

ITEM 7.00 | CHAPTER INTRO

Fla. R. Civ. P. 1.360 provides that a party may request that any other party submit to an examination by a qualified expert when the condition that is the subject of the requested examination is in controversy and the party submitting the request has good cause for the examination. The party making the request has the burden to show that the rule's "good cause" and "in controversy" requirements have been satisfied.¹ Verified pleadings or affidavits may be sufficient to satisfy the rule's requirements instead of an evidentiary hearing. The party making the request also must disclose the nature of the examination and the extent of testing that may be performed by the examining physician.² Although the examination may include invasive tests, the party to be examined is entitled to know the extent of the tests, in order to seek the protection of the court in providing for reasonable measures so that the testing will not cause injury. A party requesting a compulsory medical examination is not limited to a single examination of the other party; however, the court should require the requesting party to make a stronger showing of necessity before the second request is authorized.³ A plaintiff who has sued multiple defendants, as multiple tortfeasors, may be subject to separate examinations by each defendant.⁴

Rule 1.360 does not specify where the examination is to be performed. The Rule requires that the time, place, manner, conditions, and scope be "reasonable." The determination of what is reasonable depends on the facts of the case and falls within the trial court's discretion under *McKenney v. Airport Rent-A-Car, Inc.*⁵ Rule 1.360 is based on Fed. R. Civ. P. 35, which has been interpreted as permitting the trial court to order the plaintiff to be examined where the trial will be held because this was the venue selected by the plaintiff and it would make it convenient for the physician to testify. In *McKenney*, an examination of the plaintiff in the county in which the trial was to be held was not an abuse of discretion, even though the plaintiff resided in a different county. In *Tsutras v. Duhe*,⁶ it was held that the examination of a nonresident plaintiff, who already had come to Florida at his expense for his deposition, should either be at a location that had the appropriate medical specialties convenient to the nonresident plaintiff, or the defense should be required to cover all expenses of the plaintiff's return trip to Florida for examination. In *Goeddel v. Davis, M.D.*⁷ a trial court did not abuse its discretion by compelling the plaintiff, who resided in another state, to submit to a compulsory medical examination in the forum



state where the compulsory medical examination was to be conducted during the same trip as a deposition the plaintiff was ordered to attend, and the defendants were ordered to contribute to the cost of the plaintiff's trip. In *Blagrove v. Smith*,⁸ a Hernando County trial court did not abuse its discretion by permitting a medical examination in neighboring Hillsborough County because of the geographical proximity of the two counties. However, a trial court did abuse its discretion where the court sanctioned a plaintiff with dismissal after finding the plaintiff willfully violated a court order in failing to attend a second CME despite the fact that the plaintiff had moved to a foreign state, advised counsel two days prior that he was financially unable to attend, and filed a motion for protective order with an affidavit detailing his finances and stating he had no available funds or credit to travel to Florida. *Littlefield v. J. Pat Torrence*.⁹

The discovery of the examination report and deposition of the examiner for use at trial is permissible under Rule 1.360, even though the examination was prepared in anticipation of litigation by an expert who was not expected to be called at trial. *Dimeglio v. Briggs-Mugrauer*¹⁰ involved a claim for uninsured motorist benefits. The insurance contract provided that the claimant would consent to an examination by the insurer's chosen physician if a claim was filed. Before initiation of the lawsuit, the insurer scheduled a medical examination that was attended by the claimant, and the examiner confirmed that the claimant had suffered injury. After suit was filed, the plaintiff sought to take the videotape deposition of the examiner for use at trial. The insurer filed a motion for a protective order, claiming that the examination and report were protected as work product, and the trial court agreed. The *Dimeglio* court reversed, holding that although the examination was prepared in anticipation of litigation, Rule 1.360 applied, and the insurer could not claim a work product privilege for a physician examination of the plaintiff by the insurance company's chosen physician.

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges



Footnotes

¹ *Russenberger v. Russenberger*, 639 So. 2d 963 (Fla. 1994); *Olges v. Dougherty*, 856 So. 2d 6 (Fla. 1st DCA 2003). Once the mental or physical condition ceases to be an issue or “in controversy,” good cause will not exist for an examination under Rule 1.360, and *Hastings v. Rigsbee*, 875 So. 2d 772, (Fla. 2d DCA 2004).

² *Schagrin v. Nacht*, 683 So. 2d 1173 (Fla. 4th DCA 1996).

³ *Royal Caribbean Cruises, Ltd. v. Cox*, 974 So. 2d 462, 466 (Fla. 3d DCA 2008).

⁴ *Goicochea v. Lopez*, 140 So. 3d 1102 (Fla. 3d DCA 2014).

⁵ 686 So. 2d 771 (Fla. 4th DCA 1997). See also *Leinhart v. Jurkovich* 882 So. 2d 456 (Fla. 4th DCA 2004) where request for CME 10 days before trial was denied and upheld on appeal as being within Trial Court’s discretion.

⁶ 685 So. 2d 979 (Fla. 5th DCA 1997).

⁷ 993 So. 2d 99, 100 (Fla. 5th DCA 2008).

⁸ 701 So. 2d 584 (Fla. 5th DCA 1997).

⁹ See *Littelfield v. J. Pat Torrence* 778 So. 2d 368 (Fla. 2d DCA 2001). See also *Wapnick v. State Farm Mutual Automobile Insurance Co.*, 54 So. 3d 1065 (Fla. 4th DCA 2011) (requiring plaintiff to travel approximately 100 miles from county of residence where defendant offered to reimburse travel expenses, although reversing denial of coverage).

¹⁰ 708 So. 2d 637 (Fla. 2d DCA 1998).

