

## **Independent Medical Exams: Defense Strategies for Resisting Conditions and Limitations**

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WEDNESDAY, JANUARY 4, 2023

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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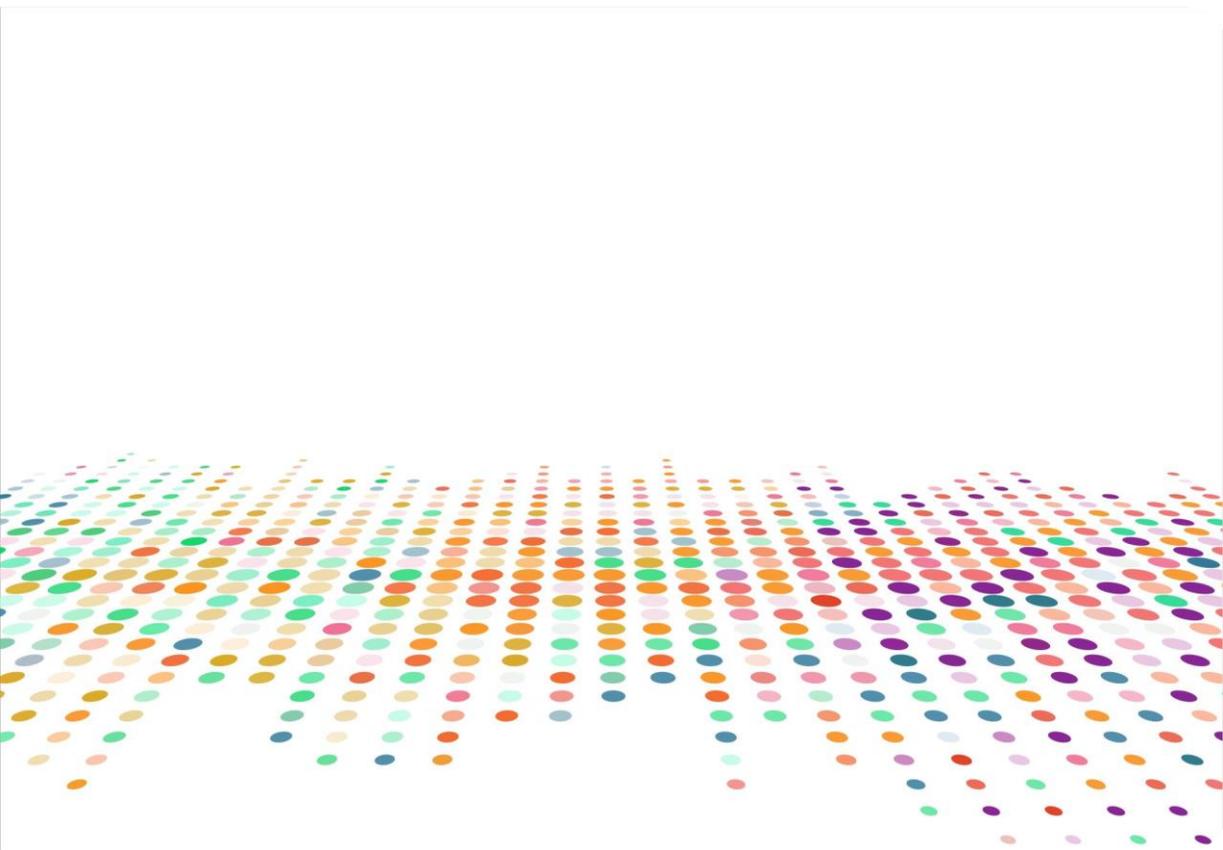
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# Independent Medical Examinations in Actual Practice

By Ray H. Littleton II

Equity Litigation Partner and Diversity Chair at  
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# How to Obtain an Independent Medical Examination

## Michigan Court Rule 2.311(a)

- Defendants in personal injury cases may seek an order to compel the plaintiff's medical examination pursuant to MCR 2.311. *Burris v KAM Transp Inc*, 301 Mich App 482, 484; 836 NW2d 727 (2013). According to MCR 2.311(a):
  - When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

## Federal Rules of Civil Procedure Rule 35

- (a) **Order for an Examination.**
- (1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.
- (2) *Motion and Notice; Contents of the Order.* The order:
  - (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and
  - (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

# Actual Litigation Practice

- In most cases, at least in my experience here in Michigan, if you want an IME done, just call the Plaintiff's attorney and let them know the dates and they will generally be agreeable to scheduling it.
- Every now and then, there will be an attorney who will want to place conditions on the Examination. For example, they may ask to be present, they may try to limit the number of Examinations, which records are provided, they try to limit the areas of the body that are examined, they may try to limit the duration of the examination, the kinds of questions the doctor can ask, etc.

# ***Burris v KAM Transp Inc*, 301 Mich App 482, 484; 836 NW2d 727 (2013).**

- In *Burris*, the plaintiff filed a third party motor vehicle negligence claim and later filed a separate first party no fault action claim. Throughout the course of discovery in the first party action, the plaintiff submitted to numerous IMEs. Subsequently, the defendants in the third party action sought plaintiff's IME. The "plaintiff indicated that she would not attend defendants' IMEs without a court order pursuant to MCR 2.311." The trial court denied the defendants' motion because plaintiff had already been required to submit to several IMEs regarding the same injury. On appeal, the decision was reversed.
- The court explained that, under MCR 2.311, the defendant needed to show (1) that plaintiff's mental or physical condition was in controversy, and (2) that good cause existed to order the IMEs. Because the plaintiff claimed "serious impairment of body function and/or permanent serious disfigurement," the court reasoned, "there is no dispute that plaintiff's mental and physical conditions are in controversy." The court then discussed whether there was "good cause" to order the plaintiff's IME. The court held that there was good cause because the IMEs were not duplicative or unnecessary and because **"defendants should be able to retain their own experts to assist in the defense of their own case."**

# Reason for the denial of an Examination: *Logan v Agricultural Society of Lenawee County*, 156 Mich 537; 121 NW 485 (1909)

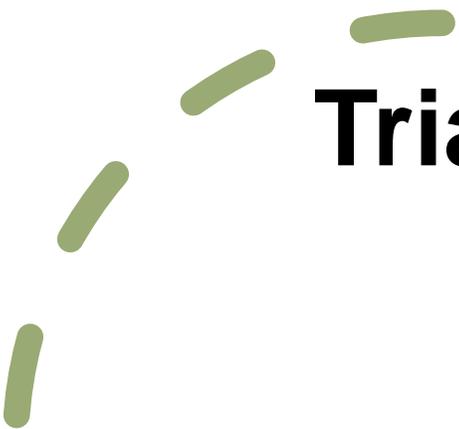
- In an old case in Michigan, *Logan v Agricultural Society of Lenawee County*, the court denied a medical examination for a plaintiff who was sitting in the bleachers set up at a horse racing event and the bleachers broke and she fell through to the ground on her back. Based on the case notes, the plaintiff's physician provided an affidavit that she was confined to her bed due to her injury and was extremely nervous and could not be examined by the defendant's experts.

# ***Fillingham v Michigan United Rys. Co., 154 Mich 233 1908***) Duplicative IMEs

- In another old case, an injured street car passenger submitted to two examinations by defendant's physicians. The court refused to require him to submit to another examination because it would be duplicative.

# ***Dierickx v Cottage Hosp. Corp.*, 152 Mich App 162 (1986); IME Overreach**

- In *Dierickx*, a hospital in a medical malpractice case was not allowed to compel a physical examination of the infant sisters of the first sister who was the plaintiff. The Plaintiff was born on May 20, 1980 and she had central nervous system damage, cerebral palsy, psychomotor retardation and severe mental retardation and seizure disorder. Her sister was born normal on June 22, 1981 and her third sister was born on October 3, 1983 and later had neurological abnormalities. Defendant tried to explore genetic causation issues as a defense but the court found that the physical condition, mental condition and blood relationship of the sisters was not in controversy in the litigation for the first sister. Plaintiff and her parents were though.



# Trial Testimony from IME Physicians

## Issues for questioning your IME expert at trial

- Education
- Certifications
- Experience
- Practice Specialty (ies)
- Peer Reviewed Publications
- Curriculum Vitae and admit it as an Exhibit
- Details of Medical Examination of Plaintiff and attempt to admit report
  - What records were reviewed; go through important records
    - Was a physical Examination Performed? Describe It
- What are your conclusions based upon the Examination and the reviewed records



# Questions?

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# IMEs in New York

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# Practical Considerations for IMEs

- ✓ Before we get too far into the nuts and bolts of an IME, the first question you need to address is whether or not conducting an IME is appropriate, and, if it is, when should the IME be conducted.
- ✓ Type of injury can be the deciding factor, in a leg off case no reason to conduct an IME.
- ✓ With purely subjective claims involving claimed psychological injury, take a good look before scheduling.
- ✓ Important to have a record review prior to requesting an IME.
- ✓ Critical that all medical records be provided for the record review.
- ✓ Be very careful about Workers Comp IMEs previously conducted.
- ✓ Remember that any reports relied upon by an expert are fair game.
- ✓ Not so for a treating provider, however, so be ready for those Comp IMEs at trial.
- ✓ Always have a verbal discussion with the provider once the record review is completed.
- ✓ Only then should the IME be noticed.



# Practical Considerations for IMEs

- ✓ Assuming that you have evaluated the damages in your case and decided to conduct an IME, the next step is to be prepared before the deposition.
- ✓ That means having a provider selected based on the records available and the records review either done or ready to go.
- ✓ There are always new providers or records identified during the plaintiff's deposition so request those authorizations and records both during the deposition, and thereafter by discovery demand.
- ✓ In New York, the current strategy for plaintiff's attorneys is to file the Notice of Availability immediately when the plaintiff's depo is completed.

# Pre-Deposition Preparation

- ✓ Do you have all medical records available or have you determined what you have is sufficient?
- ✓ Have you evaluated the specialty of the provider you will be using?
- ✓ How many IMEs will you conduct?
- ✓ What type of exams will you notice: FCE, Vocational Rehabilitation, Lifecare, IME?
- ✓ What order will you conduct them in?

Remember this may all change following the deposition.



# Post Deposition Considerations

- ✓ What additional providers did you learn about?
- ✓ Request authorizations and records.
- ✓ Authorizations can be restricted by body part claimed injured in the Interrogatories, but not restricted as to time. Make the motion if they persist.
- ✓ Assume the Notice of Availability for Examination pursuant to CPLR 3121, NYCRR 202.17(a) and case law will arrive shortly demanding that the IME be conducted, not less than 30 days nor more than 60 days from the notice.
- ✓ Be prepared to reach out to the plaintiff's attorney and work out a schedule. It is likely you need additional records and authorizations.
- ✓ Check for scheduling orders of the Court and their IME requirement.

# Setting up IMEs

## § 3121. Physical or mental examination

### Currentness

- ✓ (a) Notice of examination. After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination.



# Conducting the IME

- ✓ The plaintiff is generally allowed to have an observer attend the IME with him or her.
- ✓ Neither the observer nor the plaintiff is permitted, absent a court order, to have either an audio or video recording device.
- ✓ The provider will generally have a chaperone in attendance during all IME exams.
- ✓ It is critical to discuss with the provider or vendor the injuries or body parts the provider is being asked to examine.



# Conducting the IMEs

- ✓ With multiple exams scheduled, the order is often critical.
- ✓ Medical exams before FCE.
- ✓ FCE if necessary, following the medical exam.
- ✓ Vocational Rehabilitation following the FCE.
- ✓ Life Care last and generally done via records only and thus not disclosed until Expert Disclosures are required.



# Report Supplied to Parties

IME report supplied to the plaintiff's attorney following the IME.

(b) Copy of report. A copy of a detailed written report of the examining physician setting out his findings and conclusions shall be delivered by the party seeking the examination to any party requesting to exchange therefor a copy of each report in his control of an examination made with respect to the mental or physical condition in controversy.

It is VERY rare that an IME report is available to be disclosed within 45 days and the courts and attorneys are all aware of that issue.

Please check VERY CAREFULLY for typos before the report is exchanged.



# Expert Disclosure

## § 3101. Scope of disclosure

### (d) Trial preparation.

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.



# Expert Disclosure

- ✓ Expert disclosure is generally 30 days before trial.
- ✓ Not just for medical experts, but liability experts as well.
- ✓ Some judges now have 60 days for plaintiff's disclosures and 30 days for defendant disclosures as a surprise expert by plaintiff would likely be grounds for the defendant to have extra time to prepare for the trial and courts do not like moving trials.
- ✓ Disclose Identity of Expert, Subject Matter, Facts and Opinions and the qualifications of the expert.

# Objections to the Selected Expert

- ✓ In a recent case, the court ordered the defendant to select a different IME provider and ordered a protective order pursuant to CPLR 3103(a), precluding the defendant from using the provider of his selection.
- ✓ The judge was a recently elected plaintiff's attorney and the defendant attorney failed to submit an affidavit from the doctor in opposition, but still this is a bad look.
- ✓ A court in Rochester just months later denied a similar notion made in an attempt to preclude the same provider.



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Thank You!

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# IMEs and Restrictions

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## Rule 35(a) – The Federal Rule and Basis

- Court may order a party
- Whose mental or physical condition is in controversy
- To submit to a physical or mental examination
- By a suitably licensed or certified examiner
- Only on Motion for “good cause” and noticed
- Specify the time, place, manner, conditions, scope, and person who will perform the examination



## Rule 35(a) – The Federal Rule and Basis

- Many states base their IME/AME rules on Federal Rule 35
- Courts have interpreted the parameters differently
  - What is good cause?
  - What sorts of conditions can the examinee place on the examination/examiner



## *Schlagenhauf v. Holder* – SCOTUS on Rule 35

379 US 104 (1964)

- Discovery “is not a one-way proposition.” Issues cannot be resolved by a doctrine of favoring one class of litigants over another.
- The “good cause” and “in controversy” requirements are not met by mere conclusory allegations of the pleadings nor by mere relevance to the case. They require an affirmative showing by the movant that each condition is really and genuinely in controversy and that good cause exists for ordering each particular examination.
- Rule 35 requires “discriminating application by the trial judge,” who must decide whether the party requesting the examination has adequately demonstrated “in controversy” and “good cause”—which are necessarily related.

# *Schlagenhauf v. Holder* – SCOTUS on Rule 35

379 US 104 (1964)

- On the flip side, the Court stated that there are situations where the pleadings alone are sufficient to meet the requirements of “in controversy” and “good cause.”
- The Court’s examples:
  - A Plaintiff in a negligence action who asserts a mental or physical injury places that mental or physical injury clearly in controversy. This provides the Defendant with “good cause” for an examination to determine the existence and extent of such asserted injury.
  - Similarly, a Defendant who asserts a mental or physical condition as a defense to a claim places that condition at issue, allowing for an examination.
    - *E.G.*, an insanity defense.

# Recent Rulings from Louisiana

- LA C.C.P. art. 1464
  - When the mental or physical condition of a party, . . . is in controversy, the court in which the action is pending may order the party to submit to an additional medical opinion regarding physical or mental examination by a physician or to produce for examination the person in his custody or legal control, except as provided by law. . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
- Based on Federal Rule 35

## Prior Louisiana Rulings– Inconsistent Decisions

- *Henry v. Barlow*, 937 So.2d 895 (La. App. 3 Cir. 2006)
  - Plaintiff examinee potentially suffered from cognitive impairment
  - Appellate Court allowed Plaintiff's wife to be present for the examination
  - Appellate Court refused to allow Plaintiff's counsel to be present or to allow videotaping of the examination
  - “Requiring the videotaping of an IME would restrict the number of physicians willing to conduct a videotaped IME under such circumstances. If the Defendant's IME is allowed to be videotaped, then Defendant could urge that all of Plaintiff's examinations be videotaped as well, and so forth and so on. That is neither the intent nor the spirit of La. Code Civ. P. art. 1464.”

## Prior Louisiana Rulings– Inconsistent Decisions

- *Snapper Brown et al. v. Brennan Landry Moore et al.*, 19<sup>th</sup> Judicial District Court Docket Number 670237
  - Adult Plaintiffs both claims physical injuries, despite minor impact and little property damage, according to Defendants, and an Additional Medical Examination (new LA terminology) examination was warranted
  - Plaintiff requested that a family member of Plaintiffs be present during the exam
  - Cited to *Henry v. Barlow*, but came to a different conclusion
  - Ruled Plaintiff could have a third person present
  - Ruled Plaintiff could audio record the examination, but not video tape it

## Prior Louisiana Rulings– Inconsistent Decisions

- *Snapper Brown et al. v. Brennan Landry Moore et al.*, 19<sup>th</sup> Judicial District Court Docket Number 670237
  - Went up to the appellate court – *unpublished opinion* at 2020 CW 1285 (La. App. 1 Cir. 2021)
  - Majority of 5-judge panel reversed portions of trial court judgment allowing presence of a third person and videotaping of IME
  - No reasoning or guidance provided by either the majority or dissent

# The Louisiana Supreme Court Speaks Twice

- *Hicks v. USAA Gen. Indem. Co.*, 339 So.3d 1106 (La. 03/25/2022)
- Reviewed the meaning of “good cause” as a *res nova* question
- No dispute that Plaintiff’s neck and lumbar conditions “in controversy”
- Defendant denied an AME prior to trial.
- Defendants cited to *Schlagenhauf* (SCOTUS), asserting that Plaintiff’s putting his medical condition in controversy provided “good cause” for an additional medical examination—also asserting issues relative to wage losses and inconsistent medical testimony.
- Defendants noted the AME would be 20-30 minutes and not intrusive

# The Louisiana Supreme Court Speaks Twice

- *Hicks v. USAA Gen. Indem. Co.*, 339 So.3d 1106 (La. 03/25/2022)
- Plaintiffs countered that “good cause” must be shown and is not “acquired by right”
- Plaintiff pointed out that there had been two opinions issued already, though inconsistent, and a third opinion was unnecessary.
- Plaintiff also cited to *Schlagenhauf* for the proposition that balancing the interests involved weighed to the claims of Plaintiff.

# The Louisiana Supreme Court Speaks Twice

- *Hicks v. USAA Gen. Indem. Co.*, 339 So.3d 1106 (La. 03/25/2022)
- A basic premise of our system of justice is that both sides to a dispute stand on equal footing in gathering evidence and preparing for trial. The discovery rules are not ends in themselves, but are meant to aid in "the search for the truth."
- To that end, this Court has previously summarized the objectives of the Louisiana discovery process as "afford[ing] all parties a fair opportunity to obtain facts pertinent to the litigation," "discover[ing] the true facts and compel[ling] disclosure of these facts wherever they may be found," and "assist[ing] litigants in preparing their cases for trial."

# The Louisiana Supreme Court Speaks Twice

- *Hicks v. USAA Gen. Indem. Co.*, 339 So.3d 1106 (La. 03/25/2022)
- Article 1464 limits the extensive discovery provided by article 1422, as it balances considerations of "sanctity of the body and the right to privacy with considerations of fairness in the judicial quest for truth."
- The Court discussed how Art. 1464 was virtually identical to Fed. Rule 35 when originally enacted, and that Louisiana Courts have relied upon federal court interpretations as persuasive guides in the IME/AME context.

## The Louisiana Supreme Court Speaks Twice

- *Hicks v. USAA Gen. Indem. Co.*, 339 So.3d 1106 (La. 03/25/2022)
- Cited to *Schlagenhauf*, ruling that a party's condition is "in controversy" when a party asserts his mental or physical condition as a claim or defense to a claim. The claimed injuries to Plaintiff's neck, back, and arm put those squarely in controversy.
- The failure of the trial court to allow an AME with a physician of Defendants' choosing upset the careful balancing act that art. 1464 seeks to satisfy. "Good cause" existed for the AME.

# The Louisiana Supreme Court Speaks Twice

- *Hicks v. USAA Gen. Indem. Co.*, 339 So.3d 1106 (La. 03/25/2022)
- Declined to adopt the “less intrusive means” test of other jurisdictions (*e.g.*, Texas’ *Coates v. Whittington*), citing to Louisiana Federal Court decisions:
  - *Senegal v. Anderson*, No. 20-544, 2021 U.S. Dist. LEXIS 220138, 2021 WL 53182028, at 4 (M.D. La. Nov. 15, 2021)
  - *Knuth v. Reg. Transit Auth. of New Orleans*, No. 20-0396, 2020 U.S. Dist. LEXIS 214647, 2020 WL 6742800, at 2
  - *Johnson v. Jowin Express Inc.*, 15-1862, 2016 U.S. Dist. LEXIS 74968, 2016 WL 3200281, at 2 (W.D. La. 2016)
  - *Jackson v. Entergy Ops. Inc.*, 1998 U.S. Dist. LEXIS 752, 1998 WL 28272, at 2 (E.D. La. Jan. 26, 1998)
  - *Ferrell v. Shell Oil Co.*, 95-0568, 1995 U.S. Dist. LEXIS 17647, 1995 WL 688795, at 2 (E.D. La. Nov. 20, 1995)

# The Louisiana Supreme Court Speaks Twice

- *Hicks v. USAA Gen. Indem. Co.*, 339 So.3d 1106 (La. 03/25/2022)
- Pursuant to the above, we hold that "good cause" under Code of Civil Procedure article 464 requires that the moving party establish a reasonable nexus between the requested examination and the condition in controversy. In some circumstances, the pleadings alone may contain sufficient information to establish the reasonable nexus.

# The Louisiana Supreme Court Speaks Twice

- *Augustine v. Safeco Ins. Co. of Ore.*, 2021-CC-01753 (La. 10/21/2022)
- Trial court granted a Defense neuropsychological AME, but placing restrictions on the examination as requested by Plaintiff—to not go beyond the testing undertaken by Plaintiff’s neuropsychologist.
- The basic premise of our system of justice is that the parties are on equal footing in gathering evidence and preparing for trial, citing *Hicks*.
- Defendants contended the Plaintiff’s restrictions, as granted by the trial court, prevented a fair trial by disallowing their own potential favorable evidence.

# The Louisiana Supreme Court Speaks Twice

- *Augustine v. Safeco Ins. Co. of Ore.*, 2021-CC-01753 (La. 10/21/2022)
- “[A]ny decision which places undue restrictions on the health care provider's ability to perform the examination could frustrate the other party's ability to obtain relevant evidence.”
- “It must be presumed that doctors will conduct their physical examinations properly.”
- To rebut the presumption that a doctor would properly perform an examination, the party seeking restrictions or condition on the IME must show a special circumstance justifying the requested restrictions.

# The Louisiana Supreme Court Speaks Twice

- *Augustine v. Safeco Ins. Co. of Ore.*, 2021-CC-01753 (La. 10/21/2022)
- Provided a new framework for assessing AME/IME restrictions:
  - First, the initial burden of establishing good cause rests with the party seeking the independent medical examination.
  - Once that burden is satisfied, the court should presume that the examination will be conducted in a reasonable manner.
  - The burden then shifts to the party wishing to place restrictions on the additional medical examination to establish “special circumstances justifying the imposition of restrictions on the examination.”
- Also addressed the burden for requesting restriction:
  - “[T]he party may not rely on mere allegations or speculation, but should produce competent evidence establishing a need for restrictions and the harm which may result if such restrictions are not imposed.”