

## Is your spouse unstable? The need to know versus privacy rights

Elisa Reiter and Daniel Pollack | March 28, 2022



The pending case of In Re Grohman presents a classic dilemma. Larry Wegner sought court orders mandating a psychological evaluation of his wife, Sondra Grohman, in the context of a divorce proceeding. Does every family law matter justify a psychological evaluation?

Sondra Grohman filed for divorce. In Grohman, the Fourth District Court of Appeals issued an opinion Jan. 26, granting a stay of the trial court's order mandating the psychological evaluation of the wife. On Sept. 1, Ms.

Grohman filed a first amended petition asserting that her husband assaulted her, alleging that she had suffered bodily injury. One week later, she filed a second amended petition, asserting a claim against her husband for intentional infliction for emotional distress.

She alleged that her emotional distress was 'severe' and that she suffered from past mental anguish and would suffer from future mental anguish. While she amended her petition again on September 20th and 28th, her claims for assault and for intentional infliction of emotional distress remained.

In light of these allegations, on Oct. 7, Mr. Wegner filed a motion for psychological evaluation of his wife, seeking court orders mandating that Sondra Grohman submit to a psychological evaluation pursuant to TRCP 204.1. The trial court had entered a docket control order on Sept. 1, noting that the deadline for filing of dispositive motions was Sept. 30, and further, setting the case for trial Nov. 8. Wegner filed his Motion for Psychological Evaluation of his wife on Oct. 7 (outside the date established by the docket control order). Following a hearing on the motion Oct. 15, at which Mr. Wegner did not present any evidence, the trial court granted his motion, ordering Grohman to submit to a psychological evaluation by Nov. 2. Ms. Grohman then filed for mandamus protection, seeking a stay on that order.

Notwithstanding HIPAA, TRCP 204.1 governs requests for physical and mental examinations. The Court has the discretion to grant such examinations if good cause exists for the exam:

To show good cause, the movant must (1) show that the requested examination is relevant to issues in controversy and will produce or

likely lead to relevant evidence, (2) establish a reasonable nexus between the requested examination and the condition in controversy, and (3) demonstrate that the desired information cannot be obtained by less intrusive means.

In every case where such an exam is sought, the trial court must balance the need for the information to substantiate claims asserted by a party against that individual's right to privacy. Grohman argues that her husband failed to meet his burden of proof, in that he did not submit any evidence at the hearing on his motion. In response, Wegner argued that the Fourth DCA previously ruled that that a movant in a Rule 204.1 motion "must demonstrate that the information sought is required to obtain a fair trial and therefore necessitates intrusion upon the privacy of the person he seeks to have examined." In the Phoenix Services case, the 4th Court of Appeals held that:

privacy interests require, at minimum, that [the defendant] exhaust less intrusive means of discovery before seeking a compulsory mental examination. ... If, however, a plaintiff intends to use expert medical testimony to prove his or her alleged mental condition, that condition is placed in controversy and the defendant would have good cause for an examination.

The Fourth DCA distinguished its holding in Phoenix Services, finding that Grohman failed to designate an expert. Moreover, there are a number of less intrusive means of procuring the data, such as deposing the party's physicians or counselors, using depositions by written questions to procure records from third party providers, or reviewing expert witness reports. As Mr. Wegner failed to put on evidence at the

hearing on his motion that he had attempted to obtain the information through less intrusive means, he failed to establish that good cause existed for his motion. The result? The Fourth DCA conditionally granted mandamus, concluding that the San Antonio trial court abused its discretion by forcing Ms. Grohman to submit to a mental health examination without requiring Wegner to show good cause under Rule 204.1. The trial court was ordered to vacate its October 18, 2021 order granting that Ms. Grohman submit to a psychological examination within 15 days.

What other issues present? Ms. Grohman's failure to designate an expert could impact her claims. She may have won the battle, but not the war. If she does not designate an expert to substantiate her claims of severe mental anguish, can she recover on that claim? Lessons learned:

- Present evidence in support of any motion for physical or mental examination.
- Show why the data sought is necessary to the case.
- Demonstrate how you have attempted to procure the data through less intrusive means.

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