

“DANCING WITH WOLVES IN DRAG”

TACTICS AND STRATEGY WITH REGARD TO DEFENSE
REQUESTED MENTAL AND PHYSICAL EXAMS (DME’S)

ADAPTED FOR LOUISIANA PRACTICE



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



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Whose Contributions Are Greatly Appreciated



Tex. R. Civ. P. 204 and La. CCP art. 1464 et seq
both derive 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



PRIMARY DIFFERENCES

VOCATIONAL EXPERTS

Louisiana now allows examinations by
vocational experts, while Texas does not.



LOUISIANA

Williams v. Smith,
576 So.2d 448 (La., 1991)



COMPARE TEXAS

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. – Houst. [1 Dist.] 1991, no writ).



TIMING

Art. 1464 does not prescribe when the request for exam must be made, while under **Texas** rules it must be made no later than 30 days before the end of the discovery period.



REPORTS

Under **Louisiana** procedure examined party waives privilege as to all other examinations and reports, if a report (or deposition) is requested from the adverse examiner. **Texas** rule does not indicate “waiver of privilege” and does not include deposition as a trigger.



COMMENTING ON NO REQUEST FOR EXAM

No rule in **Louisiana**.
In **Texas**, if no request for exam, party cannot comment on willingness to undergo or failure to request.



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. 4th Cir. 1979)




CONFRONTING MYTHS



the examination is **non-adversarial**

the examination is **independent**
(maybe so in a Louisiana workers' comp case)




THE EXAMINATION IS **NEITHER!**



the examiner probably is **adversely partisan**


the examination is **adversarial**



**WELL-WRITTEN OPINION EXPLAINING
PRACTICAL ISSUES AND CONSIDERATIONS**

Pemberton v. Bennett,
234 Or. 285, 381 P.2d 705 (1963)

Cited in *Simon v. Castille*




SO WHAT DO YOU DO?




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.



- 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.




DISCOVERY CONTROL PLAN

DISCOVERY




**DISCOVERY CONTROL PLANS
(TEXAS)**



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.



PROBLEM

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. . .




CONSULTING v. TESTIFYING



In Texas a party may de-designate an expert as a testifying expert, making the expert a consultant, whose opinions may not be discovered **or referenced at trial.**

GOAL:
Lock in Defendant, so it cannot de-designate its examiner, if the report is favorable.



DISCOVERY



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:



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.**



**RESPONDING TO THE REQUEST
OR MOTION**




**PLAINTIFF'S RESPONSE TO
INFORMAL REQUEST
FOR DEFENSE
MEDICAL/PSYCHOLOGICAL EXAM**




LOUISIANA
INFORMAL REQUESTS DO NOT ACTIVATE
SANCTION PROVISION TO EXCLUDE EVIDENCE

Cheatum v. Morris,
789 So.2d 660 (La. App., 2001)



APPENDIX 1

LETTER RESPONSE TO REQUEST FOR DME
(SEE PAPER)




GOAL:

FINESSE SPECIFICITY AND AGREEMENTS



QUESTIONS

WHO
WHAT
WHEN
WHERE
HOW
WHY



Under both Texas and Louisiana rules,
report provisions apply to AGREEMENTS
unless expressly provided otherwise.

AGREEMENT should specify when report must
be delivered, since rule does not address.




REQUESTS FOR PRE-SUIT DMEs




LOUISIANA
ALLOWS PRE-SUIT EXAMINATIONS IN
CONJUNCTION WITH PERPETUATION OF
TESTIMONY

*Vaughn v. Commercial Union Ins. Co.
of New York,*
263 So.2d 50 (La. App. 4 Cir., 1972)



Requesting party must meet the criteria for
perpetuating testimony (failure to obtain will
result in a delay or failure of justice) and it
must meet the criteria under art. 1464.
(condition in controversy and good cause).



Most requesting parties seeking pre-suit exams fail to seek them utilizing perpetuation of testimony statute and therefore most requests for pre-suit DME's are denied for failure to have a condition that is in "controversy" (i.e. No suit is pending).

See State Farm Mut. Auto. Ins. Co. v. Varnado,

656 So.2d 305 (La. App. 4 Cir., 1995)



EARLY EXAMS MIGHT BE COUNTER-PRODUCTIVE TO THE REQUESTING PARTY

Estate of Patrick v. Board of Supervisors of Louisiana,

828 So. 2d 1199 (La. App., 2002)

Examination of decedent's tissue samples treated as DME. Defendant examined pre-suit and then was denied motion to re-examine after suit was filed.



OPPOSING THE DEFENSE MOTION FOR MEDICAL/PSYCHOLOGICAL EXAM




IN CONTROVERSY

GOOD CAUSE




LOUISIANA

Matherne v. Hannan,
545 So.2d 1094 (La. App. 4 Cir, 1989)



TEXAS

Coates v. Whittington,
758 S.W.2d 749 (Tex. 1988)




IN CONTROVERSY



LOUISIANA


Petition of State Farm Mut. Auto. Ins. Co.,
708 So.2d 1282 (La.App. 5 Cir, 1998)

Request for pre-suit DME denied. No pending claim; therefore no showing that medical condition in controversy




TEXAS

A Plaintiff 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)




GOOD CAUSE



RELEVANCY

NEXUS

LESS INTRUSIVE MEANS NOT FEASIBLE



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)



NEXUS

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



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



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



LOUISIANA

Williams v. Smith,

576 So.2d 448 (La., 1991)

Exam by Vocational Counselor denied because information needed could be obtained from records already available in the case



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.**



DOES DEFENDANT HAVE ABSOLUTE
RIGHT TO CHOOSE EXAMINER?



NO...

MAYBE...


KIND'UV



LOUISIANA


NO ABSOLUTE RIGHT

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




TEXAS
NO ABSOLUTE RIGHT

Employers Mut. Casualty Co. v. Street,
702 S.W.2d 779
(Tex. App.--Fort Worth 1986, orig. proceeding).




**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)



**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)



**DISCOVERY OF BIAS
LIMITED IN TEXAS**

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

Walker v. Packer,
827 S.W.2d 833 (Tex. 1992)



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.**



- ❖ 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




NATURE AND EXTENT OF EXAMINATION



KEY


Art. 1464 demands specificity with regard to what is requested and a specific order about what is to be allowed.

DEMAND BOTH!



NO SANCTION FOR FAILING TO COMPLY WITH INFORMAL REQUEST

Cheatum v. Morris,
789 So.2d 660 (La. App., 2001)



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)



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



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."



EXAM MUST HAVE NEXUS TO COMPLAINT

OBJECT TO OVER BREATH

(EXAMPLE)

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



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)



SANCTIONS MAY ONLY BE IMPOSED UNDER ART. 1471 FOR FAILURE TO COMPLY WITH AN

ORDER

See

Rogers v. Dickens,

959 So.2d 940 (La. App., 2007)

and

Crooks v. Coregis Ins. Co.,

943 So.2d 649 (La. App., 2006)



**COURT MAY DISMISS OR PREVENT TESTIMONY
OF INJURY FOR NON-COMPLIANCE WITH
ORDER UNDER ART. 1471.C (3)**

Reeder v. New York Life Ins. Co.,
790 So.2d 712 (La. App., 2001)



**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)




**COURT HAS NO DISCRETION TO IMPOSE ON
PLAINTIFF'S HEALTH CARE DECISIONS**

(i.e. enjoining Plaintiff from having surgery
pending DME)

Rogers v. Dickens,
959 So.2d 940 (La. App., 2007)




**WITNESSING OR RECORDING THE
INTERVIEW/EXAMINATION**



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.



(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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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




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)



NUMBER OF EXAMINATIONS and EXAMINERS



**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)



**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**



TIME, PLACE AND EXPENSE



ANALOGOUS TO RULES PERTAINING TO DEPOSITIONS?

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



CONSIDERATION OF EXAMINEE'S SAFETY AND HEALTH



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)




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.




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


WHAT DOES THIS MEAN?




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



DAUBERT/ROBINSON



DOROTHY CLAY SIMS



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)



TRIAL



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.



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)



RECENT CASES



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



