

“I’M MELTING”

PROTECTING THE PLAINTIFF AND THE JURY
FROM THE ADVERSE MEDICAL EXAMINER

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"You cursed brat! Look what you've done! I'm melting! Melting! Oh, what a world, what a world! Who would've thought a good little girl like you could destroy my beautiful wickedness? I'm gone! I'm gone! I'm going!"

The Wicked Witch of the West

. . . upon being liquidated by Dorothy

The Wizard of Oz (1939)

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1. INTRODUCTION

For quite some time, I have wanted to write a paper on adverse medical examinations because there really have not been many practical papers on the subject from a trial attorney’s perspective, particularly in Texas. I recently was asked to write a paper on exposing bias of expert witnesses and I have taken the liberty to use this as an opportunity to discuss handling the adverse medical examiner. What results is a review of the current state of the law regarding adverse medical examinations in Texas, discovery regarding adverse medical examiners and how to reveal the bias of adverse medical examiners at trial.

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.

While I hope to discuss concepts with regard to impeaching and de-constructing the adverse medical examiner, an in depth study of this area exceeds the scope (and industry) of this author. Instead, the reader interested in further reading in this regard is referred to Clay-Sims, *“Exposing Deceptive Defense Doctors.”*¹ Ms Clay-Sims does an excellent job of exposing how adverse medical doctors may lie and provides great insights on how to reveal such deception to the Plaintiff’s advantage.

The primary focus of the paper will be in terms of Tex. R. Civ. P. 204, which went into effect September 1, 1999, and Tex. R. Evid. 607. The Texas Rule is very similar to Fed. R. Civ. 35, upon which it and its predecessor Tex. R. Civ. 167 (repealed) are based. While the Federal Rules of Civil Procedure allow a trial judge to appoint experts to aid the court (Fed. R. Evid. 706), Texas has not adopted such a rule.

This paper will attempt to provide practical guidance with respect to how to respond to a request or motion for adverse medical examination, how to finesse the adverse medical examination with timely disclosure of the experts opinions and conclusions, how to attempt to limit or strike the expert’s testimony prior to trial, and ideas for challenging and cross-examining the expert at trial.

¹ James Publishing Incorporated, (2009).

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. There have been few cases interpreting Rule 204. 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 over time have developed and shrouded the adverse examination practice in Texas: 1) the examination is non-adversarial; and 2) the examination is independent.

As pointed out in the introduction, 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." 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 context, is adversarial.²

There are competing policy considerations that create a tension in fairly applying this rule. Plaintiff is required to present for an examination and thereby create potential evidence for the Defendant. This concept arguably is at odds with the rule in Texas that one party is not required to create evidence for an opponent. On the other hand, the Defendant should be able to obtain an examination by one or more experts that are not biased toward the Plaintiff. While the Plaintiff may not have voluntarily chosen the physicians who have participated in her care, the physicians with whom she has a patient/physician relationship may be expected to be sympathetic toward her (regardless of the reality). Defendant should be allowed to obtain its own independent

² 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).

consultation (independent of the Plaintiffs experts or those presumably sympathetic to the Plaintiff) of its exposure. Furthermore, Defendant should be allowed to have one or more experts testify on its behalf who have the opportunity to personally examine of the Plaintiff if deemed necessary. Trying to reconcile these competing interests fairly is oftentimes difficult.

The reality in most instances is that the Defendant does not desire an “independent/objective” evaluation of its exposure. Rather, the Defendant wants an expert who reliably will agree with and advocate the Defendant’s defensive strategy or supplement it with the expert’s own bias. Depending on the reader’s philosophical stance on “zealous advocacy” and the “adversarial system,” this reality may be abhorrent or merely an institutionalized reality that requires confrontation. This author, who has strong pragmatic tendencies, arguably falls into the latter camp. I believe that if a Defendant chooses to find and designate an expert who has a bias sympathetic to the Defendant’s position, then Plaintiff should be given ample opportunity to develop and challenge the expert’s bias, lack of credibility, and the unreliability of the expert’s conclusions. At the core of the adversarial process is the delegation to and faith in the jury to weigh competing stories and opinions to determine the truth. The attorneys should be able to aid this task by effective cross-examination of “qualified experts.”³

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). 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. 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 Examinations may be conducted only by “qualified physician” or “qualified psychologist.” Arguably, this does not include examination by a nurse life care planner (unless in association with a qualified physician) or a vocational rehabilitation expert. See, **Moore v. Wood**, 809 S.W.2d 621 (Tex.App.-Hous. [1st Dist.] 1991).

⁴See **Daubert v. Merrill Dow Pharmaceuticals, Inc.**, 113 S.Ct. 2768 (1993);); **Kumho Tire Co. Ltd. v. Carmichael**, 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).

3. TIMING OF THE ADVERSE MEDICAL EXAM

A. DISCOVERY CONTROL PLAN

Tactically, it is important for the Plaintiff to take the initiative with regard to the anticipated adverse examination rather than waiting to react to a request or motion. The reason for this is to avoid being disadvantaged by late designation of the adverse examiner as a testifying expert.

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 Rule 204 trump Rule 195? This author believes the answer is no. First, while Rule 204 states that a party “may” move for an order, the Rule does not state that the court “shall” grant one. In fact, Rule 204(c) states that the court “may” issue an order, provided certain criteria are met:

- (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.

Rule 204 affords a party the opportunity to obtain its own consultation regarding the opposing side’s medical issues that have been placed in issue (See, **Coates v. Whittington**, *supra*). The rule does not also afford the party the right to utilize expert opinion testimony that has not been timely and properly designated. While Rule 204

may allow a party to obtain a medical examination 30 days before the end of the discovery period, this does not abrogate the designation requirement. If a party wishes to retain the right to use the examiner as a testifying expert at time of trial, 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.

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.-Beaumont 1987, no writ).

Mora v. Chacon, ____ S.W.3d ____, 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 cases that hold 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 have 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.

A party who is concerned that his opponent may seek a medical/psychological examination in the case should request a pretrial conference at the outset of the litigation. At the conference, a party should request that the court place in the discovery control plan a deadline for the parties to seek adverse medical or psychological examinations. More particularly, the deadline for requesting the examination should be well in advance of the expert designation deadlines to afford the party moving for the examination sufficient time to designate an examiner, obtain a court order, get the examination, have the examiner produce a report, and reach a determination about whether or not the party wishes to designate the examiner as a testifying expert. Even if the court does not grant the requested relief, the party who is concerned about being an examinee has accomplished two things: 1) the party has notified the court that this could be a potential problem and educated the court about the potential problem; and 2) the party has effectively taken away from the other side the opportunity to wait until the last moment to request the motion.

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. 2-08-93 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. 3-22-93 **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. 6-07-93 PLEADINGS. Pleadings must be amended or supplemented by this date.

4. 6-07-93 DISCOVERY. Discovery requests must be made in writing and filed with the court by this date.

5. 7-07-93 PRE-TRIAL CONFERENCE. Time: 1:30 p.m.

6. 7-12-93 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 on the basis of 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

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

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 our 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. 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 further in advance than thirty days before the end of the discovery period to reduce risk of disrupting final preparations for trial.

B. DISCOVERY

Another tactical consideration is to send the Defendant a written discovery request asking whether the Defendant wishes to conduct an adverse medical examination, on what basis, by whom and when. Even if the Defendant objects to this request, the issue of the adverse medical examination is put into play and may be used by the Plaintiff to argue that the Defendant could have requested the examination earlier, but a deliberate decision was made not to do so.

EXAMPLE:

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:

4. RESPONDING TO THE REQUEST OR MOTION

A. PLAINTIFF'S RESPONSE TO 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 Tex. R. Civ. P. 204. A Plaintiff attorney should try to reach an agreement regarding the adverse examination if practical. However, the agreement must always be carefully and clearly drafted, reduced to writing, signed by all parties to the litigation,⁶ and filed with the court pursuant to Tex. R. Civ. P. 11. 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."

Attached as **Appendix 1**, is an example of a letter responding to an informal request for an adverse examination.

Any agreement that is reached not only should conform to Tex. R. Civ. P. 11, but also should conform to Tex. R. Civ. P. 204.1(d) which sets out the requirements of an order. Consideration should be given to entering into an Agreed Order, rather than simply a Rule 11 agreement. 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. OPPOSING THE DEFENSE MEDICAL/PHSYCOLOGICAL EXAM

In order 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

⁶ Plaintiff's attorney wants to be careful in a multi-defendant case about negotiating with one defendant only to have one or more other defendants subsequently also request examinations. Plaintiff should seek a protective order requiring that the defendants file a consolidated request for examinations.

between the condition and the examination sought which will lead to the discovery of admissible evidence. Also, the movant must demonstrate that it is not possible or practicable to obtain the information sought from the examination through less intrusive means.⁷ See **Coates v. Whittington**, 758 S.W.2d 749,753 (Tex. 1988). The movant also must demonstrate that the medical or psychological condition for which the examination is sought is in controversy.

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.

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.⁸ 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

⁷ See also, Tex. R. Civ. P. 192.4 (a).

⁸ (Vernon 1976, repealed 1998, now Tex. R. Civ. P. 204.1)

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. – Houst. [1 Dist.] 1991, no writ).

1) IN CONTROVERSY

The next critical inquiry was whether the Plaintiff had alleged a “mental injury,” thus “affirmatively” placing her mental condition in controversy. An examination may not be compelled simply because the Plaintiff has brought a claim for personal injuries. Further, the Texas Supreme Court makes clear 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. There is no allegation of a permanent mental injury nor any deep seated 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).

The manufacturer claimed that IT put the plaintiff's mental condition in issue by pleading contributory negligence and that the reason for plaintiff's conduct 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 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.)

2) GOOD CAUSE

In addition to demonstrating that the Plaintiff has affirmatively placed her mental or medical condition in controversy, the Defendant must also demonstrate good cause for the examination. 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 rejects 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 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).

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 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.

Additionally, it would seem that 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).

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. The question itself causes a disturbance. Some opinions have talked about the need for the playing field to be leveled. These opinions follow the presumption that the Plaintiff has selected her physicians so the Defendant should be allowed to select its physicians. 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. *Employers Mut. Casualty Co. v. Street*, 702 S.W.2d 779 (Tex. App.--Fort Worth 1986, orig. proceeding). However, a Plaintiff 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).

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.-Hous. (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 it is similar to the situation attorneys in Texas presently confront with regard 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.⁹ 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. 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 powder.

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's 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 AND LIMITATIONS

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

⁹ See, Brown, "Eight Gates for Expert Witnesses," 36 Hous. L. Rev. 743 (1999).

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

This author believes that for clarity of discussion a distinction should be drawn between an adverse interview and an adverse examination. With regard to a medical examination, it reasonably may be expected that the examiner will want to obtain a “medical history.” Similarly, with respect to a psychological examination, it can be anticipated that the examiner will want to obtain a relevant background history. These “interviews” 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.

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 actually was 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.¹⁰

¹⁰ 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 uncredible. The examiner then requests all data regarding the plaintiff whether relevant or not to

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*, --- S.W.3d ----, 2009 WL 946847 (Tex.App.-El 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.¹¹ 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

(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

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 as 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).

¹¹ 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.

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

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.¹² 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) WITNESSING OR RECORDING THE INTERVIEW/EXAMINATION

The examinee should consider filing a motion for protection if there are concerns about the competency of the patient 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 defacto deposition regarding the underpinnings of the examinee's claims.¹³ Many attorneys have sought leave for the examinee's attorney, a legal assistant or medical assistant, a treating physician, or an expert designated by the examinee to attend the examination. The plaintiff might argue that she merely wishes to have a representative present during the "interview" (as opposed to the examination or testing) to assure that the examiner only asks questions that are relevant to the condition for which the examination has been requested. In the alternative, the Plaintiff could request that the interview be recorded so that if there is a question about what was asked or the accuracy of the response that the examiner says was given, the court may make a ruling on the matter.¹⁴

¹² An interesting question in this regard is what would be the remedy if the examiner caused the plaintiff injury during the examination or exacerbated 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. Pract. & 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).

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)**.

¹⁴ See discussion below in footnote 12.

The opinions on such requests for protection 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). It has been the rare examination over the course of this author's thirty plus years of experience that was a purely scientific fact finding endeavor as opposed to a partisan exercise. 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 then would 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).¹⁵

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).

3) NUMBER OF EXAMINATIONS

While the court should be disinclined to subject the Plaintiff to multiple examinations, a Defendant should 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. Although the rule speaks only in terms of potentially allowing "a physical or mental examination," courts will probably be guided by

¹⁵ 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 lavolier 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.

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.¹⁶ 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 in the litigation, and the importance of the proposed discovery in resolving the issues.

¹⁶ See Tex. R. Civ. P. 190.3(b)(2) and comment 6 to Tex. R. Civ. P. 190.

4) 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. 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. 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.

E. THE ORDER

Medical and psychological examinations predictably can be controversial and emotional. Therefore, it is wise either to have a court order or a Rule 11 agreement that spells out the terms and conditions of the examination, clarifying the report requirement, expert designation, and deposition timetable.

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

As stated above, if an agreement cannot be reached regarding the terms, conditions and scope of the examination, the Defendant should timely file a motion for an order and the Plaintiff should file a motion for protection setting out how the examination should be limited and the bases for the requested protection. 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).

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.¹⁷

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

While an order is not required to activate the examiner's responsibility to produce a report, it is probably wise to obtain an order. The most efficient manner of doing this is to include in the order compelling the examination requirements regarding the delivery of a report. 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 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.

If the examinee requests a report, after the delivery of the report, upon request by the examining party, the examinee must produce a like report of any examination

¹⁷ 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.

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.¹⁸ This could be an important consideration in 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 with regard to 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 is 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.¹⁹ First, the

¹⁸ 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 to reduce opinions to reports or that the plaintiff produce them. The plaintiff has options in this regard.

¹⁹ 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.--

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. Houst. [14th Dist.] 2006, pet. denied).²⁰

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 (but 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

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).

²⁰ 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 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.

same as a testifying expert. Tex. R. Civ. P. 192.3(e) and comment 1 to Tex. R. Civ. P. 195.²¹ 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.

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.

²¹ *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). . .

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

Up to the point of discovery from and about the defense examining expert, the issues and strategies have centered on whether an examination should be conducted, by whom and under what terms and conditions. Once the parties enter into the discovery stage, the strategies shift to whether considerations about whether there is a desire to discredit and strike the expert's opinions prior to trial or whether to obtain ammunition to deconstruct the expert at trial.

It seems that many attorneys adopt the strategy of trying to discredit the expert prior to trial (probably in the hope of finessing a pre-trial settlement of the case) rather than gaining admissions and concessions that may be used to expose the biases and weaknesses of the expert's opinions at trial. The purpose of this paper is not to judge the comparative advantages and disadvantages of the two techniques, but merely to address the methods of optimizing the results under each.

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.²² In this connection, discovery regarding an examining physician's or psychologist's bias generally must come from informal investigation outside of formal discovery. 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.

²² *Russell v. Young*, 452 S.W.2d 434, 436 (Tex.1970).

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:

- (2) All appointment books maintained by relator during 1969;
- (3) All statements, listings, ledgers or other books showing the accounts receivable of relator during 1969;
- (4) All deposit slips or tickets showing deposits into bank accounts of relator during 1969;
- (5) All statements, listings, ledgers, journals, or other books showing receipt of payments, either in cash, by check or any other means during 1969;
- (6) All statements of account or bills for services rendered during 1969;
- (7) All accounting ledgers, journals or other books of account of relator maintained during 1969; and
- (8) 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’ 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.²³ 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

²³ See **Russell v. Young**, 452 S.W.2d 434 (Tex.1970) and **Walker v. Packer**, 827 S.W.2d 833 (Tex. 1992)

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), 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*).

H. **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.²⁴ 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 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**.

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*."²⁵ 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;

²⁴ 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. Carmichael**, 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).

²⁵ 36 Hous. L. Rev. 743 (1999), supra at footnote 9.

7. Reliance Upon Evidence Reasonably Relied Upon by Experts in the Field, Even if Hearsay;
8. Rule 403

Since all testifying experts are subject to the *Daubert/Robinson* criteria,²⁶ it stands to reason that if a medical/psychological examiner is designated as a testifying expert that such a putative expert too may be challenged.²⁷ 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,”*²⁸ 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 prepared 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

²⁶ Tex. R. Evid. 702.

²⁷ 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).

²⁸ *Supra* at footnote 1.

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 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.

I. TRIAL

Recall that if a medical/psychological examination is not sought of a party whose medical or psychological condition is in issue, the party's who 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.

Appendix 1



January 25, 2010

VIA REGULAR U.S. MAIL

Re: Cause No. _____; _____ v. _____; In the
____ Judicial District Court, _____ County, Texas

RULE 191.2 DISCOVERY DISPUTE INITIATIVE
REGARDING PROPOSED ADVERSE MEDICAL EXAMINATION

Dear _____:

I have your request for an adverse "neuro-psychological examination" of Plaintiff by **Dr. X, M.D.** Since you have not filed a Rule 204 motion for a physical or mental examination (the word "independent" is not used in the rule and probably is an inappropriate term under the circumstances. I prefer and will use the term, "adverse."), I have tentatively agreed to allow [my client] to undergo an examination, subject to us reaching an agreement on the following terms:

PROPOSAL

1. You have requested, and I have agreed, that Dr. X's examination of Plaintiff shall be limited to conducting a battery of recognized and generally accepted neuro-psychological tests "to test cognition." If this is incorrect, then by 3:00 p.m. on Friday, February 12, 2010 you and/or Dr. X shall provide to plaintiff's counsel a delineation of tests and/or examinations that are to be conducted and the good cause basis for such tests and examinations (See Rule 204.1(c) and (d)).

2. There will be neither physical nor invasive testing or examination of Plaintiff.
3. The defendant's adverse examining doctor will refrain from asking Plaintiff questions or interviewing Plaintiff regarding matters relevant to liability issues in this case. See Wright and Miller § 2236 p.500 (1994). Any information inadvertently obtained in this regard shall not be referred to in future discovery or at trial by Defendant, unless agreed.
4. Since Plaintiff will not be accompanied by an attorney to protect him from improper or abusive questioning, no verbal statements communicated by Plaintiff during the interview may be used as or relied upon as admissions at the time of trial or any hearing.
5. The defendant's adverse examining doctor will be the only healthcare professional participating in the examination and testing of Plaintiff.
6. The examination shall be audio-taped, by an individual associated with or by _____. The adverse examining physician and Plaintiff will both be equipped with Lavelier microphones and the audiographer will set up his equipment outside the examining room so that he does not physically interfere with the examination.

At the time of the defendant's designation, as set out in the agreed scheduling order, the defendant's adverse examining doctor shall produce a detailed written report that shall not only comply with the requirements set out in the agreed scheduling order regarding reports of testifying experts, but shall also comply with Tex. R. Civ. P. 204.2(a), including setting out the examiner's findings, results of all tests made, diagnoses and conclusions. The report shall also set out the factual basis for the examining doctor's opinions, conclusions, diagnoses and prognoses.

Subject to reaching an agreement on the above terms, Plaintiff is available to participate in a three hour battery of tests, beginning at ____ a.m. on _____, 2010 at Dr. X's office at _____.

If this proposed agreement is unacceptable, then of course you will need to file the appropriate motion. I trust, however, this can be accomplished expeditiously by agreement.

Please sign and return this letter, confirming your agreement to the above terms. Once signed, this agreement shall be filed with the court and constitute a Rule 11 Agreement in the above regards.

Thank you for your anticipated cooperation.

Very truly yours,

AVERSANO & GOLD

PAUL N. GOLD

PNG/bfj

APPROVED:

ATTORNEY FOR DEFENDANT