficiently in advance of the designation deadline so that the expert may be properly and timely designated. Further, a Trial Court is within its discretion to modify the Rules of Civil Procedure when there is good cause (e.g. in the interest of fair administration of justice). Tex. R. Civ. P. 191.1.

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[4]*See* ***Daubert v. Merrill Dow Pharmaceuticals, Inc.,*** 113 S.Ct. 2768 (1993);); ***Kumho Tire Co. Ltd. v. Carmic*hael**, 526 U.S. 137 (1999); ***E.I. duPont de Nemours and Co., Inc. v. Robinson***, 923 S.W.2d 549, (Tex. 1995*);* ***Merrel Dow Pharmaceuticals, Inc. v. Havner***, 953 S.W.2d 706 (Tex. 1996); ***Gammil v. Jack Williams Chevrolet, Inc.,*** 972 S.W.2d 713,724 (Tex. 1998) ***Ford v. Ledesma***, 242 S.W.3d 32 (Tex. 2007); ***Whirlpool Corp. v. Camacho***, 298 S.W.3d 631 (Tex. 2009).

Timeliness of the request for medical examination can and should be an important determinant in whether the Trial Court grants the Motion. The Trial Judge in **Southwestern *Bell Telephone v. Hudson***, 728 S.W.2d 899 (Tex. App.-Beaumont 1987, no writ) refused to find good cause and grant a motion for an adverse medical examination presumably solely because of the untimeliness of the request.

> While Appellant is correct in pointing out that Rule 167a does not specifically impose a time limit for making such a motion, we conclude that the timing of the request can be considered in determining whether there is good cause for the examination. In this case, as noted, trial counsel waited until the eve of the second special setting to request the examination. Even had the record revealed that this was the trial court's sole reason for finding that good cause for the motion did not exist, we would be hard pressed to disagree in light of the rigorous presumptions imposed by the abuse of discretion standard. For the foregoing reasons, we overrule Appellant's points of error and affirm the decision of the trial court.

Southwestern Bell Telephone v. Hudson, 728 S.W.2d at 901 (Tex.App.-Beaumont1987, no writ).

Mora v. Chacon, 2005 WL 2562616 (Tex. App. – Corpus Christi) (not designated for publication) involved a claim for personal injuries arising from a motor vehicle accident. There was a verdict in favor of Plaintiff, and Defendant brought an appeal claiming that the Trial Court erred in denying a Motion for an Independent Medical Examination. The judgment was affirmed. Tex. R. Civ. P. 204(a)(1) requires that no later than thirty days before the end of any applicable discovery period, a party may move for an Order compelling another party to submit to a physical examination by a qualified physician. The hearing on Defendant's Motion was set within thirty days of trial. Defendant, however, argued that it filed the Motion 90 days before trial. Unfortunately, the record was incomplete, and the Court ruled that Defendant had waived its complaint.

There are Texas cases holding that when a party waits until the last moment to designate an expert as a testifying expert that the Court is within its discretion in disallowing the designation as being untimely for not having been made as "soon as practicable." *See* ***Snider v. Stanley***, 44 S.W.3d 713 (Tex. App. – Beaumont 2001, pet. denied). Indeed, there is nothing in Rule 204 that states that a Court must grant an examination. Although, if the requesting party meets the criteria under Rule 204.1(c) for good cause and the medical or psychological condition of the prospective examinee has been placed in issue, and there are no extenuating circumstances (i.e. untimeliness of the request) it could be argued that the Court has abused its discretion. See ***Beamon v. O'Neill***, 865 S.W.2d 583, 586 (Tex. App. – Houston [14th Dist.] 1993, orig. proceeding) discussed in more detail below.

There is one particular case of note that addresses aspects of this issue. ***Beamon v. O'Neill***, 865 S.W.2d 583, 586 (Tex. App. – Houston [14th Dist.] 1993, orig. proceeding) deals with the issue of Discovery Control Plans, Designation of Experts, and Motions for Adverse Medical Examinations.

Beamon involved a claim for personal injuries. A Discovery Control Plan was issued as follows:

Docket Control Order

*NOTE: If an asterisk is shown, the date is governed by Texas Rules of Civil Procedure.

1. 02-08-93 Joinder. All parties shall be joined by this date. The party joining an additional party must provide the new party with a copy of this Order.

2a. 03-22-93 **EXPERTS** must be designated by **Plaintiff(s)** by this date.

b. (*) EXPERTS must be designated by all other parties by this date.

NOTE: Expert designations must be written and include the expert's name, address, area of expertise and a brief summary of the expert's opinions.

3. 06-07-93 PLEADINGS. Pleadings must be amended or supplemented by this date.

4. 06-07-93 DISCOVERY. Discovery requests must be made in writing and filed with the Court by this date.

5. 07-07-93 PRE-TRIAL CONFERENCE. Time: 1:30 p.m.

6. 07-12-93 TRIAL. If the case is not assigned to trial by the second Friday after this date, the trial date will be reset.

Note the provision regarding experts. While there is a date certain for Plaintiffs to designate their experts, no date is provided for Defendant's deadline. This issue turned out to be a critical and deciding factor in the appellate court's finding that the trial judge had abused her discretion in striking the Defendant's experts and request for medical examination based on untimeliness.

The Appellate Court pointed out that the Discovery Control Plan was controlling as to how and when discovery was to be conducted in the case: "In the absence of a subsequent Rule 11 Agreement or Court Order changing the pre-trial dates, the Court's Docket Order controls all discovery dates." ***Beamon v. O'Neill***, 865 S.W.2d at 585. Since a date certain was not indicated in the Discovery Control Order, the Defendant

need merely supplement more than thirty days before trial.[5] Indeed, the Court noted that the "as soon as practicable" language was not controlling because the Court's Order striking witnesses was not based on the Defendant not designating as soon as practicable, but not complying with the Court's Discovery Control Order.

The Appellate Court next addressed the Trial Court's Order denying the Defendant's Motion for an Adverse Medical Examination on the basis that it was untimely and beyond the deadline for designating experts. This time the Appellate Court pointed out that there was no deadline for requesting an adverse medical examination.

> Although the timing of a request for an independent medical examination may be considered in determining whether good cause exists for the examination such an analysis does not apply in this case. The Docket Control Order did **not** set a cutoff date for requesting medical examinations. [footnote omitted]

Beamon v. O'Neill, 865 S.W.2d at 586.

The above decision informs Texas practice in several important regards that already have been discussed in this paper: 1) it is imperative to have a Discovery Control Plan that clearly establishes deadlines for designating experts; 2) it is important for the Discovery Control Plan to include a deadline for requesting or filing a Motion for an Adverse Medical Examination; and 3) the Trial Court has the discretion to include provisions in the Discovery Control Plan controlling when requests for medical examinations should be filed.

The Plaintiff's attorney should consider requesting a Pre-Trial Conference and raising the above potential issue to finesse it. If in Federal Court, this issue should be addressed in the 26(f) Conference. It should be clear in the Pre-Trial Order that all testifying experts must be designated at the times stated at the risk of not being allowed to testify. If the Defendant wishes to have an examiner designated as a testifying expert, then the examination must be requested much earlier than thirty days before the end of the discovery period and most probably at least 45 – 60 days before its designation deadline. Failure to timely and completely designate the examining physician or psychologist as a testifying expert presumably could result in disallowance of that expert at trial under Tex. R. Civ. P. 193.6. Of course, if the Defendant merely wishes to have an examination to evaluate its exposure and not for expert testimony at trial, then Defendant should be allowed to request an examination as late as thirty days before the end of the discovery period. However, even in such an event, Plaintiff should require that the request be farther in advance than thirty days before the end of the discovery period to reduce risk of disrupting final preparations for trial.

While there have not been many Texas Appellate decisions regarding physical/mental examinations under Rule 204, or its predecessor, in contrast, there

[5] This case was decided under the pre-1999 amendments to the Texas Rules of Civil Procedure regarding discovery.

have been many decisions in other jurisdictions, particularly those adopting the Federal Rule (FED. R. CIV. P. 35). Especially noteworthy are several recent cases out of Texas Federal Courts. The cases discuss the interplay between FED. R. CIV. P. 35 and FED. R. CIV. P. 26. There is no deadline set out in FED. R. CIV. P. 35 as to when a request for a Defense Medical Examination must be made, except that the request be made within the discovery period. A question that arises concerns the potential impact on timing of the request by Rule 26, which authorizes a Court to impose a discovery deadline and a deadline for designating expert witnesses. Specifically, the issue is whether a Court Order setting out a discovery deadline and a deadline for designating experts tacitly imposes a deadline for requesting an AME so that the expert, if he or she is going to be a testifying expert at trial, is fully designated by the designation deadline. The controversy arises when a request for AME is made at or after the time of expert designation. In such a situation, should a Defendant be able to get an exception from the expert designation deadline? The answer may turn on whether the Defendant intentionally procrastinated or whether events occurred in the development of the case which made the late request unavoidable. The following two cases help inform the answer to this issue and to others that arise with this peculiar procedure.

A. ***Diaz v. Con-Way Truckload, Inc.,*** 279 F.R.D. 412 (S.D. Tex. 2012). This was a motor vehicle collision case that got removed to Federal Court. A Scheduling Order was entered. After the deadline for Defendant to designate experts, Defendant requested a Rule 35 medical exam. Plaintiff objected that the request was untimely because the Expert Designation deadline had expired. Defendant responded by saying that there was no deadline in Rule 35 for requesting an examination or for providing a report. After noting that there is disagreement among Courts that have addressed the interplay between Rule 26 and Rule 35, the Court found that the better course is to recognize that the two Rules operate together rather than independent of one another. Accordingly, the Court found that Defendant did not exercise diligence in attempting to request a Rule 35 examination before the expert deadline and therefore Defendant's request for an examination beyond the designation deadline should be denied. It should be noted that Plaintiff filed a late report from a neurologist to whom Plaintiff had been referred by his treating physician. The Court wound up allowing Plaintiff's late designation and in return allowed Defendant an extension of its Expert Designation deadline. Nonetheless, the opinion stands for the proposition that Rule 35 and Rule 26 are to be read together and that a request for a Rule 35 medical/mental examination must be in coordination with the Expert Designation deadline under Rule 26.

B. ***Naranjo v. Continental Airlines, Inc.,*** Slip Copy, 2013 WL 1003485 (S.D. Tex.) It is important to note that the ***Diaz*** Court observed in footnote 3 of that decision that "The Court concedes that there may be circumstances when a Rule 35 examination after the expert report deadline and discovery deadline may be warranted." ***Naranjo*** presents such a circumstance. The opinion notes that in his original pleadings, Mr. Naranjo "asserted vague claims of emotional damages"; however, during his deposition for the first time he claimed he suffered "a fear of flying, depression, post-traumatic stress disorder, anger, and hyper-vigilance." This assertion in his deposition put his mental or psychiatric in issue and Continental promptly moved for a Rule 35

psychological examination. Since the Plaintiff's deposition was late in the discovery period, Defendant's request for the psychological examination came after its expert designation deadline. The Court found that these circumstances constituted good cause to allow an extension of the deadline to permit the psychological examination.

C. ***Valenzuela v. Willette and Xpress Transportation***, 2015 WL 12843209 (S.D. Tex. Laredo 2015) In this case, the Defendant requested a medical examination after the Designation Deadline but before the Discovery Deadline. Defendant stated that it only wanted the examination to verify the testing done by Plaintiff's expert. However, the Court did not believe the argument because it was contradicted by Defendant's claim for good cause that it was entitled to an even playing field. The Court denied the Motion as untimely. But for the contradictory representation about wanting a level playing field, the Court noted that Defendant may be entitled to a medical examination beyond the Designation Deadline if the examination is merely for consultation and is not to be used at trial.

> In *Diaz,* the Court noted that "if a Rule 35 examination truly does not implicate the report or testimony of a testifying expert, then it can be scheduled after the Rule 26 expert report deadline." *Id.* Further, the Court stated that "if [d]efendant ... [was] genuinely interested in merely confirming data, [d]efendant ... would have asked its examiner to conduct the exact same or comparable examinations that had already been conducted on Mr. Diaz by his own neuropsychologist." *Id.* at 419. The Court agrees that if a Rule 35 exam does not affect the testimony or report of a testifying expert witness, then the medical exam may be conducted after the Rule 26(a)(2) deadline.

Valenzuela v. Willette and Xpress Transportation*, supra* at *3.

4. WHO MAY BE SUBJECT TO AN ADVERSE EXAMINATION

Any party who's medical/psychological condition is placed in issue, may be required to undergo a medical/psychological examination subject to the requesting party meeting the requirements for good cause. A Plaintiff therefore may seek an adverse examination of a Defendant. ***Schlagenhauf v. Holder****,* 379 U.S. 104, 118, 85 S.Ct. 234, 242, 13 L.Ed.2d 152 (1964). *See also*, ***In re Click,*** 442 S.W.3d 487, 491 (Tex. App. – Corpus Christi 2014, orig. proceeding) and ***Williamson v. Sanderson***, 904 S.W.2d 212, 216 (Tex. App. – Beaumont 1995). *See also,* ***R.K. v. Ramirez****,* 887 S.W. 2d 836, 843 (Tex. 1994 and ***In re Kristensen***, Not Reported in S.W.3d, 2014 WL 3778903 (Tex. App. Houston [14th Dist.] 2014)**.**

5. REQUESTING THE ADVERSE MEDICAL PSYCHOLOGICAL EXAMINATION

Unlike other discovery requests, a party must show not only relevancy but good cause of an adverse examination. Further, the nature and scope of the examination must also be relevant to the claims and defenses pled in the case.

A. THE INFORMAL REQUEST FOR DEFENSE MEDICAL/PSYCHOLOGICAL EXAM

Some defense attorneys choose to request a medical examination without resorting to a motion, presumably because they wish to avoid having an order issued in compliance with the adverse examination rule. Tex. R. Civ. P. 204 provides as follows:

> **(c)** ***Requirements for obtaining Order.*** The Court may issue an Order for Examination only for good cause shown and only in the following circumstances:
>
> (1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or
>
> (2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

While there is nothing wrong with entering into an agreement regarding an adverse examination, there are two important tactical points for the Plaintiff attorney to note:

1. Regardless of whether the examination takes place following a Motion, or is conducted by agreement, obtain an Agreed Order or at the very least in Texas, an Agreement in conformance with Tex. R. Civ. P. 11 (there is no corresponding Federal Rule regarding written agreements.

2. Make sure that the Agreed Order or Agreement conforms with the above rule on Orders. It should specify what can and cannot be done in conjunction with the examination.

While parties often are expected to agree on discovery matters, it is not in the examinee's interest to agree on an examiner. By agreeing to the examiner, the examinee compromises any effective cross examination on the basis of bias.

There is a lot of strategy involved in deciding whether to have any role in selecting or approving the tests to be performed by the examiner. On the one hand, it sounds reasonable and appealing. However, there is also a downside. If the examinee forces the requesting party to identify what tests the examiner is going to perform, there can be the argument or inference that the Plaintiff was able to prepare for and manipulate the test findings. Worse, is the Plaintiff agrees to the testing, the ability to argue that the tests were inappropriate or biased will be severely compromised.

A PLAINTIFF'S ATTORNEY SHOULD NEVER ALLOW HER CLIENT TO BE SUBJECTED TO A MEDICAL/PSYCHOLOGICAL EXAMINATION WITHOUT A COMPREHENSIVE ORDER OR AGREEMENT, SPECIFICALLY SETTING OUT WHAT IS AND IS NOT TO BE DONE, WHEN AND BY WHOM.

A Plaintiff attorney should try to reach an agreement regarding the terms of adverse examination, if practical. If not, there definitely needs to be a Court Order in conformance with the above rule. For instance, Tex. R. Civ. P. 204.2(b) requires that a report be created and delivered to the examinee or her attorney even if there is an agreement, unless the agreement "expressly provides otherwise." Do not leave this for after the fact disagreement. Spell it out in the Agreement or Agreed Order. Moreover, set out a specific deadline for the report and the examiner's deposition, if that is desired. The Order/Agreement should specify the time, place, manner, conditions and scope of the examination and the person or persons by whom the examination is to be made.

B. THE MOTION FOR AN ADVERSE MEDICAL/PSYCHOLOGICAL EXAM

There is a very important concept that needs to be clearly understood when a party files a Motion for an Adverse Medical/Psychological Examination. First, the party's medical/psychological condition has to be in issue or in controversy. In other words, the discovery request for an examination has to be relevant to a claim or defense pled in the lawsuit. Second, if good cause is demonstrated for an examination, the actual testing, including the questions that are asked on forms or during an interview, must be relevant to the claims and defenses pled in the case. Oftentimes, attorneys focus all their attention on whether an examination should be allowed and then, once the examination is allowed, fail to focus on the relevancy of what is to be asked and done during the examination. The latter focus arguably is more important than the former.

To establish justification for an Order Compelling a Medical or Psychological Exam, the moving party must demonstrate good cause. This requires demonstrating that the examination is relevant; that there is a reasonable connection between the condition and the examination sought which will lead to the discovery of admissible evidence. The movant also must demonstrate that the medical or psychological condition for which the examination is sought is in controversy. Also, the movant must demonstrate that it is not possible or practicable to obtain the information sought from the examination through less intrusive means.[6] *See* ***Coates v. Whittington,*** 758 S.W.2d 749,753 (Tex. 1988).

The case that is usually the starting point for sorting out the legal/factual basis for an adverse medical/psychological exam is ***Schlagenhauf v. Holder,*** 379 U.S. 104, 118, 85 S.Ct. 234, 242, 13 L.Ed.2d 152 (1964), which interpreted and applied Fed. R. Civ. P. 35, from which Rule 167 and its successor, Tex. R. Civ. P. 204 are modeled.

[6] See also, Tex. R. Civ. P. 192.4 (a).

Coates v. Whittington, 758 S.W.2d 749 (Tex. 1988) is the seminal Texas case on the issue of what is required for a Court to order a compulsory defense medical/psychological exam. The Texas Supreme Court in ***Coates v. Whittington***, was interpreting Rule 204.1's predecessor, Rule 167a.[7] The opinion drew heavily from ***Schlagenhauf***.

> The United States Supreme Court has held that Federal Rule 35 requires an affirmative showing that the party's mental condition is genuinely in controversy and that good cause exists for the particular examination. ***Schlagenhauf v. Holder,*** 379 U.S. 104, 118, 85 S.Ct. 234, 242, 13 L.Ed.2d 152 (1964). In ***Schlagenhauf,*** the Court expressly stated that these two requirements are not met "by mere conclusory allegations of the pleadings-nor by mere relevance to the case." *Id.*

Ms. Coates was burned when she attempted to use an oven cleaner. She brought a product liability claim against the cleaner manufacturer alleging physical injuries and mental anguish. The Defendant alleged contributory negligence and alleged that Ms. Coates had pre-existing conditions that may have been the basis for why she injured herself. The manufacturer sought and obtained an Order requiring a compulsory psychological exam. The Texas Supreme Court held that the Court had abused its discretion because the Defendant had failed to demonstrate that Ms. Coates had placed her mental condition in controversy and failed to show good cause for the examination. The analysis is informative.

First, it should be noted that psychological examinations have not always been allowed. Originally, the Rule in Texas only allowed an examination by a medical doctor. Since a psychologist is not a medical doctor, a Plaintiff could not be compelled to undergo psychological testing by a psychologist. See ***Coates*** 758 S.W.2d at 751. The rule subsequently was amended to allow for an examination by a psychologist if a Plaintiff designated a psychologist as a testifying expert or the Plaintiff sought to introduce records of a treating psychologist. A Plaintiff still cannot be compelled to undergo an examination by an individual who is neither a medical doctor nor a psychologist, such as by a vocational rehabilitation expert. ***Moore v. Wood***, 809 S.W.2d 621 (Tex. App. – Houston [1 Dist.] 1991, no writ).

In re Advanced Powder Solutions, 496 S.W.3d 838 (Tex. App. -Houston [1st Dist.] 2016) addresses and is informative on another important issue that arises under Rule 204. An examination may only be ordered conducted by a qualified physician or psychologist. For instance, unlike under the Federal Rule which has been amended specifically to allow vocational examinations, examinations by vocational counselors have been held to be improper under Rule 204.1. ***Moore v. Wood***, 809 S.W.2d 621, 622-24 (Tex. App. – Houston [1st Dist. 1991, orig. proceeding). In Advanced Power, there was a request for a functional capacity examination. The Court does not address whether a functional capacity examination, by definition, is permissible, if conducted by a physician. Rather, the Court points out that because the Defendant neither at the trial

[7] (Vernon 1976, repealed 1998, now Tex. R. Civ. P. 204.1)

level or in its brief had indicated who was going to perform the examination, the Defendant had failed to meet the requirements of Rule 204, which allows examinations only by a physician or psychologist.

> APS's Motion, like its mandamus petition, is silent regarding who would perform the "functional capacity evaluation and impairment rating" examination, the nature of that examination, or whether it would be performed by a "qualified physician." For this reason, APS has failed to show that its Motion satisfies the requirements of Rule 204.1.

While Tex. R. Civ. P. 2014 still requires that the examiner be a certified medical physician or psychologist, the Federal Rule 35 has been amended to specifically authorize vocational examinations. ***Jackson v. Entergy Operations, Inc.,*** 1998 WL 28272 (E.D. La. 1998).

1) IN CONTROVERSY

Breaking down the requirements of the Adverse Examination Rule, the first inquiry must be whether a party has put the party's medical or mental condition in issue. In Coates, the question was whether the Plaintiff had alleged a "mental injury," thus "affirmatively" placing her mental condition in controversy. The Texas Supreme Court made clear in Coates that merely alleging mental anguish does not expose Plaintiff to a mental examination and revelation of her past mental health history: "Rule 167a (now Rule 204) was not intended to authorize sweeping probes into a Plaintiff's psychological past simply because the Plaintiff has been injured and seeks damages for mental anguish as a result of the injury." **Coates,** 758 S.W.2d at 752. The key is whether the Plaintiff has alleged a **mental injury** for which she requires or has sought treatment as opposed to merely the ordinary anguish that would normally be expected to accompany the alleged physical injury. In Coates, there was no allegation of a permanent mental injury nor any clinically diagnosable emotional disturbance or psychiatric problem.

> A routine allegation of mental anguish or emotional distress does not place the party's mental condition in controversy. The Plaintiff must assert mental injury that exceeds the common emotional reaction to an injury or loss. ***Coates,*** 758 S.W.2d at 753.

The Texas Supreme Court referred to Federal cases interpreting Fed. R. Civ. P. 35 to demonstrate what types of situations might be viewed as a Plaintiff having affirmatively placed her mental condition in issue:

> Further, Federal Courts that have applied Rule 35 in light of ***Schlagenhauf*** have consistently distinguished "mental injury" that warrants a psychiatric evaluation from emotional distress that accompanies personal injury. *Compare* ***Anson v. Fickel,*** 110 F.R.D. 184, 186 (N.D.Ind.1986) (mental condition is in controversy when Plaintiff

> claims mental problems that required confinement in a psychiatric hospital) *and* ***Lowe v. Philadelphia Newspapers, Inc.,*** 101 F.R.D. 296, 298-99 (E.D.Pa.1983) (mental condition is in controversy when Plaintiff claims severe emotional distress and seeks to prove damages through testimony of psychiatrist) *with* ***Cody v. Marriott Corp.,*** 103 F.R.D. 421, 423 (D.Mass.1984) (mental condition is not in controversy when Plaintiff claims emotional distress and does not claim a psychiatric disorder requiring psychiatric or psychological counseling).

More recent Federal cases continue to echo these holdings. ***Ornelas v. Southern Tire Mart, LLC***, 292 F.R.D. 388, 393 (S.D. Tex. Laredo 2013) (quoting ***Bradford Felmly v. Hills***, 222 F.R.D. 257, 259 (D. Vi. 2004) and ***Bowen v. Parking Auth. of City of Camden,*** 214 F.R.D. 188, 193 (D.N.J. 2003).

The party requesting the examination may not merely speculate or draw unsubstantiated inferences to meet the "in controversy" requirement. In Coates, the manufacturer claimed that IT had put the Plaintiff's mental condition in issue by pleading contributory negligence and that the reason for Plaintiff's conduct (ostensibly some psychological condition or injury) was relevant and material. The Court disagreed:

> Whatever mental processes underlay her conduct, *it is the nature of that conduct, not the reasons for it, that is in issue.* Rule 167a clearly does not contemplate that a plaintiff would be subjected to a probing psychiatric incursion into his or her entire psychological past on the strength of a Defendant's contributory negligence claim. ***Coates,*** 758 S.W.2d at 752. (emphasis added).

A Plaintiff, however, may place her medical or psychological condition in issue through her allegations. See ***Beamon v. O'Neill***, 865 S.W.2d 583, 586 (Tex. App. – Houston [14th Dist.] 1993, orig. proceeding). But a mere allegation of mental distress or anguish will not place the Plaintiff's psychological condition in issue. ***In re Doe***, 22 S.W.3d 601, 605 (Tex. App.-Austin 2000, orig. proceeding). See also ***Amis v. Ashworth***, 802 S.W.2d 374, 378 (Tex. App. – Tyler 1990, orig. proceeding) (holding that an allegation of self-defense is insufficient to warrant granting an examination by a mental health professional.) This principle also has been followed in the Federal Courts. ***Lahr v. Fulbright & Jaworski, L.L.P.,*** 164 F.R.D. 204, 209 (N.D. Tex. 1996) ("A Plaintiff who alleges an action for intentional infliction of emotional distress asserts a mental or emotional injury, and thereby places her mental condition in controversy on the basis of the pleadings alone").

In Texas, a party's mental condition may be placed in controversy by proof that the party to be examined has designated a psychologist to testify or has disclosed a psychologist's records for possible use at trial. TEX. R. CIV. P. 204.1(c). ***In re Transwestern Pub. Co., L.L.C.*** 96 S.W.3d 501 (Tex. App.–Fort Worth, 2002).

In addition to the Plaintiff placing her medical or psychological condition in issue, the Defendant or the opposing party (the Plaintiff may put the Defendant's medical or psychological condition in issue) may put another party's medical or psychological condition in issue. The physician-patient privilege is intended to facilitate full communication between patients and their physicians and to prevent disclosure of personal information to third parties. This physician patient privilege is limited by exceptions, including a "litigation exception," which applies when "any party relies on the patient's physical, mental, or emotional condition as part of the party's claim or defense and the communication or record is relevant to that condition." TEX. R. EVID. 509(e)(4), 510(d)(5). This exception applies when "(1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance." *See* ***R.K. v. Ramirez,*** 887 S.W. 2d 836, 843 (Tex. 1994). This begs the question, what must the party who is seeking the medical or psychological condition do to place the other party's medical condition in issue. The most important thing it must do is place the condition in issue through its pleadings. This is the holding in ***In re Nikki Lauren Morgan***, 507S.W.3d 400 (Tex. App. – Houston [1st Dist.] 2016, orig. proceeding).

> Because no pleading contains a claim or defense mentioning Nikki's medical condition or treatment for RSD, the Trial Court abused its discretion in concluding that the litigation exception applies and in ordering production of Nikki's medical records concerning her RSD.

In re Click, 442 S.W.3d 487, 491 (Tex. App. – Corpus Christi 2014, orig. proceeding). ***Click*** is an interesting case for a couple of reasons. First, it involves a Plaintiff seeking a medical examination of the Defendant. Second, the case turns on the scientific reliability of the basis for which the examination was sought. The case involved claims of wrongful death arising from a head on vehicular collision. The police report indicated that the Defendant may have fallen asleep at the wheel. Also, the Defendant had been convicted in the past of possession of controlled substances. Plaintiff sought hair samples from Defendant to establish that Defendant was under the influence of controlled substances at the time of the collision. Defendant filed a response pointing out that good cause had not been established because there was no indication that the Defendant was under the influence of any drugs at the time of the collision. Defendant supported the response with an affidavit from a medical toxicologist. The substance of the affidavit is informative. The reported pertinent contents of the affidavit are as follows:

> Hair testing has "limited use" in determining whether an individual's hair has been exposed to a potential drug because a test can reflect drug usage by bystanders rather than the individual subject to testing; and hair cleaning and manipulation, hair pigment, color, race, dosage of drug exposure, and sampling methods can all affect the availability and existence of drugs in the hair at the time of testing. Dr. Beberta stated that in "situations like the present case, hair testing is ***no longer considered a scientifically reliable method*** to determine whether an individual used

> drugs, when the individual used drugs, or whether the individual was impaired or intoxicated by a particular drug found in the hair." Dr. Beberta further opined that testing hair samples more than ninety days after an alleged drug exposure was scientifically unreliable.

The Affidavit, which was not rebutted, effectively was a ***Daubert*** attack on the viability of the theory on which the requested examination was based, and it was a very effective strategy. The Trial Court did not actually order an examination of Defendant but ordered Defendant to produce a hair sample for analysis. The Appellate Court dispensed with Plaintiff's argument that the Court had not ordered an actual examination of the Defendant but merely a hair sample. The Court found that Rule 204 applies both to examinations and the product of examinations (i.e. a hair sample). The Court then found that the Court had abused its discretion by ordering the production of the examination:

> The evidence before the Trial Court did not establish that the requested examination is relevant to issues that are genuinely in controversy in the case and the examination would produce, or would likely lead to, relevant evidence, or that a reasonable nexus exists between the condition in controversy and the examination sought. *See, e.g.,* ***Coates,*** 758 S.W.3d at 751. Moreover, the real parties have made no attempt to show that it is not possible to obtain the desired information through less intrusive means.

2) GOOD CAUSE

In addition to demonstrating that a party's medical/psychological condition has been placed in issue, the party requesting the examination must also demonstrate good cause for the examination. A recent Federal case observed that the party requesting, and adverse examination must show "that the examination could adduce specific facts relevant to the cause of action and necessary to the Defendant's case." ***Ornelas v. Southern Tire Mart, LLC***, 292 F.R.D. 388, 391 (S.D. Tex. Laredo 2013) (citing ***Ragge v. MCA/Universal Studios***, 165 F.R.D. 605, 609 (C.D. Cal. 1995).

In ***Coates,*** the manufacturer alleged that there was good cause for a mental examination based on notes in the medical records and testimony that Ms. Coates had suffered from depression prior to the incident. The Court rejected this argument, observing that the Defendant had failed to demonstrate a "nexus" between the prior alleged condition and the claims that Plaintiff alleged resulting from the occurrence.

> Mrs. Coates' prior problems and attendant complaints of depression are distinct from the mental anguish she claims as a result of her injury. Drackett has failed to show any connection or "nexus" between Mrs. Coates' pre-injury depression and her post-injury embarrassment. ***Coates,*** 758 S.W. 2d at 752

The opinion instructs that there are three essential components of "good cause," and that each must be demonstrated:

> a) RELEVANCY
>
> An examination is relevant to issues that are genuinely in controversy in the case. ***It must be shown that the requested examination will produce, or is likely to lead to, evidence of relevance to the case.*** *See* ***Schlagenhauf****,* 379 U.S. at 117-18, 85 S.Ct. at 242-43. (emphasis added)
>
> b) NEXUS
>
> There must be shown a reasonable nexus between the condition in controversy and the examination sought.
>
> c) LESS INTRUSIVE MEANS NOT FEASIBLE
>
> A movant must demonstrate that it is not possible to obtain the desired information through means that are less intrusive than a compelled examination. *See* ***Schlagenhauf,*** 379 U.S. at 118, 85 S.Ct. at 242;

See also, ***In re Caballero,*** 36 S.W.3d 143, 145, (Tex. App. Corpus Christi 2000, orig. proceeding) (reiterating the requirement of meeting three above criteria).

Good cause is effectively established as a matter of law if the examinee designates a medical expert to prove his/her mental condition:

> "[i]f, however, a [party] intends to use expert medical testimony to prove his or her alleged mental condition, that condition is placed in controversy and the [other party] would have good cause for an examination under Rule 167a."

Coates, 758 S.W.2d at 753. See also, ***Amis v. Ashworth***, 802 S.W.2d 374, 378 (Tex. App. – Tyler 1990, orig. proceeding) (Designating a treating physician to testify about mental state at a particular point relevant to the occurrence is not the same as designating an expert on the Plaintiff's mental or medical condition resulting from the occurrence).

Finally, even if the Defendant demonstrates that the Plaintiff has affirmatively placed her medical or mental condition in issue and that there is good cause for the examination, the Court should still balance the competing interests.

> The "good cause" requirement of Rule 167a recognizes that competing interests come into play when a party's mental or physical condition is

> implicated in a lawsuit-the party's right of privacy and the movant's right to a fair trial. A balancing of the two interests is thus necessary to determine whether a compulsory examination may properly be ordered.

Coates, 758 S.W.2d 753.

Rule 204.1, requires a showing of good cause **and** either proof of the "in controversy" element or proof that the party to be examined has designated a psychologist to testify or has disclosed a psychologist's records for possible use at trial. Tex.R. Civ. P. 204.1(c). Thus, under Rule 204.1, even if the person to be examined has designated a psychologist to testify regarding her mental condition, the party seeking the examination must still demonstrate "good cause" for the examination. "Good cause" is not assumed merely because a psychologist has been appointed to testify as an expert regarding the subject's mental condition. Further, if the party to be examined has designated an expert psychologist to testify regarding her mental condition, the party moving for the mental examination no longer needs to show that the mental condition of the party to be examined is "in controversy." ***In re Transwestern Pub. Relators Co., L.L.C.***, 96 S.W.3d 501 (Tex. App.-Fort Worth, 2002, orig. proceeding). "When a claimant has retained her own experts and intends to prove her claim at trial through their testimony, and when her mental injuries will be an important component of her damages, good cause exists to permit Defendant to select its own expert in that field to examine her." ***Lemon v. Kilbert***, 1998 WL 788779, at *1 (E.D. La. Sept. 11, 1998).

There are two additional thoughts that the author would like to share. First, the Texas Supreme Court has issued more than one opinion that arguably is at odds with the holding in ***Coates*** in that the Court takes the view that claims of mental anguish should be strictly scrutinized. In ***Parkway Co. v. Woodruff,*** 901 S.W.2d 434 (Tex.1995), a DTPA case, the Court held that "an award of mental anguish damages will survive a legal sufficiency challenge when the Plaintiffs have introduced direct evidence of the nature, duration, and severity of their mental anguish, thus establishing a substantial disruption in the Plaintiffs' daily routine." *Id.* at 444. There must be "a high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment, or anger." ***Parkway,*** 901 S.W.2d at 444. While Parkway did not deal with a physical injury, and the Court appeared to continue to endorse mental anguish damages when accompanied by physical injury, there have been cases holding that evidence of mental suffering was insufficient to support an award of damages for this element in a physical injury case. *See,* ***Warren v. Zamarron***, Not Reported in S.W.3d, 2005 WL 1038822 (Tex. App.-Austin 2005). This issue raises the concern that a Plaintiff may at some point not meet the ***Parkway*** criteria for mental anguish and might not recover damages for this injury. If Plaintiff does meet the criteria, she might be compelled to undergo a psychological exam. While this author can foresee a Defendant attempting to create this Hobson's choice, he believes the tactic will fail because even if a Plaintiff is forced to meet the ***Parkway*** criteria and does, she still arguably may do so without having put her medical or psychological condition in controversy.

Arguably, the burden of demonstrating good cause for a medical/psychological examination should be viewed similarly to the burden of overcoming a claim of trade secrets. ***In re Continental General Tire, Inc.***, 979 S.W.2d 609 (Tex. 1998) (i.e. the examination is necessary for a fair adjudication of the facts).

3) LEVELING THE PLAYING FIELD AND THE EVISCERATION OF THE LESS INTRUSIVE MEANS TEST

Up until recently, a Plaintiff might have been able to persuade a trial judge in Texas that an examination was not warranted because the requesting party had adequate data from which to derive its opinions. This can be seen in ***In re Gonzales*****,** Not Reported in S.W.3d, 2015 WL 5837896 (Tex. App. – San Antonio 2015). The Trial Court was held not to have abused its discretion in denying a Motion for Adverse Medical Examination when the requesting party failed to demonstrate that it could not obtain the information it was seeking through less intrusive means. Plaintiff's original treating doctor had recommended a four-level cervical fusion. However, Plaintiff obtained a second opinion which resulted in the Plaintiff having a single disc repair surgery. Defendant had requested an adverse examination before the surgery which was denied. After the surgery, Defendant again sought an adverse examination. Apparently, however, Defendant did not have the examiner update and supplement his affidavit. The Defendant produced an affidavit from its adverse examiner physician that Plaintiff should "undergo an independent medical examination before he undergoes a four-level cervical fusion." Regardless, the Court found that the proof was insufficient to establish why the examination was necessary and why the information could not be obtained through less intrusive means. A physician merely stating in a conclusory fashion that the physician believes that an examination should be conducted is insufficient to meet the less intrusive means requirement:

> Dr. Meadows does not, however, detail any information necessary to his evaluation or development of opinions that is not covered by existing examinations or medical records, or that could not be obtained by other discovery, such as deposing additional witnesses. *See id.* at 870. The real parties did not establish that the information regarding Gonzalez's condition which would be available to their experts through other forms of discovery is inadequate for the purpose of defending against Gonzalez's claims and obtaining a fair trial.

With the Texas Supreme Court holding ***In re H.E.B,*** 2016 WL 3157533 (Tex. 2016) (*per curiam*), it appears the less intrusive means test has been disabled. It is, therefore, questionable whether the holding in ***In re Gonzales, supra*****,** would be the same today. Arguably, it would not. The Texas Supreme Court in ***In re H.E.B,*** 2016 WL 3157533 (Tex. 2016) (*per curiam*) appears to effectively eliminate the "less intrusive means" that has existed in both the Texas and Federal Rules since the U.S. Supreme Court handed down the ***Schlagenhauf*** decision in 1964. ***Schlagenhauf v. Holder***, 379 U.S. 104, 118 (1964). The take away from H.E.B is that if the Plaintiff has put her medical condition in issue and has designated a physician or psychologist as a

testifying expert, the Defendant, absent extenuating circumstances, probably is going to be entitled to a medical or psychological examination of the Plaintiff.

> (1) the Plaintiff intended to use expert testimony to prove causation and damages; (2) HEB sought to allow its competing expert "the same opportunity" to examine the Plaintiff as the Plaintiff's expert had; (3) the results of this requested examination "go to the heart of HEB's defense strategy;" (4) the credibility of HEB's expert would be questioned at trial if he opined without having examined the Plaintiff; and (5) a subsequent injury introduced complications regarding the nature, extent, and cause of the injuries.

Since ***In re H.E.B*** arguably alters longstanding practice, it probably is instructive to analyze how the Court got to its result. The Plaintiff was injured when he tripped on an exposed piece of metal on the H.E.B premises. The allegation was that this resulted in an injury to his spine. To complicate matters, the Plaintiff was involved in a second incident at a different store in which an object fell on his head. The nature of the alleged injuries from that incident are not explained, but it is reported that the Plaintiff filed suit against that store as well. HEB hired Dr. William Swan to provide expert testimony on the issue of damages. The seeds of controversy were planted when Dr. Swan prepared a report after only reviewing the medical records. Although Dr. Swan apparently testified that he routinely examines the Plaintiff before providing a report, this one "slipped by." Some important facts appear in the following footnote in the opinion:

> HEB did not request that Dr. Swan be permitted to examine Rodriguez before preparing the report. But when asked in a deposition whether "a treating doctor is in a better position to examine and treat a patient's injuries" than a "records review doctor," Dr. Swan testified that an examining doctor has "the best feel for the patient." He also testified that he routinely examines patients in most cases, but that examining Rodriguez "slipped by."

It would be interesting to see the actual transcript of what Dr. Swan's testimony was, as it appears that the interpretation of what was said may be different than what Dr. Swan actually said. There seems to be a commingling of the terms "treating doctor," and "examining doctor. The term "treating doctor" appears in quotes, which the term "examining doctor" does not. It makes total sense that a treating doctor is in a better position to examine and treat a patient's injuries than a records review doctor." The next sentence, however, seems out of context. "Dr. Swan testified that an examining doctor has the best feel for the patient." What does that mean? It would have made more sense if the doctor had testified that to best formulate a diagnosis to be able to treat the patient properly, an examination of the patient is preferable to making a decision on a records review. In other words, the quote that the Texas Supreme Court relies upon does not appear to support the argument that in this instance the Defendant's expert could not formulate a proper opinion through less intrusive means than a physical examination of the patient. It appears that the decision was based less upon whether

the Defendant's expert could formulate an opinion without a physical examination of the Plaintiff than it was without the opportunity to examine the Plaintiff that the Defendant's expert would have a credibility issue at trial.

> The purpose of Rule 204.1's good cause requirement is to balance the movant's right to a fair trial and the other party's right to privacy. *See id.* at 753. . . Although Dr. Swan has reviewed Rodriguez's medical records, he explained in his deposition why "a treating doctor is in a better position to examine and treat a patient's injuries" than a "records review doctor." Significantly, Rodriguez intends to prove causation and damages through expert testimony, and Rodriguez's expert has already examined him. HEB merely seeks to allow its competing expert the same opportunity, and the results of Dr. Swan's requested examination go to the heart of HEB's defense strategy. *See* ***Able Supply Co. v. Moye***, 898 S.W.2d 766, 772 (Tex. 1995) (stating that denial of discovery goes to the heart of a case when the party is prevented from developing critical elements of its claim or defense). **Further, requiring Dr. Swan to testify at trial without the benefit of examining Rodriguez places him at a distinct disadvantage because it allows Rodriguez to call into question his credibility in front of the jury. [emphasis added]**

[**Comment:** Rule 204 is an unusual rule. While the Courts have held regarding other discovery devices that a party does not have to create evidence for an opponent, effectively this is what Rule 204 requires. The rule attempts to allow the acquisition of information, while also trying to provide for fairness at trial. This creates tension, as does the balancing of fairness with protection of privacy. The HEB decision appears to seek to provide fairness (an even playing field) at trial. That indeed is one of the policy considerations underlying the Rule. What is troubling is that the opinion appears to sacrifice the "less intrusive means" criteria to achieve this end. This is unfortunate because these criteria were supposed to be used to balance the needs for fairness against the right to privacy. A better analysis in this regard might have been for the Court to find that from the evidence presented, the benefits of fairness at trial outweighed any potential harm that examination might have on the Plaintiff's privacy. That would have been a fact specific determination that would have left the "less intrusive criteria" as a meaningful consideration.]

The holding in ***In re H.E.B.*** recently has been followed in ***In re Offshore Marine Contractors***, 496 S.W.3d 796 (Tex. App. – Houston [1st Dist. 2016). The opinion highlights the evisceration of the less intrusive means requirement.

> The third element of good cause – "less intrusive means" -- addresses whether the desired information "is required to obtain a fair trial and therefore necessitates intrusion upon the privacy of the person he seeks to have examined." ***Coates***, 758 S.W. 2d at 753. The desired information is not required to obtain a fair trial when a party may obtain the same information by deposing the opposing party's physicians or relying on

> existing expert reports. *See* ***Ten Hagen,*** 435 S.W. 3d at 870. On the whole, Courts must attempt to balance "the party's right of privacy and the movant's right to a fair trial." *Id*. at 866. Therefore, in determining whether the movant has demonstrated good cause, the Trial Court must evaluate the adequacy of the less intrusive measures "in light of the fair trial standard." *Id*. at 870.

The Court then goes on to explain the rationale in ***In re H.E.B.*** such that the fair trial consideration almost always is going to require that the Court grant an adverse examination if the other party has obtained an examination by a testifying physician or psychologist.

Recent Federal cases also emphasize the Court's interest in providing the parties "equal footing," under Fed. R. Civ. P. 35. ***Ornelas v. Southern Tire Mart, LLC***, 292 F.R.D. 388, 396 (S.D. Tex. Laredo 2013) (citing ***Duncan v. Upjohn Co.***, 155 F.R.D. 23, 25 (D. Conn. 1994).

> Jones's physicians and therapists have performed examinations and tests, and the results of these examinations will form part of the evidence and the basis for expert opinion on causation and damages. Like HEB, OMC is asking for its expert, Dr. Yohman, to have the same opportunity to examine Jones. Additionally, this requested examination goes to the heart of OMC's defense strategy. *See* ***Able Supply Co. v. Moye****, 898 S.W.2d 766, 772 (Tex. 1995)* (denial of discovery goes to the heart of a Defendant's case when it prevents it from developing critical aspects of its defense, including injury and lack of causation). Without the benefit of the requested examination, Yohman's credibility could be attacked in front of the jury. *See* ***In re H.E. B.*** 2016 WL 315733, at *3.

The analysis in Ornelas is strikingly similar to that followed by the Texas Supreme Court in ***In re H.E.B***.:

> a Plaintiff may not avoid a Rule 35 examination simply on the grounds that other sources of information, such as medical reports and depositions of Plaintiff's treating physicians, are available. ***Jackson v. Entergy Operations, Inc.*** Nos. Civ. A. 96-4111, Civ. A. 97-0943, 1998 WL 28272, at *2 (E.d. La. Jan. 26 1998); ***Ferrell v. Shell Oil Co.*** Civ. A. No. 95-0568, 1995 WL 688795, at *1 (E.D. La. Nov. 201995).

While the less intrusive means requirement still technically exists, it is likely to be trumped by the right to fair trial requirement anytime the party from whom an examination is requested has undergone an examination by a physician or psychologist who is then designated as a testifying expert. Arguably, the less intrusive means requirement might have some validity and effect in the instance in which a party places in issue the medical psychological condition of the party from whom the examination is requested, and that party has not undergone an examination by a physician or

psychologist designated as a testifying expert. In such an instance, the fair trial requirement arguably might not be activated.

C. DOES DEFENDANT HAVE AN ABSOLUTE RIGHT TO CHOOSE THE EXAMINING PHYSICIAN OR PSYCHOLOGIST?

One of the most vexing aspects of the defense medical examiner procedure is the selection of the examiner. Invariably, the Plaintiff attorney believes that the examiner selected by the Defendant is synonymous with the Defendant pre-selecting an opinion. As the adage goes, "just because I'm paranoid, does not mean someone isn't following me." (with apologies to Satchel Page). Usually, the Plaintiff's attorney's suspicions are correct. This begs the question whether the Defendant should have the absolute right to choose the examining physician or psychologist. Some opinions, in the context of leveling the playing field, follow the logic that since the Plaintiff has selected her physicians so the Defendant should be allowed to select its physicians.

> The "valid objection" requirement provides Defendants with the same opportunity as Plaintiffs in choosing an expert witness. Defendants have absolutely no say in determining which physician a Plaintiff chooses as a treating physician or an expert witness; likewise, a Plaintiff should be limited in his ability to object to the selection of the Defendant's expert witnesses.

Powell v. United States, 149 F.R.D. 122, 124 (E.D. Va. 1993). Of course, oftentimes the Plaintiff has not selected her treating physicians. She has been taken to an emergency room or admitted to a hospital at which an unknown physician is assigned to her care. The Defendant responds that even if the Plaintiff did not select her physicians then the physicians who cared for her are biased or sympathetic toward her. A trial attorney of any experience knows that this proposition is far from true in a number of instances. On many occasions, the defense has used the Plaintiff's treating physicians to undermine the Plaintiff's claims of injury.

Does the Defendant have an absolute right to choose the examining physician? The answer is probably no, but close. It has been held that there is no absolute right for the party requesting the exam to choose who the examining physician will be. *See**, Great Western Life Assurance Co. v. Levithan,*** 153 F.R.D. 74 (E.D. Pa. 1994) (although the requesting party's choice will be given deference absent extenuating circumstances). Texas law is to the same effect. ***Employers Mut. Casualty Co. v. Street***, 702 S.W.2d 779 (Tex. App.--Fort Worth 1986, orig. proceeding); ***Sherwood Lane Associates v. O'Neill*** 782 S.W.2d 942 Tex. App.–Houston [1 Dist.],1990. See also, ***In re Ten Hagen Excavating, Inc.*** 435 S.W.3d 859, 866 (Tex. App. – Dallas 2014, orig. proceeding). The Trial Court may choose any physician it finds appropriate. ***May v. Lawrence,*** 751 S.W. 2d 678, 679 (Tex. App.--Tyler, 1988, original proceeding) (trial court may choose any physician it finds appropriate).

A Plaintiff, however, must still present a valid objection to prevent a doctor selected by the Defendant from being approved. Arguing that the proposed doctor is a conservative "defense doctor" has been held to be insufficient in this regard. ***Sherwood Lane Assoc. v. O'Neill***, 782 S.W.2d 942 (Tex. App.--Houston [1st Dist.] 1990, orig. proceeding). Similarly, the argument that the examiner was regularly employed by insurance companies and Defendants to perform medical examinations has been rejected. ***Powell v. United States***, 149 F.R.D. 122, 124 (E.D. Va. 1993). The complaint of bias must pertain to the specific examiner and must be factual, not conclusory. ***Robin v. Associated Indem. Co.,*** 297 So.2d 427 (La., 1973). But, when evidence is adduced that the examiner chosen to do the examination is biased, the Court has discretion to strike the proffered expert. ***White v. State Farm Mut. Auto. Ins. Co.,*** 680 So.2d 1 (La. App. 3 Cir., 1996).

In Texas, it has become even harder (it has never been easy) to obtain financial discovery suggesting that an examiner is biased because a large sum or percentage of her income is derived from conducting adverse examinations. ***In re Ford***, 427 S.W. 3d 396 (Tex. 2014) involved a claim of product defect, the Plaintiff sought to depose the corporate representative of each of the Defendant's two testifying expert's employers. One expert worked for Exponent and the other for Carr Engineering. Both of these companies regularly appear in automotive product liability cases for the Defendant automotive company, particularly Ford Motor Co. Plaintiff wanted to depose the corporate representatives on "detailed financial and business information for all cases the companies have handled for Ford or any other automobile manufacturer from 2000 to 2011." The Texas Supreme Court rejected this type of discovery as an improper fishing expedition. The Court pointed out in the decision that both experts gave testimony relevant to the issue of bias. Both testified that they had never testified against Ford and one testified that she had never testified that a vehicle had any type of design defect. The Texas Supreme Court clearly is not holding that all discovery of bias is impermissible; rather, it is reiterating that when a party seeks to delve into the financial records of the expert (or the expert's employer) the Court has drawn a very red line.

Most Courts are probably going to find that the only thing that should probably trump the Defendant's selection of the examiner is the integrity of the judicial system. If it can be shown that the examiner chosen by the Defendant previously has gamed the system, has misled the Court and Jury, or has been exposed as merely selling whatever opinion the highest bidder desires, then the Court should be inclined to disallow the choice. In such an instance should the Court select the examiner? Probably not. As there really is no authority in a civil (non-family law) case for a judge to appoint an expert. See ***McQueen v. University of Texas Medical Branch-Galveston***, Not Reported in S.W.3d, 2000 WL 704962 (Tex. App.-Houston [1 Dist.] 2000) (Court notes it is unaware of any authority for such an act in a civil action). Further, it is important to note that Texas has not adopted Fed. R. Evid. 706, which allows the Trial Court discretion to appoint experts. See generally, Wright, Miller & Marcus, Federal Practice and Procedure §2239 at 515 (West 1994). In view of these circumstances, the most likely path the Court will take is probably to simply require the Defendant to go back to

the well and find another examiner.

As with a lot of discovery issues, this controversy often boils down to a consideration of what is discoverable versus what is admissible. The policy in Texas is to allow very broad discovery so that facts necessary to properly decide the case may be revealed. However, just because something is discoverable does not make it admissible. The gateway to admissibility is significantly narrower than that to discoverability.

In a way, the issue of challenging the selection of the examiner is similar to the situation attorneys in Texas presently confront objecting to designations of responsible third parties under Chapter 33.004 Tex. Civ. Prac. & Rem. Code. While there are some pot shots a Plaintiff may take initially at the designation, by and large, such shots are non-fatal. A Court is going to allow a Defendant to designate whoever it wants (provided it can meet the basic criteria) as a responsible third party. The time and place to undertake the battle is not at the selection phase, but at the close of discovery.

At the close of discovery (long after the deadline for expert designations has passed), the party opposing the designation may move to strike (essentially a No Evidence Motion for Summary Judgment) the responsible third party on the basis that there are no facts to support a claim that the designated party has any responsibility to the Plaintiff for the injuries and damages the Plaintiff has alleged. A similar process usually plays out with respect to the selection of an examining expert.

The optimum time to attack the proposed examiner in most instances probably is not at the time of selection, but after the examiner has conducted the examination, produced a report, has been fully designated, and deposed. Then, the Defendant is stuck. If the Plaintiff waits, then it is unlikely that the Court will allow the Defendant another examination if the original examiner is exposed as a fraud. If the Defendant has time to designate a new expert, that expert will then have to testify without the benefit of an examination (and it is doubtful he could rely on the examination of the first expert because that would open the door to a discussion about why the second expert had not conducted his own examination). Once the examiner has been exposed to full discovery, the Plaintiff may now challenge the examiner/expert under ***Daubert/Robinson***.

As will be discussed below in more detail, the Plaintiff may move to strike the examiner/expert under ***Daubert/Robinson*** because the expert has not used a proper methodology, the opinion is not relevant to the facts alleged in the lawsuit, there is an analytical gap, or the opinion is simply unreliable.[8] While it may be difficult to strike an expert under ***Daubert/Robinson*** simply because the expert can be exposed for having a distinct bias, the bias may be a factor in showing that the methodology was not scientifically reliable. Even if the Plaintiff is unsuccessful in striking the examiner under ***Daubert/Robinson***, the Plaintiff will still have a strong basis for attacking the examiner's opinions at trial during direct or cross examination of the examiner.

[8] *See,* Brown, "*Eight Gates for Expert Witnesses*," 36 Houston. L. Rev. 743 (1999).

Sometimes, the best thing that can happen to a Plaintiff is for the defense to select a totally biased examiner.

If the Plaintiff is impatient, over-anxious, and mounts an aggressive campaign to strike the examiner as biased at the time of selection, the Court is likely to allow the Defendant merely to select another examiner. It is predictable that the Court is going to allow the second choice regardless of that examiner's bias because the Court is going to begin to view the exercise as a waste of judicial resources. Why waste the political capital with the Court? Why risk getting an examiner who may in fact be just as biased as or more biased than the one you had struck? Save your power.

A corollary issue is whether the Plaintiff should attempt to have the type of tests that are to be performed, identified, or to influence the tests that are administered or conducted. The answer to both is "no" in most cases (excluding tests that are overly invasive or that place the Plaintiff at risk for further injury). Here is why. If the Plaintiff has the tests identified, then the defense predictably is going to argue that the Plaintiff (through her attorney) has, in advance of the examination, studied the test and conformed her responses and behavior to obtain a test finding consistent with her claim. In other words, the Defendant is going to have a plausible basis for alleging malingering. Further, if the Plaintiff attempts to influence the types of tests that are conducted, it sets the Plaintiff up later for the defense to claim that the Plaintiff participated in choosing the tests which undermines the Plaintiff's ability to argue later that the test itself was improper, irrelevant, or that the methodology of using the test to reach a conclusion was not scientifically reliable. Be careful about micro-managing the details of the examination.

D. SCOPE OF AND LIMITATIONS ON EXAMINATION

Once the issue about who may conduct the examination is resolved, the parties may next confront questions such as: a) the nature and extent of examination; b) witnessing or recording the interview/examination; c) the number of examinations and examiners; d) the time and place of the examination and reimbursement of expense in complying with the request for examination.

1) NATURE AND EXTENT OF EXAMINATION

Consider whether a distinction should be drawn between an adverse interview and an adverse examination. With a medical examination, it reasonably may be expected that the examiner will want to obtain a relevant "medical history." Similarly, with a psychological examination, it can be anticipated that the examiner will want to obtain a relevant background history. These "interviews" arguably may be viewed distinctly from the physical examination undertaken in a medical examination or the batteries of psychological tests that might be administered by the psychologist. While this seems like a logical distinction and argument, I confess that I have not found any case adopting the dichotomy and have seen cases to the contrary

that view the interview as an integral part of the examination. See, ***Shadix-Marasco v. Austin Regional Clinic, P.A.*** 2011 WL 2011483 (W.D. Tex. 2011)

The interview raises some unique issues from the examination. The interview arguably raises the concern about the Defendant conducting an additional deposition of the examinee through a surrogate without the protection of an attorney or the Court. While a deposition affords a witness to be represented by counsel who may object to improper questions or instruct the witness not to answer improper or irrelevant questions, no such protection is usually afforded in a defense medical interview. Further, unless requested, no official record is usually maintained of what was asked and precisely what response, if any, was given. This latter issue is particularly problematical. First, there is no physician/patient privilege that protects the communications between the examinee and the examiner. For those Courts that have held that the defense is entitled to the same type of examination that the Plaintiff obtained with her treating physicians, this is a stark impediment that is difficult to overcome. The Plaintiff is expected to provide candid information to a stranger who is hired by the party the Plaintiff is suing. Further, anything the Plaintiff says or does not say may be used against her in a court of law. Of course, the Defendant often is quite content to be able to use this situation to its advantage by claiming that the Plaintiff was not completely forthcoming in support of the defense claim that the Plaintiff is not credible or is malingering. Another problem, is that frequently, the examiner will quote the Plaintiff in his records or report, but not record the question that was actually asked. This tactic allows the examiner to take the response out of context and use it however the examiner chooses. An additional concern, is that the examiner will, under the guise of obtaining a "complete" history, make inquiries into the Plaintiff's medical history that are irrelevant and that otherwise are protected from discovery, (See ***Mutter v. Wood***, 744 S.W.2d 600 (Tex. 1988)) or inquire into the matters related to liability rather than to alleged injuries.[9]

If the Plaintiff is concerned about the scope of the interview/examination, she should give consideration to filing a Motion for Protection requesting that the Court issue an Order limiting the inquiry to certain areas and restricting inquiry into other areas. See ***In re Watson,*** 259 S.W.3d 390 (Tex.App.-Eastland,2008, no pet.) (Court may limit scope and timing of written discovery) and ***In re West,*** 2009 WL 946847 (Tex. App.-El

[9] Indeed, one tactic that this author has confronted is the defense hiring an examiner to testify that the examinee has a psychological condition that makes them untrustworthy and un-credible. The examiner then requests all data regarding the Plaintiff whether relevant or not to the claims and injuries alleged and the defense attempts to get in front of the jury all prejudicial information it can about the Plaintiff through the expert, whether the information is admissible or not, claiming that the expert may rely on information that is not admissible. Through one expert, the defense attempts to paint the Plaintiff has unbelievable and at the same time prejudice the jury against the Plaintiff. Both, strategies are in violation of the Civil Rules of Procedure and should not be allowed. First, an expert should not be allowed to testify regarding the credibility of the Plaintiff, as that solely is the province of the fact-finder. See, ***In re Commitment of Beasley,*** Not Reported in S.W.3d, 2009 WL 3763771 (Tex. App.-Beaumont 2009). Second, discovery solely for impeachment is proscribed ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970).

Paso, no pet.) (Court may limit scope of depositions).

This author has often argued (with mixed results) that the examining physician does not need to conduct an interview (history and physical) separate from the written discovery and oral deposition that the Defendant already has obtained from the Plaintiff.[10] The argument is that the Defendant has obtained testimony under oath from the Plaintiff and that the Defendant could have consulted the examiner regarding any particular questions that the examiner wanted answered and obtained the answers under oath during the discovery process. Further, I have challenged the defense to state to the Court what questions the Defendant failed to ask during the discovery process that the examiner needs for an effective or complete examination and report. If there are any such questions, the next step is asking why such questions could not be propounded to the examinee as written interrogatories.

It is important to remember that all discovery is subject to balancing of interests, benefits and harms by the Court under Tex. R. Civ. P. 192.4(a) and (b):

> **Limitations on Scope of Discovery.** The discovery methods permitted by these rules should be limited by the Court if it determines, on motion or on its own initiative and on reasonable notice, that:
>
> **(a)** the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

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[10] In this regard, it is advisable for the examinee to present him/herself for deposition as early in the deposition scheduling process as is feasible. This argument also was made in ***Shadix-Marasco v. Austin Regional Clinic, P.A.*** 2011 WL 2011483 (W.D. Tex. 2011). However, it should be noted that the argument was rejected by the Court, which offered the following analysis: *See* ***Jackson v. Entergy Operations, Inc.,*** 1998 WL 28272, at *2 (E.D. La. Jan. 26 1998) (holding that Plaintiff's compliance with discovery in producing her medical records, expert reports and depositions of her treating physicians was not sufficient to supplant the Defendant's need to have its own experts examine Plaintiff and analyze her condition); ***Ferrell v. Shell Oil Co***., 1995 WL 688795, at *1 (E.D. La. Nov. 20, 1995) (the Plaintiff may not avoid a Rule 35 examination simply on the grounds that other sources of information, including expert reports and depositions, are available to the Defendants). As one district court reasoned:

> [O]ne purpose in granting a request for a psychiatric examination pursuant to Rule 35 is to "preserve [ ] the equal footing of the parties to evaluate the plaintiff's mental state...." Thus, while Plaintiff has produced voluminous medical records and reports, which he claims are sufficient to evaluate his mental state at all relevant times, this production does not necessarily negate the Defendant's interest in an independent examination of the Plaintiff.

Duncan v. Upjohn Co., 155 F.R.D. 23, 25 (D. Conn. 1994); (internal citations omitted).

> **(b)** the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties= resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Even when the good cause and in controversy requirements of Rule 35 have been met, "it is still within the sound discretion of the Trial Court as to whether to order an examination." ***Kador v. City of New Roads***, 2010 WL 2133889, at *2 (M.D. La. May 27, 2010). A Trial Court, therefore, retains the discretion to limit both the interview and the examination under Tex. R. Civ. P. 204.1(d). *See,* ***In re Offshore Marine Contractors****,* 496 S.W.3d 796 (Tex. App. – Houston [1st Dist.] 2016); and ***In re Trimac Transp, Inc.***, No. 09-080270-CV, 2008 WL 2758793, at *1 (Tex. App. – Beaumont July 17, 2008, orig. proceeding (Trial Court retains discretion to impose reasonable limits on place and scope of testing). However, a Trial Court may not prevent the development of medical testimony that would allow the Defendant to fully investigate the conditions that the Plaintiff has placed in issue. *See* ***Ginsberg v. Fifth Court of Appeals,*** 686 S.W.2d 105, 107-08 (Tex. 1985) (psychotherapist-patient privilege) cited in ***In re Trimac Transp. Inc****., supra.*

Also, if the Plaintiff is concerned about the safety of the exam, the Motion for Protection could restrict the Defendant to certain tests that did not subject the examinee to potential risk of physical, psychological, or emotional injury.[11] *See* ***Masinga v. Whittington****,* 792 S.W.2d 940 (Tex.,1990) and ***In re Toyota Corporation***, 191 S.W.3d 498 (Tex. App. – Waco 2006, orig. proceeding) (Court disallowed depositions of children on basis of psychologist testimony that it would be harmful).

2) THIRD PARTY ATTENDANCE AT EXAMINATIONS AND RECORDING INTERVIEW-EXAMINATION

A major issue regarding adverse examinations is the desire of the examinee to have a third party in attendance or to have the examination (interview, examination, or both) recorded. While there are certainly circumstances

[11] An interesting question in this regard is what would be the remedy if the examiner caused the Plaintiff injury during the examination or worsened the injuries for which the Plaintiff was making a claim? Since there is no physician/patient relationship, the claim would not be a "healthcare" liability claim. See Ch. 74 Tex. Civ. Prac. & Rem. Code. The examinee owes only a duty not to cause harm (see ***Ramirez v. Carreras***, 10 S.W.3d 757 (Tex. App.-Corpus Christi,2000)) and if the examinee did cause harm, arguably the examiner could be sued or joined in the pending lawsuit. Additionally, the Plaintiff might be able to allege that her injuries sustained in the occurrence giving rise to the lawsuit subsequently were aggravated by a examiner retained by the Defendant. In response, the Defendant would likely try to raise judicial immunity. See generally, ***Davis v. Medical Evaluation Specialists, Inc.,*** 31 S.W.3d 788 (Tex. App.-Houston [1 Dist.],2000).

when such accommodations are appropriate and have been ordered, the majority view appears to be that the adverse examination rule does not address the issue and that if a party wishes to have a third party present or to record the examination, the examinee must timely file a Motion for Protective Order. Such an Order requires that the movant demonstrate, with evidence, why such accommodations should be granted. Many examinees fail to appreciate that the burden of proving the necessity of such accommodation falls on the examinee/movant and even more are unfamiliar with the evidentiary requirements for obtaining a Protective Order. Hopefully, the following discussion will help inform future decision-making and tactics.

As will be discussed below, most Courts disfavor having a third party in attendance at the examination, observing that such an examination should be conducted under circumstances like those for a treating physician. ***Calderon v. Reederei Claus- Peter Offen GmbH & Co***. 258 F.R.D. 523, 526 (S.D. Fla. 2009) (collecting cases). Few examinees have their attorneys or an attorney's assistant attend their regular physician appointments. However, many times, an examinee will have a family member (particularly a spouse or a parent) attend such appointments. There are cases that have held that a family member's attendance at a Court ordered adverse examination is reasonable*. See,* ***Robin v. Associated Indem. Co***., 297 So.2d 4227 (La. 1973) and ***Simon v. Castille***, 174 So. 2d 660 (La. App. 3 Cir. 1965). Additionally, the Rule specifically carves out an exception to the Rule that an attorney must always be present for an interview of the attorney's client. *See,* ***Rodriguez v. Pictsweet Co***. 2008 WL 2019460 at *3 (S.D. Tex. – Brownsville 2008).

As a fallback position, examinees often request that the examination be videotaped. Courts often find that videotaping has the same disruptive qualities as third-party attendance. However, there are "special circumstances that Courts have deemed sufficient for requiring a video or audio recording. *See* ***Schaffer v. Sequoyah Trading & Transp.***, 273 F.R.D. 662, 664 (D. Kan. 2011) (among other reasons, because "plaintiff ha [d] a lengthy history of serious mental issues," the Court had serious doubts "as to whether Plaintiff [would] be capable of providing any assistance to his attorney in understanding what took place during the examination." (cited in ***Ornelas v. Southern Tire Mart***, 292 F.R.D. 388 at 397 (S.D.Tex. 2013).

Great deliberation needs to go into the decision to videotape an examination as the law of unintended consequences looms large over the tactic. There are many instances in which a videotaped examination has come back to haunt the examinee. What is the strategy behind videotaping the examination. Why do you want to record the examination? Is it your desire to accurately preserve what was said and done by everyone involved? This can be a valid strategy, particularly if the examiner has a reputation for playing fast and loose with the examination or her reporting of Plaintiff's demeanor and effort. While this makes sense in the context of a psychological examination, there is less to commend the tactic in a medical examination, such as an orthopedic examination. Indeed, like a poorly planned animation at trial, videotaping an orthopedic examination may be counterproductive at best and provide the defense a demonstrative aid at trial, at worst. Rather than videotaping the adverse medical

examination, consider videotaping the same examination performed by the Plaintiff's physician. I even have experimented with having the Plaintiff at his treating physician's deposition and letting the physician use the Plaintiff as a prop to explain the testing and how and why. *See* Gold, *"Youtubephoria"* (www.cuttingedgejustice.com). Bottom line, as with many things in litigation, just because you can, does not mean you should. Have a plan.

Audiotaping is probably the least intrusive approach and provides the most bang for the buck. ***Kuslick v. Roscezewski***, 2012 WL 899355, at *5 (E.D. Mich. 2012) ("the presence of an unobtrusive tape recording during [a] medical exam should not inhibit the expert's ability to question" the Plaintiff). Audiotaping preserves the discussion between examiner and examinee so that if there is any question about what was asked and what the answer was, the audiotape may be consulted. ***Gade v. State Farm Automobile Insurance,*** 2015 WL 12964613 (D. Vt. 2015). The audiotape also will provide a good record of whether the examiner manipulated the testing any discernable way and whether the examinee provided good effort. However, as with third party attendance and videotaping, the examinee must be able to provide the Court with an evidentiary basis for why audiotaping is necessary. [12]

If the examinee has any concerns about the integrity of the examination, the examinee should timely bring these concerns to the Court's attention by way of a Motion for Protection. Timely means before the date of the examination. Raising issues at or after the examination are often going to be found untimely and will be overruled if not considered waived.

As discussed above, the Court has discretion to limit or modify the questions that are asked the examinee and the tests that are administered to the examinee. The first line of argument to the Court should be that the Court limit the scope of the interview and examination.[13] The second level of argument should be for the Court to allow videotaping. The third level of argument should be for the Court to authorize audiotaping.

An important consideration for advocating that the examination be recorded is the examinee's competency to understand and follow instructions and to communicate effectively. Recording the examination will help assure that the examinee's claims are

[12] Another option, offered by Wright, Miller and Marcus is to file a motion to exclude from presentation to the jury (i.e. no reference to or reliance upon) any statements made by the examinee to the doctor relating to non-medical or matters irrelevant to the claims and defenses alleged in the case. See, Wright Miller & Marcus***, Federal Practice and Procedure*** §2236 at 502. (West 1994).

[13] For instance, Wright Miller and Marcus state that the examiner should not be allowed to ask question that might obtain admissions bearing on the issue of liability. See, Wright Miller & Marcus, ***Federal Practice and Procedure*** §2236 at 500 et seq (West 1994).

not undermined because of incompetency or because the examinee is not able to communicate effectively. Similarly, an examinee should be able to explain to her counsel what took place during the examination so that the examinee's attorney may properly prepare to challenge the findings during deposition or trial. Accordingly, if the examinee is unable because of impairment to effectively aid in the litigation, then recording the examination may be appropriate. Bases for a Protective Order include competency of the examinee to fully understand and respond appropriately to the examiner, the accuracy of the interview, the protection of irrelevant, private healthcare information, or protection from the interviewer conducting a *de facto* deposition regarding the underpinnings of the examinee's claims.

The opinions on requests for protection from an adverse examination vary from jurisdiction to jurisdiction and from case to case. See generally, Wright Miller & Marcus***, Federal Practice and Procedure*** §2236 at 496 et seq (West 1994). California provides by statute that the examinee's attorney may attend and record the examination. Cal. Code Civ. Proc. §2032(g)(1). Illinois and Michigan have similar statutes. Other Courts have found that allowing an examinee's attorney present during the examination risks making the examination partisan. ***Warrick v. Brode***, 46 F.R.D. 427, 428 (D.C. Del. 1969). Federal Courts, as stated earlier in the paper, reportedly take the view that the examination should not be adversarial in nature and generally refuse requests for attorneys to attend. Wright Miller & Marcus, ***Federal Practice and Procedure*** §2236 at 500 et seq. (West 1994).

The leading case in Texas (mainly because it is just about the only reported case to address the issue) holds that a Plaintiff does not have an automatic right to have an attorney in attendance. ***Simmons v. Thompson,*** 900 S.W.2d 403, 404 (Tex. App.-Texarkana 1995, orig. proceeding) (Grant, J., dissenting).

> We conclude that, in the absence of any rule or statute, the right to have one's attorney present at a physical examination ordered pursuant to Rule 167a is a matter to be determined within the discretion of the Trial Court on a case-by-case basis according to evidence showing a particularized need therefore.

Without citing ***Masinga v. Whittington,***792 S.W.2d 940 (Tex.,1990), the Court seems to be saying that in order to obtain an Order allowing an attorney to attend the examination or presumably to record the examination (audio or video), the party seeking the attendance, or the recordation is seeking protection from discovery and, therefore, must show a particularized harm.

Justice Grant dissented, citing the due process concern of a party having to participate in the litigation process with assistance or advice of counsel:

> A party has a right to have an attorney present at any critical stage of the litigation process. The right to counsel in civil cases arises from the Due Process Clause. An attorney's presence at a physical examination may be

just as important as his presence at an oral deposition. ***Jakubowski v. Lengen,*** 86 A.D.2d 398, 450 N.Y.S.2d 612 (1982).

A practical problem with the attorney or an agent attending the examination is that the attorney then potentially becomes a fact witness, creating a potential ethical conflict. See Rule 3.08 Tex. Rules of Professional Conduct. The concern often cited by Courts rejecting the request to have a treating physician or designated expert attend the examination is the "goose/gander" rationale that it is unfair to require the defense examiner to conduct an examination under conditions that did not exist or were not imposed on the Plaintiff's treating physicians or experts. Additionally, just because the defense is requesting an examination, does not mean that the examiner will be designated as an expert witness or that if the examiner is designated as an expert, the Defendant may not subsequently de-designate the examiner as a testifying expert. This would then make the examiner a consultant. It arguably would be valid (without commenting on whether it is a winnable argument) under this situation for the Defendant to argue that the examination is in the nature of "testing" that the Defendant should be able to undertake without having to reveal the testing to the Plaintiff*. See* ***General Motors Corp. v. Gayle***, 951 S.W.2d 469, 474 (Tex.1997).

While there has not been a Texas case holding that it is improper to record an examination by digital medium, presumably ***Simmons*** also would be cited with regard to such a request. In this regard, the examinee should express concerns about not having a complete record under the Rule of Evidence 106 (Optional Completeness) if the interview is not completely recorded. It would be good to show examples of the examiner's notes or reports from other similar cases to point out the weaknesses and deficiencies in the examiner's note-taking (i.e. quoting only the examinee and not recording the context of the answer or the question).[14]

If all requests to attend or record the examination consider an Order, not only limiting the scope of inquiry, but also requiring the examiner to preserve all notes to assure compliance. ***Robin v. Associated Indem. Co.,*** 297 So.2d 427 (La., 1973)

A Federal Case that provides an excellent overview and analysis of this issue is ***Ornelas v. Southern Tire Mart***, 292 F.R.D. 388 (S.D.Tex. 2013).

3) WHO MAY CONDUCT THE EXAMINATION

The examination in Texas may only be conduct by a certified physician or certified psychologist. Texas still does not allow examinations by vocational

[14] Toward this end, this author has been very successful using a technique in which an audiographer sits outside the examination room and records while listening to headphones that are connected to lavalier microphones attached to the examiner and examinee. This is minimally intrusive. The tape is transcribed. Neither the tape nor the transcript are provided or disclosed to either side. Both items are placed in a sealed envelope and delivered to the court for in camera inspection that is conducted only if requested by one of the parties.

counselors, unless of course, the vocational counselor is a certified psychologist. The Federal Rules are the same, except that the Federal Rule has been amended to allow examinations by vocational counselors. The Order should specify who is authorized to conduct the examination. Oftentimes, with neuropsychological examinations, the neuropsychologist conducts the examination and renders conclusions from the testing data; however, a psychologist is typically enlisted to conduct the testing. At least one Court has found this acceptable. ***Rodriguez v. Pictsweet Co***. 2008 WL 2019460 at *3 (S.D. Tex. – Brownsville 2008). However, the question can be raised about the status of the testing psychologist. Is she a consulting expert whose mental impressions and data have been reviewed by a testifying expert? Is she a fact witness or a percipient expert witness? While I have not seen any cases specifically addressing this issue, (which does not mean there may not be some), I believe the tester could, and in some instances, should be deposed regarding how the testing was administered and the Plaintiff's demeanor and responses during the testing.

4) NUMBER OF EXAMINATIONS

Fed. R. Civ. P. 35(a)(2)(A) does not limit the number of independent medical examinations that may be ordered so long as "good cause" is shown for each exam. ***Peters v. Nelson,*** 153 F.R.D., 635, 637 -38 (N.D. Iowa 1994). In ***Sadler v. Acker***, the Court was satisfied Defendants had demonstrated good cause for an updated neuropsychological examination when two years had passed since the discovery deadline, and Plaintiff's neuropsychologist had had the opportunity to conduct additional testing. ***Sadler v. Acker***, 263 F.R.D. 333 (M.D. La. 2009).

Ornelas**,** citing to **Sadler and Peters,** provides the following insight on how many examinations may be requested:

> So long as the "in controversy" and "good cause" requirements are met for each requested exam, Rule 35 does not otherwise limit the number of examinations a party may be required to undergo, nor would such a limitation be judicious. ***Sadler v. Acker***, 263 F.R.D. 333, 336 (M.D. La. 2009); ***Peters v. Nelson***, 153 F.R.D. 635, 637 (N.D. Iowa 1994). Each request for an independent examination "must turn on its own facts," and depends solely on the circumstances underlying the request. *Peters,* 153 F.R. D. at 637; ***Moore v. Calavar Corp*** 142 F.R. D. 134, 135 (W.D. La. 1992). The number of examinations ordered should merely "be held to the minimum necessary considering the party's right to privacy and the need for the Court to have accurate information." ***Sadler,*** 263 F.R.D. at 336 (citations and internal quotation marks omitted).

Ornelas v. Southern Tire Mart, 292 F.R.D. at 392.

While the wording of the Rule does not limit the number of examinations, it is unlikely the Court will be receptive to requests for multiple examinations and will no doubt be very conservative in allowing only what is shown to be necessary. There is a

difference between requesting multiple examinations in the same field of medicine or by the same examiner and allowing examinations for different alleged injuries. A Defendant should not be allowed to obtain multiple examinations by the same examiner or in the same specialty (until he finds an examiner that he likes) absent a clear demonstration of good cause. ***Granger v. Montgomery Ward & Co., Inc.,*** 408 So.2d 320 (La. App. 3 Cir., 1981). A party should, however, be able to request the Court to allow multiple examinations by physicians or psychologists if the Plaintiff has put into issue medical conditions involving different specialties. ***Viator v. Sonnier,*** 355 So.2d 1091 (La. App. 3 Cir., 1978). Although the Rule speaks only in terms of potentially allowing "a physical or mental examination," Courts will probably be guided by fairness in this regard. For instance, if the Plaintiff has allegedly sustained an injury to the heart and to the kidneys, the defense may be able to make a valid argument that it needs an examination of the Plaintiff both by a cardiologist and a nephrologist. In ***Exxon Corp. v. Starr***, 790 S.W.2d 883 (Tex. App.--Tyler 1990, orig. proceeding), where the Plaintiffs obtained psychiatric experts to testify in addition to previously identified medical physicians, the Defendants were held to be entitled to have the Plaintiff submit to an independent medical exam by a psychiatrist, notwithstanding that the Plaintiff already submitted to an independent exam by medical doctors. This case, however, does not address the issue of whether a Defendant is entitled to have a Plaintiff seen by multiple physicians of the same specialty so that it can select the strongest witness. Indeed, this practice would not be in keeping with the spirit of the Rule which is to provide an objective evaluation of the Plaintiff's complaints rather than to supply the Defendant with the most effective advocate.

A Court should, however, reject an argument to have the Plaintiff examined by multiple doctors of the same or similar specialty or to assess the same condition. Similarly, if there are multiple Defendants and there is no adversity with regard to Plaintiff's allegations of damages, the Court should count the Defendants as a "side" and apply the same criteria above, as it would with regard to juror strikes or for depositions.[15] Also, the Plaintiff always should be able to assert protection under Tex. R. Civ. P. 191.2 by arguing that the multiple examinations are unnecessarily duplicative, burdensome, and harassing or that the benefit of the examination is outweighed by its intrusiveness and burden, particularly when the information may be obtained from other less intrusive sources (i.e. the examinee's medical and hospital records):

> **Limitations on Scope of Discovery.** The discovery methods permitted by these rules should be limited by the Court if it determines, on motion or on its own initiative and on reasonable notice, that:
>
> **(a)** the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
>
> **(b)** the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake

[15] See Tex. R. Civ. P. 190.3(b)(2) and comment 6 to Tex. R. Civ. P. 190.

in the litigation, and the importance of the proposed discovery in resolving the issues.

5) TIME PLACE AND EXPENSE

The same considerations that decide where a deposition should take place should generally guide the determination about where the examination takes place and whether the Plaintiff should be reimbursed for expenses. ***Madison v. Travelers Ins. Co.,*** 308 So.2d 784 (La., 1975). If the deposition is taken in the forum where the Plaintiff chose to file the lawsuit, then the Defendant should be allowed to request that the examination take place in the same forum, even if the forum is not or is no longer a convenient place for the Plaintiff. Basically, the Rule is that if the Plaintiff chooses the forum, then the Plaintiff should have to provide discovery in the forum.

> The general rule is that a Plaintiff who brings suit in a particular forum may not avoid appearing for an examination in that forum. ***McDonald v. Southworth***, 2008 WL 2705557, at *6 (S.D. Ind. 2008) (quoting another source); *see also,* ***Page v. Hertz Corp*****.** No. Civ. 09-5098, 2011 WL 5553489, at *6 (D.S.D. Nov. 15, 2011) (citing ***McCloskey v. United Parcel Serv. Gen Serv. Co***., 171 F.R.D. 268, 270 (D.Or. 1997). In the case of physical or mental examinations, this rule ensures that the examining specialist is available as an expert witness at trial. ***McDonald,*** 2008 WL 2705557, at *6. However, if the Defendant wishes to have the Plaintiff travel outside the forum for an examination, then the Defendant should have to show good cause and should have to reimburse the Plaintiff for reasonable expenses for travel. Otherwise, if the examination is in the forum where the suit is pending or in the country of the Plaintiff's residence, then the Defendant probably should not be required to reimburse travel expense. If the Plaintiff believes the time or place of the examination is inconvenient, then the Plaintiff should seek a protective Order in a timely manner.

Ornelas v. Southern Tire Mart, 292 F.R.D. at 400. However, if the Defendant wishes to have the Plaintiff travel outside the forum for an examination, then the Defendant should have to show good cause and should have to reimburse the Plaintiff for reasonable expenses for travel. Otherwise, if the examination is in the forum where the suit is pending or in the country of the Plaintiff's residence, then the Defendant probably should not be required to reimburse travel expense. If the Plaintiff believes the time or place of the examination is inconvenient, then the Plaintiff should seek a protective order in a timely manner.

6) PROTECTION FOR PROTRACTED, UNDULY INTRUSIVE OR PAINFUL EXAMINATIONS

A frequent area of dispute, particularly in instances in which neuropsychological testing is involved, is the length of the testing and the duration of the entire examination. Oftentimes, testing can take all day, up to eight (8) hours. Plaintiffs will argue that because of the length of the testing, the Plaintiff will become fatigued and the examiner will use this against the examinee, claiming the examinee did not give full effort. Defendants will counter by offering to extend the testing over two (2) days, which the examinee will argue is unreasonably burdensome on examinee's time. The bottom line is that the Rule places no limit on the length of the examination, leaving it to the Court's discretion. The Court will be guided by what is reasonable balanced against evidence of undue hardship and potential harm. A fairly recent California Federal Court examined case law on the issue before finding that the length of testing requested by Defendants (eight (8) hours over two (2) days) was not unreasonable and did not recreate a demonstrable harm:

> A number of Courts have entertained requests to limit the duration of psychological examinations. Few Courts have found limits of only three (3) hours reasonable, however, *See, e.g.,* ***Nguyen v. Qualcomm Inc****.,* No. 09-1925-MMA (WVG), 2013 WL 3353840 at * 9 (rejecting Plaintiff's request of two (2) hour limitation and approving Defendant's proposed duration of four (4) to five (5) hours); ***Simonelli v. Univ. of California-Berkeley***, No. C- 02-1107 JL, 2007 WL 1655821 at *3 (N.D. Cal. June 4, 2007) (rejecting Plaintiff's request of three hour limitation because "the interests of both parties in the examiner's arriving at an accurate diagnosis militates against setting an artificially short time limit" and setting an eight (8) hour limit for a psychiatric examination); ***Greenhorn v. Marriot Int'l, Inc.,*** 216 F.R.D. 639, 653 (D. Kan. 2003) (rejecting Plaintiff's request for two (2) hour limitation and approving Defendant's anticipated three (3) to five (5) hour time frame). Courts that have set limitations have also done so only where some specific circumstance demanded it. ***Nicholas v. Wyndam Int'l, Inc***., 218 F.R.D. 122, 123 (D. Vi. 2003) (approving five-hour limit where Plaintiff-examinee was a minor child and allegations involved inappropriate sexual conduct by Defendant).

Halliday v. Spjute, 2015 WL 3988903 at *2 (E.D. Ca. 2015)

Protection against a putatively painful examination was sought in ***Gade v. State Farm Mutual***, 2015 WL 12964613 at *5 (D. Vt. 2015). The Court observed that although some states require Court approval for "any diagnostic test or procedure that is painful, protracted, or intrusive" there is scant Federal case law on point. *See* ***Carpenter v. Superior Court****,* 45 Cal. Rprtr. 3d 821, 826 (Cal. Ct. App. 2006) (quoting Cal. Civ. P. Code § 2032.220) *cf.* ***Newman v. San Joaquin Delta Cmty. Coll. Dist****.* 272 F.R.D. 505, 515 (E.D. Cal. 2011) (discussing ***Carpenter*** and noting that Federal Courts do not follow the state requirements). This issue, however, likely will be considered the same

as any other Motion for Protection, with the Court weighing evidence of a demonstrable harm versus the need for the examination. *See* ***Williamson v. Haynes Best Western of Alexandria,*** 595 So.2d 1201 (La. App. 4 Cir., 1992).

E. THE ORDER

The Order is perhaps the most aspect of the adverse examination rule, yet many practitioners pay it sufficient homage. Both the Federal and Texas Rule state what an Order must ("shall") contain. Under Tex. R. Civ. Proc. 204.1(d), the Order must "be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Any agreement should probably conform to the same criteria.

Agreements are to be encouraged, but even if there is an agreement regarding the scope, terms, and conditions of the adverse examination, it should be reduced to an agreed Order that is signed by all parties and the Court, so that it is enforceable as any other Discovery Order. Enforcement, however, is not the only consideration. Clarifying the examination's parameters is paramount. A party is not only providing discovery, the party's privacy is being invaded to achieve the goal of leveling the playing field. While this sacrifice can be justified in a legal context, still the examination should be tailored to the specific claims and defenses in the case and should be no more intrusive than necessary to achieve litigation parity.

If an agreement cannot be reached regarding the terms, conditions, and scope of the examination, the party desiring the adverse examination should timely file a Motion for an Order. I believe it is prudent to finesse a Motion for Adverse Examination, so that the requesting party clearly establishes the justification for the examination and the responding party has the opportunity to object to whether the foundation has been met and whether the choice of examiners is in the interest of fair administration of justice. While in most instances, a requesting party is probably going to be able to demonstrate that a medical or psychological condition is in controversy and there is good cause for the examination, (*See* ***Lahr v. Fulbright & Jaworski, L.L.P.,*** 164 F.R.D.204, 207 n.1 (N.D. Tex. 1996) (observing that Rule 35(a) should be interpreted liberally to further discovery)) it often is good to have a record and Motion process provides the judge a full context for issuing an appropriate Order.

Contemporaneous with the Motion for the adverse examination, the potential examinee should, (in addition to raising objections to whether the foundational requirements have been met and the examiner is acceptable) consider filing whatever Motions for Protection, he/she deems appropriate. This includes requests for third-party attendance, requests to record and requests to limit the examination or provide for the protection of the examinee. As with all Motions for Protection, the Motion must be fact based, supported by evidence, and above all, put forth a demonstrable harm for which protection is needed. In this regard, it usually is most persuasive to offer the affidavit testimony of a treating physician or psychologist regarding how an examination might cause harm or additional harm to the examinee and why the examination should be

disallowed or limited. ***In re Toyota Corporation***, 191 S.W.3d 498 (Tex. App. – Waco 2006, orig. proceeding) (Court disallowed depositions of children on basis of psychologist testimony that it would be harmful).

If there is a Motion for an adverse examination and the requirements for one is met, the Court must not only issue an Order for an examination, the Order must conform to the requirements of the Rule, by specifying the scope, terms, and conditions of the examination. It is an abuse of discretion for the Court to issue a general Order without addressing these specific parameters.

> Although the Trial Court did not abuse its discretion in granting the Motion for eye examination, the Order signed by the Court is fatally deficient, because it fails to meet the specificity requirements of Rule 167a. [The predecessor Rule to Rule 204] The Order merely recites that "Defendant, Joe Harold Williams, [shall] submit to an independent eye examination by an ophthalmologist." Since the Order does not specify the "time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made," as required by Rule 167a, the Court abused its discretion in issuing it. ***Amis v. Ashworth***, 802 S.W.2d 374, 379 (Tex. App. – Tyler,1990, orig. proceeding) [leave denied].

Williamson v. Sanderson, 904 S.W.2d 212, 216 (Tex. App. – Beaumont 1995).

A Court abuses its discretion if it denies discovery going to the heart of a claim or defense pled in the case. This axiom applies to all discovery tools, including adverse medical examinations. If a party meets the necessary criteria for obtaining an examination, the Court must order one in the interest of achieving fairness at trial. However, the Trial Court retains discretion to fashion the parameters of the examination and testing. This was made clear in ***In re Offshore Marine Contractors***. The Appellate Court noted that just because a party may be entitled to an examination, does not mean that the party may conduct whatever examination and testing it desires.

> While the Trial Court abused its discretion in not permitting any interview or testing by Yohman, it does not necessarily follow that OMC is allowed the full panoply of tests it seeks. **The Trial Court retains discretion to place reasonable limits on Yohman's interview and tests.** *See* TEX. R. CIV. P. 204.1(d) (Order compelling examination must specify time, place, manner, conditions, and scope of examination); ***In re Trimac Transp. Inc***., No. 09-08-270-CV, 2008 WL 2758793, at *1 (Tex. App. – Beaumont July 17, 2008, orig. proceeding) (Trial Court retains discretion to impose reasonable limits on place and scope of testing). The length of Yohman's interview and the quantity and duration of neuropsychological tests to be administrated are matters for the Trial Court's discretion, which must be exercised by considering the fair-trial standard. (emph. added)

In re Offshore Marine Contractors, 496 S.W.3d 796, 803 (Tex. App. – Houston [1st Dist. 2016). As with any other discovery tool, presumably the Order cannot exceed the relief that has been requested. *See*, ***In re Lowe's Companies***, 134 S.W.3d 876 at fn 7 (Tex. App. Houston [14th Dist.] 2004].

It is advisable that the Order not only address the scope, terms, and conditions of the examination, but also spell out the report requirements, when a report must be produced and preferably when the examiner must be presented for deposition, if this is desired. As will be discussed below, disputes can arise regarding timing and scope of the report, if not adequately addressed in the Court's Order.

Ideally, the timing, scope, terms, conditions, and report requirement should be addressed early in the case, and under Federal Practice, should be addressed in the 26f and made part of the Pre-Trial Order. Some practitioners might adhere to the philosophy of not raising an issue in the mistaken belief that if it is not raised, maybe the other side will forget about it. This approach is misguided. Almost certainly an adverse examination will be considered, whether or not opposing counsel chooses to pursue it. The benefits of addressing the procedure early far outweigh any strategic risks.

F. THE REPORT

Tex. R. Civ. P. 204.2 provides that ***upon request*** (no Motion or Order is required) of the person ordered to be examined, the party causing the examination to be made ***must*** deliver to the person a copy of a ***detailed report*** of the examining physician or psychologist setting out the following:

a. the findings, including results of all tests made;
b. diagnoses and conclusions,
c. together with like reports of all earlier examinations of the same condition.[16]

If a physician or psychologist fails or refuses to make a report, the Court may exclude the testimony if offered at the trial.

Tex. R. Civ. P. 204.2(b) states that unless an agreement expressly provides otherwise, the right to a report spelled out in Rule 204.2(a) applies whether there is an agreement for an examination or an Order. Also, providing a report does not preclude the discovery of a report of an examining physician or psychologist or the taking of a

[16] This phrase has always struck me as odd. What exactly is meant by "reports of all earlier examinations of the same condition"? It does not make sense that the examiner would have to produce reports that presumably already are in the examinee's possession. It does not state that the examiner must produce all reports of the same condition that he/she had reviewed or relied upon. There is a virtual dearth of discussion or history regarding this phrase. One interpretation that would make sense, however, is that the phrase is referring to other reports the examiner had written regarding other examinees complaining about the same condition. These reports would likely reveal a bias. Also, they would not be protected because there would not have been a patient/physician relationship between the examiner and examinee.

deposition of the physician or psychologist in accordance with the provisions of any other rule.

While an Order is not required to activate the examiner's responsibility to produce a report, it is probably wise to obtain an Order. There is always the concern that a party might obtain the examination, find that it does not help that party (and may even help the examinee) and decide to try to designate the examiner as a consulting only expert. (See further discussion about this tactic below). This could then result in a dispute about whether 1) the examiner could be designated as a consulting only expert; 2) whether the examiner could be deposed as a fact witness, even if the examiner's opinions were beyond the scope of discovery because the examiner had been designated as a consulting expert. *See,* ***Axelson v. McIhaney***, 798 S.W.2d 550 (Tex. 1990). And there is the issue of whether an expert's opinions may be protected from discovery, once a report has been published, setting out those opinions. *See* ***Matosky v. Manning, M.D***, 2009 WL 10680997 (W.D. Tex.- S.A. Div. 2009).

The most efficient manner of obtaining a report is to include a production date in the Order compelling the examination. It merely becomes part of the terms and conditions of the Court ordered examination. The Order should set out what should be included in the report. In this regard, the Order should track the Rule and also should set out that the examiner should have to deliver his notes (written or electronically recorded), raw data (such as raw test data obtained from psychological testing) and all scales required to interpret the test data with the report. The Order also should set out a specific time period (usually within ten (10) days of the ruling) when the report should have to be delivered. If an Order or agreement is not obtained in this connection, there will be no time period during which the report has to be delivered as the Rule does not state a time period. Absent a date certain, reasonableness could be interpreted any number of ways within the discretion of the Court. See, ***Rodriguez v. Pictsweet Co***. 2008 WL 2019460 at *3 (S.D. Tex. – Brownsville 2008).

If the examinee requests a report, the examinee, after receipt of the report, and upon request by the examining party, must produce a like report of any examination made before or after the ordered examination of the same condition unless the person examined is not a party and the party shows that the party is unable to obtain it. What does this mean?

For instance, if before or after the compelled psychological exam, the examinee was tested by her own psychologists, then the examined party would have to obtain and deliver reports (just like the one that the examiner produced) from those psychologists to the party that obtained the examination.[17] This could be an important consideration in

[17] It would seem this requirement would trump the consulting expert privilege, although this author has found no case authority on this point. It does not seem that the provision applies only to designated testifying experts because if it did, it would be a redundancy since the party would have to produce such reports of its testifying experts in response to requests for disclosure, if the reports were already created. However, the disclosure rule does not require that the experts

the examinee's determination about whether to request a report from the examiner. If the examinee chose not to request a report, presumably there would be no basis for the examinee to have to produce the reports of her examining physicians or psychologists. The Plaintiff could merely notice the examiner's deposition and serve it with a subpoena *duces tecum*. There is no requirement that the examinee produce reports if she obtains the deposition of the examiner. The Rule specifically states that providing a report does not preclude the discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule. A fair interpretation of this provision also could be that if the Plaintiff sought a report under Tex. R. Civ. P. 195.5 that it would not activate the requirement that the examinee produce a like kind report.

The Rule also provides that the Court, upon Motion, may limit delivery of a report on such terms as are just. One of the important things to note about the report requirement is that the party causing the examination to be made must produce a report (subject to the above proviso) regardless of whether it subsequently designates the examining physician or psychologist as a consulting expert, as the report requirement is independent of the disclosure requirements under Rules 194 and 195. This concept is worth examining from a tactical perspective.

If the party causing the examination to be made produces a report and then designates the examining physician or psychologist as a consulting only expert, the question is begged whether the party may prevent use at trial of the examining physician's or psychologist's report or the findings contained within it.[18] First, the Plaintiff conceivably could designate the examining expert as a testifying expert, which raises the question whether that action would trump the action of the party who requested the examination in designating the expert as a consultant. In other words, would the Plaintiff's act of designating the examining physician or psychologist as a testifying expert make the report and findings admissible at trial? The answer to this question is unclear, but likely. See In ***Hooper v. Chittaluru, M.D. et al***,222 S.W.3d 103, (Tex. App. Houston. [14th Dist.] 2006, pet. denied).[19]

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to reduce opinions to reports or that the Plaintiff produce them. The Plaintiff has options in this regard.

[18] See, ***In re Doctors Hospital of Laredo,*** 2 S.W.3d 504 (Tex. App. --San Antonio 1999). Rule 192.3(e) prevents discovery of a consulting expert's opinion, provided the opinion has not been reviewed by a testifying expert. Tex. R. Civ. P. 192.3(e). A "testifying expert [may] be 'de-designated' as long as it is not part of 'a bargain between adversaries to suppress testimony' or for some other improper purpose." ***Castellanos v. Littlejohn***, 945 S.W.2d 236, 240 (Tex. App.--San Antonio 1997, orig. proceeding) (distinguishing ***Tom L. Scott, Inc. v. McIlhany***, 798 S.W.2d 556 (Tex.1990)). It is probably an abuse of discretion and may be reversible error to allow one side to offer the deposition testimony of a de-designated expert (i.e. a consulting expert) at trial. *See* ***Rendon v. Avance***, 67 S.W.3d 303 (Tex. App.-Fort Worth,2001).

[19] In this case, the Fourteenth Court of Appeals, disregarding Defendant's lament that "you cannot hijack her expert," found that where Plaintiff had timely cross designated Defendants' expert following Defendants' designation of the expert, the court knew of no precedent that disallowed Plaintiff from calling Defendants' expert in Plaintiff's case in chief at trial. Finding that

Of course, if no examination is sought either by agreement or under Rule 204, the party whose physical or mental condition is in controversy must not comment to the Court or jury concerning the party's willingness to submit to an examination or on the failure any other party to seek an examination. Tex. R. Civ. P. 204.3. But what happens if a party requests an examination either by agreement or Order and then comes to the conclusion that the findings of the examiner help the examinee and decides to designate the examiner as a consultant? Does this prevent the examinee from commenting at trial that he underwent an examination at the request of the Defendant? Probably not. While the Plaintiff might be prevented from identifying who the examiner was or what the examiner's findings are (see discussion above about what might be the result of the examinee designated the examiner as a testifying expert), the party who requested the examination would be in the embarrassing and unenviable position of having to answer the question in the jury's mind about why the examiner is not being called at trial. The Plaintiff conceivably could answer the question rhetorically in closing, "if the examiner had anything to say that would have helped the Defendant, you certainly would have heard from him or her."

Also, there is the problem about sharing the examination with the Defendant's other testifying experts. If the Defendant (usually, but not always, the party requesting the examination) designates the examiner as a consultant but the testifying experts review the examiner's report or findings, then the consultant becomes discoverable the same as a testifying expert. Tex. R. Civ. P. 192.3(e) and comment 1 to Tex. R. Civ. P. 195.[20] This would once again put the party requesting the examination in a box. Either such party would have to offer the prejudicial report at trial or be faced with having to explain why none of its testifying experts reviewed or relied upon the report. Even then, it is arguable that the examinee's testifying experts could review the report and either comment about it or state that it supports their opinions.

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obtaining testimony from the opposing side's expert could be particularly damning at trial, the court held that the disallowance of the testimony was an abuse of discretion requiring a remand of the case.

[20] ***In re TIG Insurance Company***, 172 S.W.3d 160 (Tex. App.—Beau, 2005) discusses the issue about discovery of and from consulting experts whose work product or opinions have been reviewed or relied upon by a testifying expert. It is unquestionable that discovery of purely consulting experts is proscribed under the Texas Rules of Civil Procedure. (See, ***comment 1*** to Rule 195). Similarly, the 1999 amendments to Rule 195.1 make clear that discovery of testifying experts only may be obtained through disclosure, reports or deposition. The open question since the 1999 amendments has been whether information about "consulting plus" experts is within the scope of permissible discovery. This decision suggests that it is. TIG holds that information regarding consulting expert discovery is not governed exclusively by Tex. R. Civ. P. 195.1. Moreover, ***comment 1*** to Rule 195, states as follows:

> This rule does not limit the permissible methods of discovery concerning consulting experts whose mental impressions or opinions have been reviewed by a testifying expert. See Rule 192.3(e). . .

Production of the report can be a problematic issue. Rule 35 does not set out a specific time period for producing the report. One Federal Court has rejected Plaintiffs' request for the report to be produced within three (3) days after the examination finding instead that Defendants need only produce the report a reasonable time after they receive it and the supporting data. ***Rodriguez v. Pictsweet Co***. 2008 WL 2019460 at *3 (S.D. Tex. – Brownsville 2008).

Earlier, we discussed the tension between Fed. R. Civ. P. 26 and 35 regarding the timing of a request for an adverse examination and the Court's deadline for designating testifying experts and producing reports. There is an additional tension involving the production of reports. May a Court compel a party to produce the report of its adverse examiner before the deadline to designate experts? At least one Court has answered the question, yes. ***Garayoa v. Miami-Dade County***, 2017 WL 2880094 at *7 (S.D. Fla. 2017).

As set out above, Tex. R. Civ. P. 204.2 provides that a Court, on Motion, may limit delivery of a report on such terms as are just. Predictably, the Defendant is going to request an extended time during which to allow its examining expert to prepare a report. The examinee should be prepared for this tactic and move that the report and the underlying data (especially including all written and electronic notes taken in conjunction with the interview, examination, testing and drafting of the report) be delivered to the examinee within ten (10) days. In this regard, it is useful for the examinee to conduct an investigation of other cases in which the expert has been involved and provide the Court with affidavit testimony that it is feasible for the expert to produce a report within ten (10) days because s/he has done so in the past.

Tex. R. Civ. P. 204.2(b) states that unless an agreement expressly provides otherwise, the right to a report spelled out in Rule 204.2(a) applies whether there is an agreement for an examination or an Order. I can think of no legitimate reason why an examinee would ever enter into an agreement that expressly relinquishing the right to request a report.

Failure or refusal of the physician or psychologist to provide a report (as ordered or agreed) may be a basis for the Court excluding the testimony if offered at the trial. See, Tex. R. Civ. P. 204.2(a). If the physician or psychologist fails to completely comply with the Order or agreement (fails to provide all the information required under Tex. R. Civ. P. 204.2(a)) the examinee should point out the deficiencies and if not corrected immediately, should file a Motion to Strike the testimony of the physician or psychologist as a failure to respond. This would be similar to a Motion to Strike under Tex. R. Civ. P. 193.6 or under Tex. R. Civ. P. 215.1(b).

G. SCOPE OF DISCOVERY

There are two different spheres of discovery involving the adverse examination. First, there is the discovery about the examinee. But second, there is also

discovery about the examiner. The former, is quite broad, within the scope of discovery that pertains to all discovery devices. The latter, however, is much narrower.

1. DISCOVERY ABOUT THE EXAMINEE

Once the party's medical/psychological condition is put in issue, privilege as to that condition is essentially waived. The opposing party is entitled to fully explore the claim and the examinee's history relevant to that condition. However, this exploration is not without limits. As with all discovery, the questions propounded by the examiner and the testing must be "tailored" to the claims and defenses pled in the case. *See**, In re Gerdau Ameristeel US, Inc***., 2017 WL 6062486 (Tex. App. – Beaumont 2017) petition for mandamus to require Trial Court to order Plaintiff to return to exam and answer questions about what he remembers about the accident giving rise to the case, denied) *cf*. ***Robin v. Associated Indem. Co.,*** 297 So.2d 427 (La., 1973). The examiner should be forced to disclose what examination she intends to administer (both the scope of the interview questions, if any, and the testing). While it is unlikely a Court would require the examiner to set out all the questions and all the testing that will be administered, there still should be a requirement that the examiner set out the general scope of the questioning (to demonstrate its relevancy) and the nature of the testing (to demonstrate both its validity and relevancy).

I mention "validity," of the testing because a party seeking an examination should have to withstand a challenged that the testing it seeks to do is scientifically accepted and reliable for obtaining the data that is being sought. It is similar to a Daubert challenge. This concept is demonstrated in ***In re Click,*** 442 S.W.3d 487, 491 (Tex. App. – Corpus Christi 2014, orig. proceeding) in which the Plaintiff sought a hair sample from the Defendant to demonstrate drug use at the time of the collision. The Court, in denying the request, found that such testing was unreliable for the stated goal.

Also, the Court also performs an important gatekeeper role in protecting the examinee from inquiry and testing of areas of her medical history that are irrelevant and remain confidential. The examinee waives her privilege of privacy and physician/patient privilege only as to those conditions that are in controversy. As with any other discovery request, an examinee should seek protection from the examiner going into areas that are irrelevant to the claims and defenses pled. The Court should, after due consideration, grant such protection. It would likely be an abuse of discretion for a Court to allow a wholesale examination without providing the examinee's irrelevant and privilege health care conditions protection.

The take-away point I wish to stress is that there are two levels of discovery involved in the request for the adverse examination. First, the requesting party must demonstrate that the medical/psychological condition of the party from whom the adverse examination is sought is in issue. Then, it must demonstrate good cause. Relevancy is critical, but relevancy alone is insufficient to warrant an adverse examination. Once it is determined that a prima facie case has been made for allowing an examination, the Court must then, in constructing an appropriate Order, clearly set

out the scope of discovery from the examination, (amongst other things such as who is going to conduct the examination, when, where and length). This stage is sometimes overlooked by all involved. Not only is it an abuse of discretion for the Court to allow an examination without defining the scope of the examination, failing to do so is likely to result in an inefficient and possibly contentious examination exercise.

2. DISCOVERY ABOUT THE EXAMINER

The credibility of the examiner is always in issue. First, the examinee likely will challenge the choice of the examiner because of a reputation for bias. She will attempt to do this with informal discovery that she has obtained from sources outside the litigation to demonstrate that examiner should not qualify as a viable expert. She will attempt to do this by showing, either the examiner no longer is engaged in a private, clinical practice, and only does forensic examinations, the examiner makes unspeakable amounts of money for performing adverse examinations, the examiner only works for one side in litigation, or one particular entity, or the examiner has a theory (the Plaintiff, the Plaintiff's claims, or both are not credible) that he always follows regardless of its application to the facts in the case. Unless, there are specific instances of the examiner demonstrating an invalid bias or otherwise abusing the legal system (i.e. lying under oath) Courts tend to grant deference to the party's choice of examiner.

Once an agreement is reached or an Order is obtained allowing an adverse examination, discovery about the examiner is constrained by Tex. R. Civ. P. 195.5. There are only certain tools that may be used to obtain discovery about the examiner. First, is the report, and second, is an oral deposition. The report that is required under the adverse examination rules (Tex. R. Civ. P. 204 and Fed. R. Civ. P. 35) are different from the reports that are required at time of disclosure or expert designation. They arguably are not as comprehensive. One Federal Court recently has pointed out this dichotomy.

> Importantly, reports generated pursuant to Rule 35 are not identical to the contents of an expert report as required by Rule 26(a)(2). As an example, a Rule 35 examiner's report "must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests." FED. R. CIV. P. 35(b)(2). By contrast, a Rule 26 expert report must contain the following items:
>
> > (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous ten (10) years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a

> statement of the compensation to be paid for the study and testimony in the case.
>
> FED. R. CIV. P. 26(a)(2)(B). Another significant distinction is that "Rule 26(a)(2) applies to witnesses who are specially retained to provide expert testimony in the case, while Rule 35 permits the Court to order a party to submit to a mental or physical examination whether or not the examiner was previously retained to provide expert testimony." ***Bush v. Pioneer Human Serv***., 2010 WL 324432, at *5 (W.D. Wash. Jan. 21, 2010).

Garayoa v. Miami-Dade County, 2017 WL 2880094 at *4 (S.D. Fla. 2017). In view of these circumstance, the oral deposition, with a request for production, becomes a very important discovery device for obtaining impeachment discovery.

By far, one of the most contested and reported issues regarding examining physicians and psychologist is scope of discovery. Most attorneys confronting an adverse examining expert hope to obtain a trove of information that will expose the expert as biased and un-credible. Here is where attorneys often confront a strange irony in Texas practice. While parties in Texas are generally allowed broader discovery than they are admissibility of evidence at trial, the opposite is true with regard to impeachment of experts. While parties are given considerable leeway to impeach a witness' credibility at trial (subject to the court's view and holding of the relevancy of such information), discovery purely for purposes of impeachment is generally held to be impermissible.[21] Accordingly, there is a limited opportunity to obtain discovery regarding expert bias provided the party seeking the discovery may first establish the relevancy of bias.

The seminal Texas case on this subject is ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970). While that case did not involve an adverse medical examiner, it is informative about the scope of discovery from a testifying expert witness, including presumably a defense medical/psychological examining expert. Dr. James Sharp was the Plaintiff's treating physician. The Defendant issued a notice for his deposition along with a subpoena *duces tecum* requiring him to produce certain medical, accounting and financial records. The subpoena reportedly was in regard to the doctor's possible bias and prejudice. Following a motion to quash hearing, here are some of the items the doctor was ordered to produce:

> (1) All appointment books maintained by relator during 1969;
>
> (2) All statements, listings, ledgers or other books showing the accounts receivable of relator during 1969;
>
> (3) All deposit slips or tickets showing deposits into bank accounts of

[21] ***Russell v. Young***, 452 S.W.2d 434, 436 (Tex.1970).

relator during 1969;

(4) All statements, listings, ledgers, journals, or other books showing receipt of payments, either in cash, by check or any other means during 1969;

(5) All statements of account or bills for services rendered during 1969;

(6) All accounting ledgers, journals or other books of account of relator maintained during 1969; and

(7) All financial statements showing income and expenses of relator during 1969.

A petition for writ of mandamus was filed and the Texas Supreme Court made the following ruling:

> The question to be decided is whether the records of a potential witness in a lawsuit are discoverable prior to trial in instances where the potential witness is not a party to the lawsuit ***and whose credibility has not been put in issue*** and where the records do not relate directly to the subject matter of the pending suit and ***are sought to be discovered for the sole purpose of impeachment of such witness by showing his bias and prejudice.*** We hold that under such circumstances, such records are not discoverable. [emphasis added].

Russell, 452 S.W.2d at 435. The Court offered the following rationale for its decision:

> Relator [Dr. Smith] has not yet taken the witness stand nor has his deposition been introduced into evidence because there has not yet been a trial; relator's records cannot possibly have impeachment value because there is nothing yet to impeach and there may never be anything to impeach, depending upon the contents of the testimony, if any, which is introduced during the trial of the lawsuit. *See,* ***United States v. Certain Parcels of Land, etc.***, 15 F.R.D. 224 (D.C.S.D.Cal. 1953).

Russell, 452 S.W.2d at 437.

As will be seen by the discussion below, the holding in ***Russell v. Young*** continues to be the law in Texas. It is questionable, however, whether the above rationale still provides the adequate basis for this legal concept. In Texas, we now have designation of experts. Also, there is a circular logic that is difficult to reconcile. If the party cannot obtain discovery relevant to impeachment, how will the party impeach the witness at trial? The more plausible basis for the ruling and the policy is that Courts simply are disinclined to allow intrusive discovery from a potential expert that is not relevant to an issue in the case other than for impeachment ("[T]here is ... a limit beyond

which pre-trial discovery should not be allowed." ***Russell***, 452 S.W.2d at 437).

The rationale for the **Russell** holding was clarified more in ***Ex parte Shepperd***, 513 S.W.2d 813, 816 (Tex. 1974):

> [a]llowing Discovery Orders of that kind would permit witnesses to be subjected to harassment and might well discourage reputable experts from accepting litigation employment.

The discovery sought in ***Shepperd*** was not of the personal financial records of the expert, but the condemnation appraisal reports prepared by expert appraisers. The Court observed that the credibility of the appraisers would definitely be in issue, and that the reports were not sought solely for impeachment. However, noting that the reports concerned other tracts which were the subject of other continuing litigation, the Court held that "an especially vigorous showing of good cause would be required before a party to one pending action could obtain reports immune from discovery in another pending action to which they primarily relate." ***Ex parte Shepperd***, 513 S.W.2d at 817.

The holding in ***Russell v. Young*** was reiterated by the Texas Supreme Court in ***Walker v. Packer***, 827 S.W.2d 833 (Tex. 1992). However, the Court distinguished and allowed discovery for the purpose of establishing bias. The Court noted that the holding in Russell should not be applied mechanically, but on a case by case basis, depending on the precise nature of the discovery request and the context in which it is requested.

> FN6. We do not decide whether the documents were properly discoverable, only that the Trial Court erred in denying discovery based solely on ***Russell.*** If the Walkers sought the documents solely to attack the credibility of Dr. Gilstrap by showing that his deposition testimony was untrue, for instance, the information would probably not be reasonably calculated to lead to the discovery of admissible evidence. *See* Tex. R. Civ. Evid. 608(b). ("Specific instances of the conduct of a witness [other than criminal convictions], for the purpose of attacking ... his credibility, may not be ... proved by extrinsic evidence.").

Walker v. Packer, 827 S.W.2d at 839.

Recall that in ***Russell,*** the Texas Supreme Court noted that at the discovery stage, the witness's credibility had not yet been put in issue. This consideration was a focus of the Court in ***Walker.*** In ***Walker,*** the Plaintiffs did not seek financial or tax information from the witness, but instead were seeking a policy from the doctor/expert's employer hospital restricting employee/doctors from testifying on behalf of Plaintiffs. Presumably, Plaintiffs believed that such evidence would undermine the credibility of the witness by exposing a bias. The expert testified that he knew of no such policy. ***Walker v. Packer***, 827 S.W. 2d at 837. Plaintiffs sought the deposition of the hospital agent who presumably possessed the policy and the hospital moved to quash. The Plaintiff's attorney, then in another case, took the deposition of a physician who testified

that there was, in fact, a policy, and that each hospital employee doctor had received a copy of it. The Plaintiffs renewed their request from the hospital for the controversial policy. The Court observed that this case was different from Russell in that Plaintiffs did not seek global discovery for impeachment but sought a very limited type of discovery. "The Walkers are not engaged in global discovery of the type disapproved in ***Russell;*** they narrowly seek information regarding the potential bias suggested by the witness' own deposition testimony and that of his professional colleague. ***Walker v. Packer***, 827 S.W. 2d at 839. The Court notes that discovery is allowed when it may lead to admissible evidence and that bias is admissible under Tex. R. Evid. 613(b), but that evidence of bias is not admissible if the witness "unequivocally admits such bias or interest" at trial. The Court noted that the witness in question had not admitted any bias, but rather has flatly denied it. Given this situation, the Court held such evidence should be discoverable.

> The Trial Court erred in failing to apply the foregoing rules to determine whether the documents were discoverable. Instead, the Trial Court simply read ***Russell*** as an absolute bar to discovery, even though the circumstances here are quite distinguishable. In so doing, the Trial Court misapplied the ***Russell*** holding. We expressly disapprove such a mechanical approach to discovery rulings.

In ***Kupor v. Solito,*** 687 S.W.2d 441 (Tex.App. [14 Dist.]1985, no writ), the Defendant argued that discovery regarding credibility should be disallowed under the holding in **Russell v. Young**, but the Court rejected the argument, finding that there was no evidence that the Plaintiffs sought the discovery ***solely*** for impeachment:

> The cases cited are distinguishable in that both cases show the information sought was *solely* for impeachment purposes. There has been no such admission in Relator's case; to the contrary, the record indicates the Plaintiffs sought this information for other purposes *in addition* to use for impeachment. Thus, Relator cannot claim the answers are nondiscoverable because he has failed to prove the information was sought solely for impeachment.

Kupor v. Solito, 687 S.W.2d at 443.

Olinger v. Curry, 926 S.W.2d 832 (Tex. App-Fort Worth 1996, orig. proceeding) involved discovery from an examining expert retained by an insurance carrier in an uninsured motorist case. The Plaintiff sought to prove that Dr. Olinger was biased by seeking his tax returns and various financial records. The Court noted the following testimony from Dr. Olinger:

> Dr. Olinger admitted that approximately 90% of his expert consultation services had been provided for Defendants as opposed to personal injury plaintiffs. He also testified that "the success [of the party who retains him to testify] ... is not my concern." ***Olinger v. Curry***, 926 S.W.2d at 833.

The Court found that this testimony did not put Dr. Olinger's credibility in issue. Therefore, Federal income tax returns could not lead to admissible evidence under Rule 613(b). See Tex. R. Civ. Evid. 613(b) (extrinsic evidence of bias is not admissible if the witness "unequivocally admits such bias or interest.").

In 1999, the Texas Supreme Court adopted new rules of discovery. At the last moment, before the 1999 amendments to the Texas discovery rules were promulgated, the Court inserted into the scope of discovery provisions in Rule 192.3(e) the category of "any bias of the witness." This change created some controversy about whether the historical scope of discovery regarding experts had been expanded, particularly with respect to the long-recognized doctrine that discovery solely for impeachment is proscribed.[22] Unfortunately, the Texas Supreme Court provided no commentary with regard to this provision.

One of the first cases to interpret the new provisions was ***In re Doctors Hospital of Laredo,*** 2 S.W.3d 504 (Tex. App. --San Antonio 1999, orig. proceeding). This case involved the consulting expert exemption and the scope of discovery relating to bias. A medical malpractice action was brought against hospital regarding a child's birth. The Trial Court ordered medical experts' depositions and ordered discovery of experts' income tax schedules and one expert's calendars. The Hospital filed petition for writ of mandamus. This opinion centered on the interpretation of Rule 192.3 of the Discovery Rules. The Trial Court construed the Rule to permit the deposition of a consulting witness and to permit the production of a testifying witness's income tax schedules and appointment calendars. The San Antonio Court of Appeals issued a conditional writ of mandamus holding that: (1) the hospital properly re-designated a doctor from testifying expert to consulting expert, and thus Trial Court abused its discretion in ordering doctor's deposition, and (2) the new Discovery Rules, which provide for discovery of any bias evidence of testifying witness, do not allow discovery of personal financial records and appointment books of nonparty witnesses. We will focus on the second ruling.

Two experts were noticed for depositions by the Plaintiff. One expert had been de-designated as a consultant. The Plaintiff subpoenaed the income tax schedules of both experts, and the calendars of the remaining testifying expert. The Trial Court ordered produced the schedules showing income from medico-legal consulting and the calendars for a three-year period. The Court held that the Trial Court had abused its discretion in ordering the production of the requested documents:

> Citing ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970), the hospital contends that income tax schedules and calendars of nonparty witnesses are not discoverable to show bias. In response, the Plaintiffs claim this case was overruled by the new discovery rules***. We disagree that new rule 192.3 overruled Russell.*** Unlike former discovery Rule 166b (2) (e),

[22] See ***Russell v. Young***, 452 S.W.2d 434 (Tex.1970) and ***Walker v. Packer***, 827 S.W.2d 833 (Tex. 1992)

> new Rule 192.3(e) (5) specifically provides that a "party may discover ... any bias of the [testifying] witness."Tex. R. Civ. P. 192.3(e) (5). We have found no historical commentary that would suggest the rule drafters intended to overrule Russell and its progeny. [footnote omitted]. ***We therefore read the rule to permit discovery of bias evidence, other than the personal financial records and appointment books of nonparty witnesses.*** By ordering the production of these personal records, the Trial Court abused its discretion. [emphasis added]

In re Doctors Hospital of Laredo, 2 S.W.3d at 507.

Chief Justice Harberger dissented, noting that one well-known commentator believes that Rule 192.3 "probably may" overrule ***Russell.*** See Michol O'Connor, et al., **O'Connor's Texas Rules Civil Trials** 309 (1999); see also Sam Johnson, "*Scope of Discovery Under the 1999 Revisions to the Texas Discovery Rules,*" Univ. Hous. Law Found., **Civil Discovery Under The New Rules** C, C-9 (1998) (describing change in Rule concerning evidence of expert bias and concluding documents to impeach expert may be discovered upon showing of special circumstances indicating impeachment is possible).

> I would agree with these commentators that a serious question exists as to whether the broad language in ***Russell*** remains the absolute law. I concur in the result the majority reaches, though, not because of the language in ***Russell***, but because ***the Trial Court in this case failed to explore other methods of obtaining the information contained in Dr. Grossman's income tax schedules before ordering their production***. See ***El Centro del Barrio, Inc. v. Barlow***, 894 S.W.2d 775, 780 (Tex. App.--San Antonio 1994, orig. proceeding) (stating tax returns are not material if the same information can be obtained from another source); see also ***Olinger v. Curry***, 926 S.W.2d 832, 834-35 (Tex. App.--Fort Worth 1996, orig. proceeding) (holding tax returns not discoverable where doctor admitted to potential bias in deposition); ***Kern v. Gleason***, 840 S.W.2d 730, 738 (Tex. App.--Amarillo 1992, orig. proceeding) (asserting party seeking production must show information unavailable from another source). Less intrusive methods for the discovery of bias exist, such as through depositions as demonstrated in ***Olinger.*** Protection of privacy is of constitutional importance, and a Trial Court abuses its discretion by requiring the disclosure of tax returns when the same information can be obtained from another source. ***Sears, Roebuck & Co. v. Ramirez***, 824 S.W.2d 558, 559 (Tex.1992); ***El Centro del Barrio, Inc***., 894 S.W.2d at 780***. In this case, there was no showing that the information the plaintiffs sought to obtain was unavailable from another source, or that the other potential sources of such information, i.e, interrogatories, requests for admission, depositions, etc., had been pursued before seeking discovery of the tax returns.***

In re Doctors Hospital of Laredo, 2 S.W.3d at 507-508.

Two important considerations may be gleaned from the majority opinion and dissent in ***In re Doctors Hospital of Laredo***: 1) the party seeking the discovery on bias must be able to show that it has attempted to obtain private information by less intrusive means than requesting financial records and tax returns; and 2) while personal information such as financial records and tax returns are going to be afforded protection from discovery, a party may be allowed to obtain other evidence of bias through discovery. This then raises the following questions: 1) will discovery of bias be given greater latitude in depositions and interrogatories than in requests for production; and 2) what other types of information relevant to bias may be discoverable?

The Appellate Court in ***In re Dolezal***, 970 S.W.2d 650 (Tex. App. – Corpus Christi 1998, orig. proceeding) held that discovery of patient lists and contracts between a chiropractor and various attorneys and law firms was irrelevant to the claims at issues and should not be allowed. In 2005, the Beaumont Court of Appeals reiterated that an expert's personal financial information is off limits as to discovery***. In re Weir***, 166 S.W.3d 861 (Tex. App. – Beaumont 2005, orig. proceeding). The San Antonio Court of Appeals in ***In re Makris***, 217 S.W.3d 521 (Tex. App.-San Antonio,2006) disallowed the discovery of personal financial documents and also expert reports and correspondence from other related cases. **In *In re Plains Marketing*** 195 S.W.3d at 782 (Tex. App. – Beaumont 2006), the Beaumont Court of Appeals rejected a request for production of hard copies of all reports expert witness had prepared as a medical expert for 10 years observing that there had not been a demonstration of relevancy:

> In the instant case, Rawls does not specify what information contained in Dr. Levine's medical examination reports prepared for various unrelated lawsuits would show his bias or prejudice with regard to Rawls or her cause of action against realtors.

In re George Wharton**,** 226 S.W.3d 452 (Tex. App.- Waco 2005, orig. proceeding) agreed with the San Antonio Court in **In re Doctor's Hospital of Laredo** that ***Russell*** (discovery of personal financial records of a non-party solely for impeachment is proscribed) was not overruled by the promulgation of Rule 192.3(e)(5). The main support for this holding was found in the comments to the 1999 Amendments:

> "The scope of discovery, always broad, is unchanged." *Explanatory Statement Accompanying the 1999 Amendments to the Rules of Civil Procedure Governing Discovery* 977 – 978 S.W 2d (Tex. Cases) xxxv (Tex. Nov. 9, 1998) (emphasis added)

If a party seeks to obtain documents from a non-party expert for impeachment purposed, the party seeking discovery must first present evidence "raising the possibility that there is bias.*" See* ***Walker v. Packer***, 827 S.W.2d 833, 838 (Tex. 1992 (orig. proceeding). The reports that Dr. Wharton, an adverse examining physician, retained by

the Defendant, had generated in other cases also were sought in ***In Re George Wharton.*** The fact situation is not clearly developed in the opinion, but the Court suggests that there had not yet been a declaration that Wharton would be called as a testifying expert at trial (Wharton was retained to perform a medical examination of the Plaintiff on behalf of the defense). Consequently, since no declaration had been made about whether Wharton would be called as an expert witness at trial, Wharton's credibility was not placed in issue. It may be inferred from the decision, however, that if an expert is designated as a testifying expert, the expert's reports from other cases may be discoverable on the issue of credibility*. See, **In re George Wharton*****,*** 226 S.W.3d at 458-9 *(concurring opinion)*. However, consider Chief Justice Gray's concurring opinion in which states the scope of discovery still should be limited, even if an expert is designated to testify at trial. (citing Justice Harberger's concurrence in ***In re Doctor's Hospital of Laredo***).

Recently, the Texas Supreme Court has issued an opinion making clear that discovery of financial records will not be allowed in Texas as a matter of course. ***In re Ford***, 427 S.W. 3d 396 (Tex. 2014). The bench and bar have a love/hate relationship with experts. While experts drive up the cost of litigation and sometimes do more to misdirect the jury than guide and inform them, they are a necessary tool in explaining and proving many complex points that are beyond the common understanding of many jurors. For this reason, the Texas Supreme Court has repeatedly expressed that it will not condone overbroad discovery of expert's personal and financial data. While this information might arguably be relevant to the issue of "bias," the Court seeks to balance the benefit of such discovery against the potential to dissuade genuine experts from participating in the judicial system. ***Ex parte Sheppard***, 513 S.W.2d 813, 816 (Tex. 1974) (orig. proceeding). See also ***Russell v. Young***, 452 S.W.2d 434, 437 (Tex. 1970) (orig. proceeding) (denying discovery of financial records from a potential medical expert witness because "[t]here is ... a limit beyond which pre-trial discovery should not be allowed").

In ***Ford****,* which involved a claim of product defect, the Plaintiff sought to depose the corporate representative of each of the Defendant's two testifying expert's employers. One expert worked for Exponent and the other for Carr Engineering. Both of these companies regularly appear in automotive product liability cases for the Defendant automotive company, particularly Ford Motor Co. Plaintiff wanted to depose the corporate representatives on "detailed financial and business information for all cases the companies have handled for Ford or any other automobile manufacturer from 2000 to 2011." The Texas Supreme Court rejected this type of discovery as an improper fishing expedition. The Court points out in the decision that both experts gave testimony relevant to the issue of bias. Both testified that they had never testified against Ford and one testified that she had never testified that a vehicle had any type of design defect. The Texas Supreme Court clearly is not holding that all discovery of bias is impermissible; rather it is reiterating that when a party seeks to delve into the financial records of the expert (or the expert's employer) the Court has drawn a very red line.

H. PRODUCTION OF DOCUMENTS, DATA AND THINGS GENERATED AND CONSIDERED

A very controversial issue involving requests for adverse psychological examinations is the production of testing and raw data. A frequent objection to producing such data is that it is proprietary and that it is against the psychologist code of ethics to release such data. As will be discussed below, many, if not all these objections, may be easily overcome with a Protective Order that prevents dissemination of the tests and raw data outside the litigation and that also can restrict the publication of such data only to the attorneys and experts in the case.

Before undertaking a discussion about how to obtain the testing and raw data, it is worth talking about why such data should be sought and obtained. It is noteworthy that when parties seek disclosure of testifying experts, they expect to receive not only a report but all documents, data and things the expert considered in formulating her opinions. here is a clear reason for this. The expert's opinions must be based upon scientifically reliable methodologies and reliable data. Why should this not also the case with an examining neuropsychologist? In the card game, Spades, there is a risky bid referred to as a "blind nil" bid. The bid is made before the player looks at her cards. While this may sometimes be a beneficial tactic in Spades, it never is a rewarding experience when deposing an adverse medical examiner. The examinee's attorney – not just the examinee's psychologist – needs the raw data to be able to conduct a meaningful and effective cross -examination. The cases below should help inform how this data may be obtained.

The best place to start this discussion is with the seminal United States Supreme Court case of ***Detroit Eison Company v. National Labor Relations Board***, 99 S.Ct. 1123 (1979). The facts and procedural history are largely irrelevant to our discussion. What is relevant, is the following passage, and particularly the footnote from the majority opinion:

> The Company administered the tests to applicants with the express commitment that each applicant's test score would remain confidential. Tests and test scores were kept in the offices of the Company's industrial psychologists who, as members of the American Psychological Association, deemed themselves ethically bound not to disclose test information to unauthorized persons.[6]
>
> [6] See American Psychological Assn., Standards for Educational and Psychological Test. (1974). Standard J-2 prohibits disclosure of aptitude tests and test scores to unauthorized individuals. See also Ethical Standards for Psychologist (1977 rev.) Principle 5 of the Ethical Standards imposes an obligation on the psychologist to safeguard "information about an individual that has been obtained. . . in the course of. . . teaching, practice or investigation." Subsection (b) of the Principle permits the psychologist to discuss evaluative data concerning employees but only if

> the "data is germane to the purposes of the evaluation" and "every effort" has been made to "avoid undue invasion of privacy."

Detroit Edson Company, 99 S.Ct. supra at 307. Also noteworthy, however, is the following footnote to Justice Steven's dissent in Detroit Edison:

> [6]There is no reason to believe, moreover, that release of the scores to the Union will result in dissemination to the employees generally. The Union has no incentive and indeed would be foolish, to publicize the information against the wishes of an actual or potential member of the bargaining unit. Furthermore***, the Board's Order may reasonably be read to restrict divulgence and use of the test scores as test questions***. [emphasis added].

As will be seen in the following discussions, most Courts handle the issue of raw data, test scores, and questions, as Justice Steven noted was proper and adequate, by way of Protective Order that restricts dissemination of the data outside the litigation and when necessary, restricts it to attorney and expert eyes only.

Taylor v. Erna, 2009 WL 2425839 (D. Mass. 2009) clearly outlines the framework of the arguments in most cases. Plaintiff in a motor vehicle collision case was examined by her psychologist who produced a report, but without including the raw data, testing, and test protocols. Defendants argued that the disclosure was incomplete under Fed. R. Civ. P. 26, for failing to provide the withheld data. Plaintiffs responded that 1) the psychologist could not ethically release the raw data to anyone but a certified psychologist under the American Psychologists Association (APA) ethical guidelines; 2) Plaintiffs had already provided the information to Defendant's expert psychologist who had written a report and 3) Plaintiffs had offered to provide Defense counsel the raw data, but without the test questions and test protocols. The Appellate Court discusses the requirements of Fed. R. Civ. P. 26 which requires that the expert produce all data that the expert has created or considered. It further discusses the ethical guideline and how some Courts had found that a Court Order resolves the ethical issue. ***Tibbs v. Adams,*** No. S-05-2335, 2008 WL 2633233, at 1-3 (E.D. Cal. June 25, 2008).

> ***Any conflict can be eliminated by Court Order.*** The APA's Ethical Principles of Psychologists and Code of Conduct acknowledge that the ethical obligations of the professional *must conform to legal directives*. Ethical Standard 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority directs that: "If psychologists' ethical responsibilities conflict with law, regulations or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is unresolvable via such means, psychologist may adhere to the requirements of the law, regulations, or other governing legal authority." Ethical Standard 9.11, Maintaining Test Security directs that: "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other

> assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code." [emphasis added]

Taylor v. Erna, *supra* footnote 2. The Court also conducts a review of the ***Detroit Edson Company***, opinion, noting that the U.S. Supreme Court did not go so far as to hold that it was erroneous to produce the data, only that it was erroneous to do so without protective relief. ("This holding leaves open the possibility that a more focused and conditioned disclosure would be acceptable to the Court.") ***Taylor v. Erna,*** *supra* at *2. Rather than following the cases that had ordered the data produced only to the other side's experts, the Taylor court ordered all the data, testing results and testing protocols produced to the Defendants with a Protective Order. ***Taylor v. Erna,*** *supra* *3

The raw data was also held discoverable in ***In re Air Crash Near Clarence Center, New York***, 2013 WL 6073635 (W.D. N.Y. 2013). In holding that the raw data must be produced, the Court cited to ***Taylor v. Erna***:

> Testing performed in conjunction with a psychological examination is discoverable under Rule 26(a)(2). *See, e.g.,* ***McCumons v. Marougi,*** CIV. .08-11164-BC, 2011 WL 1330807, at 3 (E.D. Mich. Apr. 7, 2011) (finding that Rule 26(a)(2)(B)(ii) requires production of "raw data" from psychological testing); ***Taylor v. Erna***, No. 08-10534-DPW, 2009 WL 2425839, *1-2 (D. Mass. Aug. 3, 2009) (similar).

I. *DAUBERT/ROBINSON*

In researching this paper, I was totally surprised that I could not find any reported Texas reports addressing a ***Daubert/Robinson*** challenge to an adverse medical/psychological examiner designated as a testifying expert.[23] This does not mean there are no such cases out there, but if there are any in the universe, they are keeping a very low profile. Additionally, if I am correct that there are no such reported cases, it should not be inferred from this that the qualifications and methodology of all

[23] Reference is made to the gate-keeping role of the trial court in making a determination of whether a designated testifying expert should be allowed to offer opinions to the fact-finder. In this regard, the expert must be qualified and each opinion to be offered to the factor finder must be based upon scientifically accepted methodology, and the opinion must be scientifically reliable, must be relevant to the issues in the lawsuit and there must be a nexus between the opinions and the facts in the case. The Court should make such a determination whenever there is a challenge to the expert. *See* ***Daubert v. Merrill Dow Pharmaceuticals, Inc.,*** 113 S.Ct. 2768 (1993);); ***Kumho Tire Co. Ltd. v. Carmic*hael**, 526 U.S. 137 (1999); ***E.I. duPont de Nemours and Co., Inc. v. Robinson***, 923 S.W.2d 549, (Tex. 1995*);* ***Merrel Dow Pharmaceuticals, Inc. v. Havner***, 953 S.W.2d 706 (Tex. 1996); ***Gammil v. Jack Williams Chevrolet, Inc.,*** 972 S.W.2d 713,724 (Tex. 1998) ***Ford v. Ledesma***, 242 S.W.3d 32 (Tex. 2007); ***Whirlpool Corp. v. Camacho***, 298 S.W.3d 631 (Tex. 2009).

medical/psychological examiners meet the ***Daubert/Robinson*** criteria as a matter of law, that medical/psychological examiners are immune from a ***Daubert/Robinson*** challenge, or that medical/psychological examiners should not be challenged under ***Daubert/Robinson***.

The closest example of something akin to a Daubert analysis was ***In re Click***, 442 S.W.3d 487 (Tex. App. – Corpus Christi 2014, orig. proceeding), discussed above. In that case, Plaintiff sought a hair sample from Defendant to be able to do toxicological testing to determine if there were drugs in Defendant's system. The Court rejected the request, observing that even if the toxicological test could with scientific reliability determine whether there were drugs in Defendant's system at the time the sample was taken, there was no accepted scientific methodology for inferring backward that there were such drugs in such amounts in Defendant's system at the time of the collision. While ***Daubert/ Robinson*** was not referred to in the Court's analysis expressly, the Court properly exercised its gatekeeping role applying the Daubert/Robinson rationale of scientific reliability, nexus, and relevancy.

It is foreseeable that a party's examiner may want to conduct testing that has not been validated or that has not been validated for the conclusions the examiner wishes to draw from it for the particular examinee. The testing and its applicability to the examinee always need to be examined and challenged, if there is a question about their scientific reliability and relevancy to the issues in the particular case.

It is beyond the scope of this paper to discuss how to set up a ***Daubert/Robinson*** challenge and how to conduct one. In this connection, I refer you to the excellent work done on this subject by Hon. Harvey Brown, starting with his seminal work, *"Eight Gates for Expert Witnesses.*"[24] The eight gates through which an expert's opinions must cross in order to be admissible are as follows:

1. Helpfulness;
2. Qualifications;
3. Relevance;
4. Methodological Reliability;
5. Connective Reliability;
6. Foundational Reliability;
7. Reliance Upon Evidence Reasonably Relied Upon by Experts in the Field, Even if Hearsay; and

8. Rule 403.

Since all testifying experts are subject to the ***Daubert/Robinson*** criteria,[25] it stands to reason that if a medical/psychological examiner is designated as a testifying

[24] 36 Houston L. Rev. 743 (1999), supra at footnote 9.

[25] Tex. R. Evid. 702.

expert, that such a putative expert too may be challenged.[26] This paper does not attempt to define the criteria that should be applied to a medical/psychological examiner in determining whether any of the expert's opinions meet the ***Daubert/Robinson*** criteria for admissibility. Instead, the questions this paper poses, are whether a medical/psychological examiner should be challenged under ***Daubert/Robinson*** and if so when.

As Ms. Clay-Sims points out in her excellent book on *"Exposing Deceptive Defense Doctors,"*[27] the methodologies of many, if not most, defense examining doctors and psychologists is flawed (either intentionally, because of bias, or simply because of incompetence). Most do not thoroughly read the medical history or medical records pertinent to the claim and most have not read a treatise or stayed current with the literature in years (indeed many are so busy churning out reports of no injury and malingering) that they may be forgiven for not having the time to read such mundane things as medical records or medical journals. Many medical/psychological examiners do not support their opinions with peer reviewed literature, but instead attempt to justify their findings on experience (much of which is not on clinical practice, which in most cases the doctor or psychologist abandoned years ago, but on forensic examinations performed on behalf of insurance companies and defense attorneys). While these views might be criticized as being cynical, the proof, as they say, is in the pudding. By definition, the adverse medical/psychological examiner is someone who is hired by one side to prepare a report for litigation. One could apply the Watergate test, and merely "follow the money," for bias. However, the United States Supreme Court is likely a better source of support. The following passage from ***Daubert***, quoted in ***Robinson***, is instructive:

> opinions formed solely for the purpose of testifying, are more likely to be biased toward a particular result.

E.I. du Pont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 559 (Tex.1995). It is the rare examiner who can cite peer reviewed literature in support of his opinions or point to any treatise that supports the methodology s/he used in reaching opinions that the Plaintiff is not injured, the Plaintiff is exaggerating his/her injuries (the plaintiff is a malingerer) that the injury pre-existed the incident giving rise to the

[26] More than one Court has addressed the criteria that should be applied to a treating doctor, reaching a clinical opinion. See, **Moore v. Ashland Chemical, Inc***.,* 126 F.3d 679, 690 (5th Cir. 1997), *on reh 'g,* 151 F.3d 269 (5th Cir. 1998), *cert. denied,* 526 U.S. 1064 (1999); and ***LMC Complete Automotive, Inc. v. Burke****,* 229 S. W.3d 469 (Tex. App.-Houston [1 st Dist.] 2007) (finding treating physician's causation opinion, which was based on his experience, the patient self-reported history, the physician's physical examination of the patient, and some objective medical evidence of a disc herniation, was sufficiently reliable to justify its admission). Of course, these cases might be distinguishable when applied to a medical/psychological examiner because such an examiner is not a treater and the medical/psychological examiner is not formulating a clinical opinion in the ordinary course of his/her practice (unless it is conceded that they usual practice is limited to performing adverse examinations).

[27] Supra at footnote 1.

litigation, or the incident was not a substantial causative factor. In many instances, when the rhetoric is sifted away, the opinion is conclusory, unsubstantiated by accepted scientific research or methodology and is simply *ipsi dixit.* All things considered, the medical/psychological examiner, when placed in the universe of potential testifying experts in trial, is probably the most vulnerable to a ***Daubert/Robinson*** challenge. So, should the Plaintiff always challenge the medical/psychological examiner who has been designated as a testifying expert? The answer is probably not.

If the attorney opposing the testifying medical/psychological examiner has thoroughly prepared to impeach the physician/psychologist by attacking the examiner's qualifications, experience, bias and lack of sound scientific methodology, it may often be the better course not to strike the expert but to allow the "expert" to testify at trial and then conduct an incisive and devastating cross examination, exposing the examiner's deficiencies, the deficiencies in his methodology, his bias and the invalidity of his opinions.

J. SANCTIONS

1. FAILURE TO ATTEND

What are the consequences if a party fails to attend an adverse examination? If the examination is by agreement, the consequences are probably minimal, unless built into the agreement. However, if the examination is ordered, the examinee can be subject to sanctions. The question then arises, what type of sanctions are warranted? ***Dominguez v. Crosby Tugs, L.L.C***., 704 Fed. Appx. 364 (5th Cir.2017) helps answer the question. The Court found that the Plaintiffs conduct in failing to attend the examination on multiple occasions could be interpreted as contumacious conduct, but even so, death penalty sanctions were inappropriate. Instead, the found that the Trial Court could have stricken Plaintiff's treating physician.

> If the District Court concluded, as it evidently did, that Dominguez's failure to attend the IME was sanctionable conduct, striking Dr. Voohries' report and opinion would have been a logical lesser remedy. Without Dr. Voohries' opinion that Dominguez was not at maximum medical cure, there would have been no reason for the IME in the first instance.

Dominguez v. Crosby Tugs, L.L.C., 704 Fed. Appx at 367.

2. SPOLIATION

One might wonder how the issue of spoliation arises in the context of an adverse examination. The usual scenario is that the party who is the focus of the examination is advised to obtain surgery and the surgery is conducted before the examining party is able to obtain an examination. I intentionally did not use the term "did not have the opportunity," because some instances involve missed opportunities. The main question, however, is whether a party seeking the examination of another can

prevent the other party from having surgery, simply because the party seeks an adverse examination. Then, there is the question of whether obtaining surgery constitutes an act of spoliation and if so what, if any, sanction is warranted. The Fifth Circuit case, ***Guzman v. Jones,*** 804 F.3D 707 (5TH Cir. 2015) helps inform some of these questions.

The Guzman decision turns on the absence of bad faith, notwithstanding suspicious timing of the surgery. Defendant requested an adverse examination on May 9, 2011, to which Plaintiff agreed in concept. Plaintiff's deposition was taken on May 27, 2011, at which time, Plaintiff disclosed that he was to undergo surgery. No action was taken by Defendant. Plaintiff, on June 23, 2011, scheduled his surgery, which was conducted on June 27, 2011. Plaintiff's attorney signed the Agreed Order about the examination on June 29, 2011, but it was never filed. The examination was conducted on July 26, 2011. In conjunction with the examination, Plaintiff provided Defendant all the before and after records and images. It was not until after the examination, that Defendant alleged spoliation. The Court found that Plaintiff probably had a duty to preserve because he had been put on notice of Defendant's desire to obtain an adverse examination. Nonetheless, the Court did not find any evidence of bad faith. Suspect time alone was insufficient to establish bad faith:

> While the timing of Guzman's surgery may seem strange, there is no evidence to suggest that he acted in a manner intended to deceive Appellants or that he undertook the surgery with the intent of destroying or altering evidence. The District Court concluded that the timing of Guzman's surgery alone was insufficient to demonstrate he had acted in bad faith. We find no reason to conclude that the district court abused its discretion in denying the motion for adverse instructions based on spoliation of evidence.

Guzman v. Jones, 804 F.3D at 713.

There is an interesting question whether an instruction to the jury about inferences that could be drawn from spoliation, if the Court had found that the surgical procedure was done with the intent of keeping evidence from the Defendant. Even under ***Brookshire Brothers v. Aldridge***, 438 S.W.3d 9 (Tex. 2014) this sanction might remain viable under such circumstances. Many members of the bar who have written or commented on the ***Brookshire Bros.*** opinion overstate the holding in terms of the permissibility of a Trial Court issuing a spoliation instruction by generally stating that such an instruction is no longer permissible. That is not the case. It certainly will be harder, if not unlikely, in most instances, to get a spoliation instruction. However, the Court expressly recognized in the opinion that a Trial Court still has the discretion, when appropriate, to issue a spoliation instruction.

> After a Court determines that a party has spoliated evidence by breaching its duty to preserve such evidence, it may impose an appropriate remedy. Rule 215.2 of the Texas Rules of Civil Procedure enumerates a wide array of remedies available to a Trial Court in addressing discovery abuse, such

as an award of attorney's fees or costs to the harmed party, exclusion of evidence, striking a party's pleadings, or even dismissing a party's claims. *See* TEX. R. CIV. P. 215.2-.3. These remedies are available in the spoliation context. ***Trevino v. Ortega****,* 969 S.W.2d 950, 953 (Tex. 1998) (Baker, J., concurring). The Trial Court also has discretion to craft other remedies it deems appropriate in light of the particular facts of an individual case, including the submission of a spoliation instruction to the jury. *Id.*

K. TRIAL

1. EXAMINEE CALLING THE EXAMINER AS A WITNESS AT TRIAL

The Texas case, ***Hooper v. Chittaluru***, 222 S.W.3d 103, 108 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) holds that an opposing party may call in its case in chief the opposing party's testifying expert. The Fourteenth Court of Appeals, disregarding Defendant's lament that "you cannot hijack her expert," found that where Plaintiff had timely cross designated Defendants' expert following Defendants' designation of the expert, the Court knew of no precedent that disallowed Plaintiff from calling Defendants' expert in Plaintiff's case in chief at trial. Finding that obtaining testimony from the opposing side's expert could be particularly damning at trial, the Court held that the disallowance of the testimony was an abuse of discretion requiring a remand of the case.

2. IMPEACHMENT

Recall that if a medical/psychological examination is not sought of a party whose medical or psychological condition is in issue, the party whose condition may be in issue may not comment at trial on her willingness to submit to an examination or on the right or the failure of any other party to seek an examination. Tex. R. Civ. P. 204.3. I have thought, what would be the effect if a party had sought an examination but failed to get one. While this Rule might not be applicable, the Court still could prevent discussion of this fact at trial under Tex. R. Civ. P. 403.

Paradoxically, while the Rules of Civil procedure with regard to what may be discovered, regarding the bias of a testifying expert are somewhat restrictive, the rules regarding use at trial are comparatively more liberal. Still, the bottom line comes down to whether the trial judge believes the evidence is relevant, Tex. R. Civ. P. 401, and whether the probative value of the potential evidence exceeds its prejudicial effect. *See,* Tex. R. Evid. 403.

The following language from ***Russell v. Young*** is instructive about the ability to challenge an expert's credibility at trial:

> It is true that in order to show bias and prejudice an expert medical witness may be cross-examined regarding the number of times he has testified in lawsuits, payments for such testifying and related questions. ***Traders & General Ins. Co. v. Robinson***, 222 S.W.2d 266 (Tex.Civ.App.1949) writ ref'd; ***Horton v. Houston & T.C. Ry. Co.,*** 46 Tex.Civ.App. 639, 103 S.W. 467 (1907) writ ref'd; and ***Barrios v. Davis,*** 415 S.W.2d 714 (Tex.Civ.App.1967) no writ hist***. We do not disturb the law governing the cross-examination of witnesses to show bias and prejudice.*** [emphasis added]

Russell v. Young, 452 S.W.2d at 436. See also, ***Collins v. Wayne Corp.,*** 621 F.2d 777 (5th Cir. 1980). The Trial Court's ruling on admissibility of evidence based on relevancy is going to be given great deference. See e.g. ***Mendoza v. Varon***, 563 S.W.2d 646 (Tex. App. – Dallas). 1978.

Tex. R. Evid 603 also is informative:

> **(b) Examining Witness Concerning Bias or Interest.** In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.