DIVISION CV-E GUIDELINES REGARDING
COMPULSORY MEDICAL EXAMINATIONS

CONDUCTED PURSUANT TO *FLA. R. CIV. P.* 1.360(a)(1)(A)
AND IF ORDERED 1.360(a)(1)(B), AS WELL AS 1.360(b) AND 1.390(b) & (c)[1]

In order to assist counsel for all parties seeking to invoke the privileges and protections afforded under Fla. R. Civ. P. 1.360m the Court herein addresses the most frequently disputed matters that are brought before the Court.

The examination under the Rule is a Compulsory Examination and not an Independent Examination. The physician or healthcare provider was not chosen by the Court. The examination must not be referred to during the actual examination or in front of the jury as an "independent medical exam" or "court ordered medical exam."

Request for, Objections to and Hearings on

Requests for an examination must set forth the time, place, manner, conditions, and scope of the examination as well as the name of and the qualifications of the person conducting the examination with specificity. **If examinations under these rules are requested such written request should be made no later than 150 days before the pretrial date to allow time for objections, hearings on same and an opportunity to reset the examination.** Objections to "Examination of Persons" under *Fla. R. Civ. P.* 1.360(a)(1)(A) must be filed no later than 30 days from the written request assuming service of process has occurred at least 15 days prior to the request being served. The objections must state the specific reasons for the objections. A hearing must be immediately requested on any objection filed. Failure to set the objection for immediate hearing will be deemed an "Abandonment of the Request" under the rules.

Examinations sought under *Fla. R. Civ. P.* 1.360(a)(1)(B) [non-physical condition] must be obtained with an order from this Court, or with a written agreement of all parties in the form of an agreed order submitted to this Court. Please make certain the time, place, manner, conditions and scope of the examination as well as the name of and the qualifications of the person conducting the examination are set forth with specificity. *See Maddox v. Bullard*, 141 So. 3d 1264 (Fla. 5th DCA July 11, 2014) [Order on psychological examination reversed because specifics were not set forth in the order including the "manner, conditions or scope of the examination thereby, in effect, giving the psychologist 'carte blanche'…"]. A form *Order Regarding Rule 1.360 Examination* is attached hereto as **Exhibit A** to facilitate the parties meet and confer process to either narrow the

[1] These "Guidelines" are published to assist trial counsel with issues that routinely come before the Civil Courts involving expert examinations of injured parties and discovery of those expert opinions. Counsels are not precluded from filing the appropriate motions and obtaining a hearing before the Court on a particular case should the facts of that case, in good faith, suggest that these standard provisions should not control.

issues/objections for immediate hearing or draft a proposed agreed order. A copy of said form order in Word format can be found on the Division CV-E website.[2]

The date and time of the examination must be coordinated with opposing counsel. If the attorneys cannot agree on a mutually convenient date for the examination to occur within 45 days of the request, the Court, upon written motion, will pick the date without consultation with counsels' calendars.

Location of Examination

Rule 1.360(a)(1)(A), Fla. R. Civ. P., governing physical examinations, do not restrict where the examination is to be performed, **except that it be set at a "reasonable place."**[3] *See, also McKenney v. Airport Rent-A-Car*, 686 So. 2d 771, 772 (Fla. 4th DCA 1997); and *Tsutras v. Duhe*, 685 So. 2d 979, 981 (Fla. 5th DCA 1997) (the rule authorizing medical examinations requires that the examination be set at a **reasonable place**). This is the only test governing the determination of the location of a CME found in Florida's rules of Civil Procedure. In 1997, Florida's Fifth District Court of Appeal was the first court DCA to address and decide: "whether a nonresident plaintiff must submit to an independent medical examination in Florida." *Tsutras v. Duhe*, 685 So. 2d 979, 980 (Fla. 5th DCA 1997). To date, *Tsutras* has not been disturbed, as this holding has no negative subsequent appellate history. *See also, Goeddel v. Davis*, 993 So. 2d 99, 100 (Fla. 5th DCA 2008) (where the Court clarified that it previously in *Tsutras*, rejected the argument that a nonresident plaintiff was required to submit to a medical examination in Florida and observed the rule authorizing medical examinations required only that the examination be set at a **"reasonable place" pursuant to Fla. R. Civ. P. 1.360.**

The *Tsutras* facts are instructive, namely: (a) the Plaintiff was a resident of Florida at the time of collision; (b) the Plaintiff was a resident of Florida at the time of filing the lawsuit (and later moved to another state); and (c) the locale of the Plaintiff's residence played no part in the collision itself.[4] *Id.* at 980. Upon these facts, the Fifth DCA reasoned as follows:

> To say that Tsutraes must give up a right (the same right as any other nonresident in so far as the location of an IME is concerned) because they moved from Florida after the accident is, in effect, **imposing a continuing Florida residence on the Tsutrases merely for the convenience of the alleged tort-feasor. There appears to be no authority for this position.**

[2] See website: https://www.jud4.org/Ex-Parte-Procedures-and-Dates

[3] The request shall specify a **reasonable** time, **place,** manner, conditions, and scope of the examination and the person or persons by whom the examination is to be made." Fla. R. Civ. P. 1.360(a)(1)(A) (emphasis added). The same is true for Rule 1.360(a)(1)(B), governing non-physical examinations.

[4] E.g. the collision "would have occurred as it occurred, and the action would have been filed as it was filed even if the [Plaintiffs] had been nonresidents visiting in Florida." *Id.*

> In this pending personal injury action, Dean Tsutras and Maria Tsutras appeal the trial court's order which compels Mr. Tsutras, now a Virginia resident, to attend **at his own expense** a physical examination in Orange County, Florida, where the underlying accident occurred and where the current action is pending.
>
> The question then, is where should the IME of a nonresident plaintiff be taken?

Tsutras v. Duhe, 685 So. 2d 979, 980 (Fla. 5th DCA 1997) (emphasis added). Accordingly, the Fifth DCA quashed the trial court's order directing the non-resident plaintiff to submit to an IME in Florida at defendant's convenience, and plaintiff's expense, **because it did not comply with the requirement of Fla. R. Civ. P. 1.360 that such an examination to be set at a "reasonable place."** The Fifth DCA directed the trial court to order either that the exam be held at a location with the appropriate medical specialties convenient to plaintiff, **or** require defendant to cover plaintiff's travel expenses.

Determination of **"reasonable place"** is based upon geographic proximity as well as undue burden and expense. See, e.g., the controlling case, *Tsutras v. Duhe*, 685 So. 2d 979 (Fla. 5th DCA 1997) (finding that the distance between Florida and Virginia is not a reasonable proximity); *Blagrove v. Smith*, 701 So. 2d 584, 585 (Fla. 5th DCA 1997) (finding that the distance from Hernando County, FL to Hillsborough County, FL is reasonable proximity); and *Liberatore v. MSC Cruises (USA), Inc.*, 268 F.R.D. 678 (S.D. Fla. 2010) (finding that a 14 mile difference is a reasonable proximity).

Generally, the examination should occur in the county where the case is being tried absent agreement of counsel to the contrary. An out-of-county examination must be approved by the Court after an evidentiary hearing and the proper record having been made. While requiring an in-county exam is not a hard and fast, inflexible rule, it is generally well within the Court's discretion. *See McKenny v. Airport Rent-A-Car*, 686 So. 2d 771 (Fla. 4th DCA 1997). Generally, if an out-of-county examination is to be conducted, the transportation and loss of work expense will have to be born by the party requesting the examination.

A plaintiff who was a resident of Florida and who has now moved out of State, or who was a guest in State may be requested to undergo a CME. Knowing that such a request is permitted under the rules and is a normal process of litigation, attorneys for the Plaintiff should notify opposing counsel when they learn that their client is going to move out of State to allow for an examination before the party moves. A request that an out-of-state examination be done if not agreed to, will require a hearing.

Multiple factors will be considered by the Court, not the least of which is whether or not opposing counsel was notified that plaintiff was permanently moving before he/she moved. While it may be an inconvenience and an expense to plaintiff to return to Florida for an examination, it is also an inconvenience and an expense to defendant to have the defendant's examining doctor have to travel to Florida for the trial to testify. Factors such as the cooperation of Plaintiff, timeliness of the requested examination, type and availability of the physician or expert needed for the

condition, whether it is an initial or subsequent or updated examination, whether it is in conjunctions with a deposition or mediation that is also scheduled, and the cost as well as who will be paying the cost will be considered and evaluated. *See, Goeddel v. Davis*, 993 So. 2d 99 (Fla. 5th DCA 2008) [clarifying *Tsutras* to say that the examination must be at a "reasonable place," not that it required Plaintiff to return to forum especially after he had already come to Florida for a deposition]; See also, *Tsutras v. Duhe*, 85 So. 2d 979 (Fla. 5th DCA 1997). If Plaintiff is out-of-state, the CME should be coordinated with a trip to Florida either for his/her deposition or mediation. The Court can award the reasonable expense of the travel if deemed appropriate.

Persons Who May Be Present at the Examination

One of Plaintiff's counsel or a representative thereof, a videographer, a court reporter, an interpreter, if necessary, a spouse, and/or if a minor, a parent or guardian, may attend the compulsory medial examination. No other attendees shall be present during the examination without specific order of the Court. *See Broyles v. Reilley*, 695 So. 2d 832 (Fla. 2d DCA 1997). Absent a court order stating otherwise, the Defendant and/or Defense Medical Examiner shall not interfere with the Plaintiff's right to have the above listed persons in attendance and record the Rule 1.360 examination, regardless of whether the examination is a physical, psychiatric or psychological one. *See U.S. Security Ins. Co. v. Cimino*, 754 So. 2d 697 (Fla. 2000) and *Byrd v. Southern Prestressed Concrete, Inc.*, 928 So. 2d 455 (Fla. 1st DCA 2006). Audio tape recordings are also permitted by Plaintiff. *See Palank v. CSX Transp. Inc.*, 657 So. 2d 48 (Fla. 4th DCA 1995). No other persons may attend without specific order of the Court. **Plaintiff's counsel will notify, in writing within 10 days of the examination, the names, relationship to the plaintiff, and number of persons who will be present so that an examining room of sufficient size can be reserved.** The presence of these third parties is premised upon a requirement that they will not interfere with the doctor's examination. *See Bacallao v. Dauphin*, 963 So. 2d 962 (Fla. 3d DCA 2007). **To that end, no person present may interrupt, enter or leave the examining room during the examination, or vocalize in any matter.** No communication vocally, in writing, or in any other manner may occur between or amongst the party being examined and anybody else in the examining room except the examiner or individuals that she/he deems necessary for the examination. Neither Plaintiff's counsel, nor anyone else permitted to be present, shall interject themselves into the examination unless the examiner seeks information not permitted by this Court's order.

If the person to be examined is not fluent in English and if the examiner is not fluent in the language of the person being examined a certified interpreter must be utilized to interpret the examination. The expense of the interpreter will be born by the party requesting the examination.

Neither Defendant's attorney nor any of Defendant's representatives may attend or observe, record or video the examination or the questioning. *See Chavez v. J&L Drywall*, 858 So. 2d 1266 (Fla. 1st DCA 2003); *Prince v. Mallari*, 36 So. 3d 128 (Fla. 5th DCA 2010); and *Ruiz v, Carpio*, 99 So. 3d 516 (Fla. 3d DCA 2011). The medical examiner shall not be entitled to any payment of an additional or accommodation fee from the Plaintiff or his counsel, simply because of the presence

of legally permitted third parties. The Court shall reserve ruling as to whether such costs, if imposed by an examiner, may be properly recoverable by the Defendant as a taxable cost, or otherwise awarded by the court.

Number of Examinations

Generally, a party will be limited to one examination in a specialty. A second examination will only be allowed upon good cause being shown. *Royal Caribbean Cruises, Ltd. v. Cox*, 974 So. 2d 462 (Fla. 3d DCA 2008). However, when there are multiple defendants, from separate accidents, and the allegation alleges that the injuries from the three accidents are "indivisible and superimposed upon one another and the plaintiff is unable to apportion her damages between them" each defendant may be entitled to a separate CME. *Goicochea v. Lopez*, 39 Fla. L. Weekly D1245b (Fla. 3d DCA June 11, 2014) [noting that plaintiff had 'pitted codefendant against codefendant."]

Videotape and Stenographic Record of Examination

As noted above, a person being examined may be accompanied by a videographer, certified court reporter, and/or interpreter. The recordings are the property of the legal representative of the person being examined and are not discoverable without further order of this Court. Only if the video is identified as impeachment material for use at trial or if the work product privilege is waived through action or words may the defense counsel obtain a copy. *See Maguire v. Pool Doctor of Palm Beaches, Inc.*, 23 So. 3d 865 (Fla. 4th DCA 2009) (*citing McGarrah v. Bayfront Medical Center, Inc.*, 889 So. 2d 923 (Fla. 2d DCA 2004). The party requesting the examination is not permitted to record or video tape the examination is not permitted to record or video tape the examination nor photograph the Plaintiff.

Items and Information to Be Brought

The person being examined is not required to bring any medical records, diagnostic films or studies or aids or reports with him/her.[5] *See Franklin v. Nationwide Mut. Fire Ins. Co.*, 566 So. 2d 529 (Fla. 1st DCA 1990) (requesting party must obtain records through normal discovery process). *See also Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855 (Fla. 1994) (proper for injured party to sign appropriately limited release for out-of-state medical records where subpoenas have been ignored). The person being examined should have a form of identification to verify their identity if requested. If a patient information sheet was forwarded to counsel for the party to be examined at least 10 business days before the examination, the party to be examined should bring the completed information sheet with them.

[5] If the original records, films or other diagnostic aids are in the actual possession of the party, or his/her guardian, being examined, those records would have to be produced at the time of the examination upon proper written request.

Written intake forms or histories that are deemed necessary by the examiner must be provided to counsel for the party to be examined no later than 10 days prior to the exam. These forms can be reviewed by counsel and completed by the party to be examined and **must be brought to the office of the examiner on the day of the exam.** The examining physician may question the party about entries made on the form regarding medical issues. *See Bozman v. Rogers*, 640 So. 2d 180 (Fla. 1st DCA 1994) (court could require party being examined to provide all "appropriate" information by filling out forms and answering questions at CME).

The party being examined will not be required to provide information as to when or why they retained counsel. Further, while they will not be required to respond to questions regarding who was at fault in the accident, they will need to respond to inquiry from the healthcare provider regarding the mechanics of the accident and their body movements within the vehicle or at the time of the incident. They will not be required to provide their medical history without limitation as to time frame and a work history with regard to the physical attributes and activities of their present and past occupations and hobbies.

Limitations on Examination

The examiner will be limited to non-invasive procedures unless a prior order from the court has been obtained and will further be limited to the extent of the examination that was set forth in the "Request for Examination" and/or Order allowing the examination. Neither an examination nor subsequent opinions resulting from the examination outside of the examiner's specialty will be permitted. If any diagnostic tests (i.e. x-rays, MRIs, CTs, etc.) are determined necessary by the Defendant's examiner, the Court shall rule on the need for any such tests prior to the tests being performed. Further, if such diagnostic tests are ruled necessary by the Court, such tests shall be limited solely to the part(s) of the body at issue in this case.

Times for Examination

While an expert's time is valuable, so is the time of the party who is being examined. The party being examined should arrive no later than 15 minutes before the start time of the examination. Examinations which have been scheduled for a specific time should commence within 30 minutes of that time. The party who was to be examined will be free to leave the examiner's office if she/he has not been called in for examination after having waited for 30 minutes from the published start time of the examination.

Expert Reports and Anticipated Discovery and Testimony

Subpoenas

Retained experts must be produced for discovery deposition without the necessity of a subpoena. If specific items are to be brought to the deposition by the retained expert witness, opposing counsel must be notified well in advance of the deposition.

All experts should be under subpoena for trial. The Court cannot force a witness to appear who is not under subpoena.

Written Reports

Pursuant to *Fla. R. Civ. P.* 1.360(b) a **"detailed written report"** will be issued by the examining physician or healthcare provider **and provided to all counsel no later than 30 days after the day of the examination.** As noted in the rule, "..if an examiner fails or refuses to make a report, the court may exclude the examiner's testimony if offered at the trial."

The party requesting the examination shall also provide to opposing counsel, at the time the examination is scheduled, no less than three dates when the examiner will be available for oral deposition. The witness shall be available to be deposed within ten (10) days of rendering the report. Should any of the dates be within 30 days of the examination, the above referred to CME written report shall be provided to deposing counsel no later than 5 days before the deposition date.

No report under *Fla. R. Civ. P.* 1.360 will be admissible at trial absent a stipulation by the parties.

Opinions Not Contained in Written Reports

Experts rendering opinions under this rule will be prohibited from expressing opinions, diagnostic impressions, causations opinions and other conclusions that are not contained within the written report. Any changes of opinions or conclusions based on new information must be made known to opposing counsel immediately, a revised or supplemental report provided and dates for updated depositions must also be provided. At trial, failure to have taken all immediate, timely and reasonable steps to advise opposing counsel of changes in expert's opinions or conclusions will mitigate against allowing such testimony. *See Office Depot v. Miller*, 584 So. 2d 587 (Fla. 4th DCA 1991).

HIPAA Requirements

All protected health information generated or obtained by the examiner shall be kept in accordance with HIPAA requirements and shall not be disseminated by the examiner or defense counsel to any person or entity not a party to this case without a specific order from this Court. Once the instant litigation has concluded, the examiner may destroy the file.

Expert Fees and Charges

The Court will not require counsel to tender fees for discovery of trial testimony in advance of or as a condition of the examiner appearing. However, the Court does require full payment to be remitted to the examiner no later than 10 business days from receipt of the invoice from the examiner's office.

The retaining party is free to compensate an expert witness any amount they deem appropriate or any amount which they have agreed by contract to pay. The Court will only require opposing counsel to pay a reasonable fee for the time reserved or the time used whichever is less. If counsel and the examiner can agree on such a fee, that fee will apply. If no agreement can be reached, the Court will, upon proper motion and hearing and notice to all parties of interest, including the examiner, establish a reasonable fee for the services. In some cases, this may involve an evidentiary hearing as to the reasonable amount of the fee and the time expended. Be sure to advise the Judicial Assistant as to how much time will be needed. See Fla. R. Civ. P. 1.390(c).

The Court gratefully acknowledges that these Guidelines were primarily prepared by the Honorable John Kest and previously adopted, with minor changes, by the 9th Circuit Court Civil Division; this Court has made further revisions.