

GUIDELINES REGARDING COMPULSORY MEDICAL EXAMINATIONS CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360(a)(1)(A) AND 1.360(B)

DIVISION 02, VOLUSIA COUNTY – JUDGE KATHRYN D. WESTON

In order to assist counsel and parties seeking to invoke the privileges and protections afforded under Rule 1.360 of the Florida Rules of Civil Procedure for a compulsory medical examination, the Court has developed these “guidelines” for dealing with the most frequently disputed matters brought before the Court regarding these examinations. Many hours of hearing time are consumed addressing the same disputes and objections, for the same stated reasons, despite the existence of controlling case law. These guidelines do not preclude the filing of appropriate motions and obtaining a hearing before the Court should the facts, in good faith, suggest that these guideline provisions should not control.

The examination under Rule 1.360 is a compulsory examination, and not an “independent” examination. The physician or healthcare provider is not chosen by the Court, but by one of the parties. Thus, the examination should not be referred to as an “independent” medical examination in the presence of a jury.

Requests for, Objections to, and Hearings

Requests for an examination must be in writing, and set forth with reasonable specificity 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. **Such written requests should be made no later than 70 days before docket sounding** in order to allow time for objections, hearings on same, and an opportunity to reschedule the examination. Objections to “Examination of Persons” under Rule 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 objection must state the specific reason(s) for the objection. A hearing must be immediately requested on any objection filed. Failure to immediately set the objection for hearing will be deemed an abandonment of the objection.

Psychological or Psychiatric Examinations sought under Rule 1.360(a)(1)(B) (non-physical exams) must be obtained by order from the Court, or pursuant to written agreement of all parties. This request must set forth with reasonable certainty 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.

The Examination

The date and time of the examination must be coordinated with opposing counsel/party. If there is no agreement as to a mutually convenient date for the examination to occur within 60 days of the request, the Court, upon written motion, may select the date without consultation with counsels’ calendars.

Examinations should ordinarily occur in the county where the case is being tried. Absent agreement of the parties, out-of-county examinations must be approved by the Court after an evidentiary hearing and the proper record having been made. Generally, if out-of-county examinations are to be conducted, the transportation and loss of work expense will be borne by

the party requesting the examination.

Persons Who May be Present During 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. No other persons may attend without specific order of the Court. At least seven (7) days prior to the examination, Plaintiff must provide, in writing, of the names of attendees, their relationships to the Plaintiff, and the total number of persons who will be present, so that an examining room of sufficient size can be reserved. No person present during the examination may interrupt, enter or leave the room, 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 anyone else in the examining room except the examiner or individuals that she/he deems necessary for the examination.

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 the Court.

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. However, if the original records, films or other diagnostic aids are in the actual possession of the person to be examined or his/her guardian, those records shall be produced at the time of the examination upon proper written request. 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 person to be examined at least seven (7) business days before the date for the examination, the person 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 person to be examined no later than seven (7) days prior to the exam. These forms can be reviewed by counsel and completed by the person 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 person with respect to entries made on the form regarding medical issues.

The person being examined will not be required to provide information as to when or why counsel was retained. Further, while they will not be required to respond to questions regarding who was at fault in the accident, they must respond to inquiry from the healthcare provider regarding the mechanics of the incident/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 time frame 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 party requesting the examination shall bear this cost.

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.

Times for the examination

While an expert’s time is valuable, so is the time of the person who is being examined. The person being examined must 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 person who was to be examined is 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 scheduled start time of the examination.

Expert Reports and Anticipated Testimony

Subpoenas

Retained experts must be produced for discovery deposition without the necessity of a subpoena. All experts should be under subpoena for trial. The Court will not require a witness who is not under subpoena to appear for trial.

Written Reports

Pursuant to Rule 1.360 (b), Fla. R. Civ. P., a “detailed written report” must 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.” *Id.*

The party requesting the examination shall 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 Rule 1.360 (b), Fla. R. Civ. P., 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. The party requesting the examination shall immediately advise opposing counsel of any change of opinions or conclusions based on new information. In addition, a supplemental report must be promptly provided along with dates for an updated deposition. 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.

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 20 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 contractually agreed to pay. The Court will 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.