GUIDELINES FOR COUNSEL REGARDING
COMPULSORY MEDICAL EXAMINATIONS (CME)
CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360(A)(1)(A)
& IF ORDERED (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. 1.360, the Court herein attempts to address the most frequently disputed matters that are brought before the Court.

"Independent" vs. Examination Requested by Defense

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 in front of the jury as an "independent 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 some specificity. If examinations under these rules are requested such written request should be made no later than 70 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) must be obtained with an order from this Court, or with a written agreement of all parties. 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 some specificity. *See*, *Maddox v. Bullard*, 39 Fla. L.

[1] These "Guidelines" are published to assist trial counsel with issues that routinely come before this Court involving expert examinations of injured parties and discovery of those expert opinions. Hours of hearing time per year are consumed addressing the same "objections" for the same stated reasons despite the existence of controlling case law. Counsel 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.

Weekly D1438 (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' …."]

The Examination

The date and time of the examination must be coordinated with opposing counsel. If the attorneys can not agree on a mutually convenient date for the examination to occur within 20 days of the request, the Court, upon written motion, will pick the date without consultation with counsels' calendars.

Location of Examination

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

Plaintiffs who were residents of Florida and who have now moved out of the State, or who were guests in the 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 plaintiffs should notify opposing counsel if they learn that their clients are going to be moving out of state to allow for an examination before the party moves. A request that an examination be done out of state, if not agreed to, will require a hearing.

Multiple factors will come into play in the Court's decision, not the least of which is whether or not the clients notified opposing counsel that they were permanently moving before they moved. While it may be an inconvenience, and an expense to the plaintiff to return to Florida for an examination, it is also an inconvenience and an expense to the defendant to have the defendant's examining doctor have to travel to Florida for the trial to testify. Factors such as the cooperation of the 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 conjunction with a deposition or mediation that is also scheduled, and the cost involved as well as who will be paying the costs will have to 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 the Plaintiff is out of State, the CME should be coordinated with the 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, and/or, if a minor, a parent or guardian may attend the compulsory medical examination. *See Broyles v. Reilley*, 695 So. 2d 832 (Fla. 2d DCA 1997). Audio tape recordings are also permitted by the 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. The plaintiff's counsel will notify, in writing, the names, position relative 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.

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. 3rd 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. 3rd 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. The party requesting the examination is not permitted to record or video tape the examination.

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.[2] *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) (appropriate 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 seven (7) business days before the date for the examination, the party to be examined should bring the completed information sheet with them.

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 seven (7) 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 be not be required to respond to questions regarding who was a 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 be required to provide their medical history without limitation as to timeframe involved and a work history with regard to the physical attributes and activities of their present and past occupations and hobbies.

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 borne by the party requesting the examination.

Limitations on Examination

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[2] 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.

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.

Times for the 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 the examination after having waited for 30 minutes from the published start time of the examination.

Expert Reports and Anticipated Discovery and Testimony

Subpoenas & Depositons

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 14 business 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." 1.360(b)(1)

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. Should any of the dates be within 14 days of the examination the above referred to 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, causation 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 experts opinions or conclusions will mitigate against allowing such testimony. *See Office Depot v. Miller*, 584 So. 2d 587 (Fla. 4th DCA 1991).

Expert Fees and Charges

The Court will not require counsel to tender fees for discovery or 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).