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“And what big **teeth** you have, Grandma!”



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



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**PAUL N. GOLD**

**AVERSANO & GOLD**  
HOUSTON , TEXAS

**WWW.CUTTING EDGE JUSTICE.COM**




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**Tex. R. Civ. P. 204** derives almost verbatim  
from  
**Fed. R. Civ. P. 35**

*Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct.  
234, 12 L.E.3d 152 (1964)

Informs what criteria **must** be met to obtain  
an examination




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**BALANCING OF POLICY CONSIDERATIONS**

The Sanctity Of Body And The Right Of Privacy  
**v.**  
Fairness In The Judicial Quest For Truth

*See Alugas v. Halbert*,  
378 So. 2d 192, 193 (La. App. 4<sup>th</sup> Cir. 1979)




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**STRATEGY**

1. Expedite the Court determination of if or when an examination will be allowed.
2. Compel the Defendant to meet all elements of its burden.
3. Strike biased examiners.
4. Seek protection re scope of interview and examination.
5. *Daubert* challenge.




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1. **Expedite the Court determination of if or when an examination will be allowed.**

Avoid the Defendant requesting an examination **AFTER** the deadline for designation of experts.




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**INTERROGATORY:**

In the interest of aiding the parties in timely completing discovery in compliance with the discovery control plan, please state whether Defendant desires an adverse examination pursuant to Rule 204 and if so, on what basis, by what specialties and by what physicians or psychologists specifically, and when.

**RESPONSE:**




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**STRATEGY**

- 1. Expedite the Court determination regarding if or when an examination will be allowed.
- 2. **Compel the Defendant to meet *all elements* of its burden.**




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**APPENDIX 1**

LETTER RESPONSE TO REQUEST FOR DME  
(SEE PAPER)




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**GOAL:**

**FINESSE SPECIFICITY AND AGREEMENTS**




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**QUESTIONS**

WHO  
WHAT  
WHEN  
WHERE  
HOW  
WHY



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**OPPOSING THE DEFENSE  
MOTION FOR  
MEDICAL/PSYCHOLOGICAL EXAM**



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**IN CONTROVERSY**



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**PLAINTIFF'S PLEADING**

***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.")



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***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)**

***In re Transwestern Pub. Co., L.L.C.***

96 S.W.3d 501

(Tex.App.–Fort Worth,2002)



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**GOOD CAUSE**



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RELEVANCY

NEXUS

LESS INTRUSIVE MEANS NOT FEASIBLE



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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)



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NEXUS

There must be shown a reasonable nexus between the condition in controversy and the examination sought.



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Mrs. Coates’s 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’s pre-injury depression and her post-injury embarrassment. *Coates*, 758 S.W.2d at 752



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**IN CONTROVERSY**

Just because a treating physician is named as potential expert witness at trial does not put a medical condition in controversy.

*In re Thuesen*,

Not Reported in S.W.3d,  
2013 WL 1461790  
(Tex.App.-Hous. (14 Dist.))



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**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



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**LESS INTRUSIVE MEANS**

*In re Caballero,*

36 S.W.3d 143

Tex.App.–Corpus Christi,2000.

Excessive bleeding following hysterectomy



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**STRATEGY**

1. Expedite the Court determination of if or when an examination will be allowed.
2. Compel the Defendant to meet all elements of its burden.
- 3. Strike biased examiners.**



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**DOES DEFENDANT HAVE ABSOLUTE  
RIGHT TO CHOOSE EXAMINER?**



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**NO...**

**MAYBE...**

**KIND'UV**



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*Sherwood Lane Associates v. O'Neill,*  
782 S.W.2d 942  
Tex.App.—Hous. [1 Dist.],1990.



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*Employer's Mutual Cas. Co. v. Street,*  
702 S.W.2d 277, 279  
(Tex. App.—Fort Worth 1986, original proceeding)



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***May v. Lawrence,***  
 751 S.W. 2d 678, 679  
 (Tex. App.--Tyler, 1988,original proceeding)  
 (trial court may choose any physician it finds appropriate)




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**COMPLAINT OF BIAS MUST BE AS TO  
 SPECIFIC EXAMINER AND MUST BE FACTUAL,  
 NOT CONCLUSORY**

***Robin v. Associated Indem. Co.,***  
 297 So.2d 427 (La., 1973)




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**WHEN EVIDENCE IS ADDUCED THAT  
 EXAMINER CHOSEN TO DO EXAM IS BIASED,  
 THE COURT HAS DISCRETION TO STIKE THE  
 EXPERT**

***White v. State Farm Mut. Auto. Ins. Co.,***  
 680 So.2d 1 (La. App. 3 Cir., 1996)




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**DISCOVERY OF BIAS  
LIMITED IN TEXAS**

**[UPDATE]  
SIGNIFICANT OPINION**

*In re Ford,*  
427 S.W.3d 396  
(Tex. 2014)




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**STRATEGY**

1. Expedite the Court determination of if or when an examination will be allowed.
2. Compel the Defendant to meet all elements of its burden.
3. Strike biased examiners.
- 4. Seek protection re scope of interview and examination.**




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**NATURE AND EXTENT OF EXAMINATION  
WITNESSING OR RECORDING THE  
INTERVIEW/EXAMINATION  
NUMBER OF EXAMINATIONS & EXAMINERS  
TIME, PLACE, AND EXPENSE  
EXAMINEE'S SAFETY AND HEALTH  
INTERESTS**




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**IS THE TESTING PROPOSED SCIENTIFICALLY  
RELIABLE?**

*In re Click,*  
442 S.W.3d 487  
(Tex. App. CC-Edinburg 2014)



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**NATURE AND EXTENT OF  
EXAMINATION**



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**Tex. R. Civ. P. 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.”



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**NON-SPECIFIC ORDER  
AN ABUSE OF DISCRETION**

*Williams v. Sanderson,*  
904 S.W.2d 212  
Tex.App.–Beaumont,1995




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**ORDER SHOULD NOT EXCEED REQUEST  
AND  
EXAMINATION SHOULD NOT EXCEED ORDER**




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Requests under this article **must specify in detail** the character and extent of the examination in or to establish not only the necessary showing of **good cause**, but also the inapplicability of C.C.P. art. 1464's limitation. Moreover, the details of the requested examination are necessary to enable the trial judge (if good cause and the inapplicability of the restriction are established) to **fix limitations** on the extent of the examination or to determine the availability of other alternatives.

*Alugas v. Halbert,*  
378 So. 2d 192 (La. App. 4 Cir., 1979)




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**REQUIRE DELINEATION  
OF TESTS AND TOPICS**

*Ornelas v. Southern Tire Mart, LLC,*  
292 F.R.D.388  
(S.D. TEX. 2013)



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**NO FISHING!  
EXAM MUST HAVE NEXUS TO COMPLAINT  
OBJECT TO OVERBREADTH**

(EXAMPLE)  
Neurological examination regarding motor and sensory loss irrelevant and beyond the scope of discovery when the complaint is impairment to executive functioning.



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**DISCOVERY TO BE "TAILORED" TO THE  
CLAIMS AND DEFENSES ALLEGED**

A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.

*In re American Optical,*  
988 S.W.2d 711,713 (Tex. 1998)



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The trial court may place reasonable conditions on the manner and scope of the examination. See *id.* Furthermore, the discovery methods permitted by the rules may be limited by the trial court under certain circumstances not present here. TEX. R. CIV. P. 192.4. **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).

*In re Trimac Transp., Inc.,*

Not Reported in S.W.3d, 2008 WL 2758793  
(Tex.App.-Beaumont)



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**PROTECTIVE ORDER LIMITING SCOPE**

*SHADIX-MARASCO v.*  
*AUSTIN REGIONAL CLINIC, P.A.,*  
2011 WL 2011483 (W.D. Tex)



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**THE COURT'S ORDER MAY LIMIT SCOPE OF  
QUESTIONING AND ORDER EXAMINER TO  
PRESERVE NOTES**

*Robin v. Associated Indem. Co.,*  
297 So.2d 427 (La., 1973)



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**WITNESSING OR RECORDING THE  
INTERVIEW/EXAMINATION**




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**TEXAS**

*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.




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(Grant, J., dissenting).

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).




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**LOUISIANA**

Art. 1464 does not state one way or another whether an attorney may attend or videotape.

**MUST SHOW EXCEPTIONAL CIRCUMSTANCES**

*Henry v. Barlow,*

937 So.2d 895 (La. App., 2006)

*Robin v. Associated Indem. Co.,*

297 So.2d 427 (La., 1973)

**CASE BY CASE DETERMINATION**



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**LOUISIANA**

COURTS SYMPATHETIC TO REQUESTS FOR SPOUSE TO ATTEND, PARTICULARLY WITH REGARD TO WOMEN EXAMINEES

*Robin v. Associated Indem. Co.,*

297 So.2d 427 (La., 1973)

and

*Simon v. Castille,*

174 So.2d 660 (La. App. 3 Cir., 1965)



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**NUMBER OF EXAMINATIONS and EXAMINERS**



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**EXAMINATIONS BY MULTIPLE EXAMINERS IS  
WITHIN THE COURT'S DISCRETION**

*Viator v. Sonnier,*

355 So.2d 1091 (La. App. 3 Cir., 1978)

ONE EXAMINER/EXAMINATION FOR EACH  
DISCRETE AREA OF INJURY

(e.g. TBI/neurologist, chronic back  
pain/orthopedist)



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**MULTIPLE EXAMS WITHIN SAME SPECIALITY  
DISFAVORED**

*Granger v. Montgomery Ward & Co., Inc.,*

408 So.2d 320 (La. App. 3 Cir., 1981)

DEFENDANT NOT ALLOWED TO KEEP SEEKING  
EXAMS UNTIL IT GETS ONE IT LIKES



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**TIME, PLACE, AND EXPENSE**



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**ANALOGOUS TO RULES PERTAINING TO DEPOSITIONS?**

*See*  
***Madison v. Travelers Ins. Co.,***  
308 So.2d 784 (La., 1975)



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**CONSIDERATION OF EXAMINEE'S SAFETY AND HEALTH**



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**WHILE NOT DISPOSITIVE, SHOULD BE CONSIDERED AND BALANCED AGAINST DESIRES OF REQUESTING PARTY**

***Williamson v. Haynes Best Western of Alexandria,***  
595 So.2d 1201 (La. App. 4 Cir., 1992)



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**THE REPORT**



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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.



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**“together with like reports of all earlier examinations of the same condition”**

**WHAT DOES THIS MEAN?**



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**FAILURE TO PRODUCE REPORT CAN RESULT IN  
TESTIMONY OF EXAMINER BEING STRICKEN**



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**DAUBERT/ROBINSON**



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**Subjectivity  
(analogy to tire experts)**

**Malingering / Lack of Effort  
(where's the science)**

**Credibility *solely* the province of the jury**



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**DOROTHY CLAY SIMS**




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Opinions formulated solely for litigation more  
suspect than opinions formulated in the  
ordinary course of practice.

Testimony of treater given greater weight than  
testimony of a retained examiner.

***Knox v. Calcasieu Parish Police Jury,***  
900 So.2d 1128 (LA, 2005)




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**MEDICAL/PSYCHOLOGICAL EXAMINATION OF  
DEFENDANT**

***Williams v. Sanderson,***  
904 S.W.2d 212  
(Tex.App.–Beaumont,1995)  
**(vision)**

***In re Click,***  
442 S.W.3d 487  
(Tex. App. CC-Edinburg 2014)  
**(drugs)**




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**TRIAL**




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**Tex. R. Evid 603**

**(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.




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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. [omitting citations] ***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 434, 436 (Tex.1970)




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