

ITEM 7.02 | ISSUE 2

Issue 2:

Who may accompany the examinee to a compulsory examination, and may the examination be videotaped, audiotaped, or recorded by a court reporter?

Resolution:

Rule 1.360 (a) (3) permits the trial court, at the request of either party, to establish protective rules for compulsory examinations. The general rule is that attendance of a third party at a court-ordered medical examination is a matter within the sound discretion of the trial judge.¹³ A plaintiff may request that a third party attend an examination to (1) accurately record events at the examination; (2) “assist” in providing a medical history or a description of an accident; and (3) validate or dispute the examining doctor’s findings and conclusions.¹⁴ The burden of proof and persuasion rests with the party opposing the attendance to show why the court should deny the examinee’s right to have present counsel, a physician, or another representative.¹⁵

Without a valid reason to prohibit the third party’s presence, the examinee’s representative should be allowed.¹⁶ In making the decision about third-party attendance at the examination, the trial court should consider the nature of the examination, the function that the requested third party will serve at the examination, and the reason why the examining doctor objects to the presence of the third party. A doctor must provide a case-specific justification to support an objection in an affidavit that the presence at the examination of a third party will be disruptive.¹⁷ Once this test is satisfied, the defendant must prove at an evidentiary hearing that no other qualified physician can be located in the area who would be willing to perform the examination with a third party (court reporter, attorney, or other representative) present.¹⁸ This criteria applies to compulsory examinations for physical injuries and psychiatric conditions.¹⁹

The rationale for permitting the presence of the examinee’s attorney is to protect the examinee from improper questions unrelated to the examination.²⁰ Furthermore, the examinee has a right to preserve by objective means, the precise communications that occurred during the examination. Without

a record, the examinee will be compelled to challenge the credibility of the examiner should a dispute arise later. "Both the examiner and examinee should benefit by the objective recording of the proceedings, and the integrity and value of the examination as evidence in the judicial proceedings should be enhanced."²¹ The rationale for permitting a third party's presence or recording the examination is based on the examinee's right of privacy rather than the needs of the examiner. If the examinee is compelled to have his or her privacy disturbed in the form of a compulsory examination, the examinee is entitled to limit the intrusion to the purpose of the examination and to have an accurate preservation of the record.

Courts may recognize situations in which a third party's presence should not be allowed. Those situations may include the existence of a language barrier, the inability to engage any medical examiner who will perform the examination in the presence of a third party, the particular psychological or physical needs of the examinee, or the customs and practices in the area of the bar and medical profession.²² However, in the absence of truly extraordinary circumstances, a defendant will not be able to satisfy its burden of proof and persuasion to prevent the attendance of a passive observer.²³ It has been held that a court reporter's potential interference with the examination or inability to transcribe the physician's tone or facial expressions are invalid reasons.²⁴ The examiner's refusal to perform the examination in the presence of third parties also is an insufficient ground for a court to find that a third party's presence would be disruptive.²⁵ Excluding a court reporter because of a claimed chilling effect on physicians and the diminishing number of physicians available to conduct examinations also is insufficient.²⁶ However, it would take an exceptional circumstance to permit anyone other than a videographer or court reporter and the plaintiff's attorney to be present on behalf of the plaintiff at a Rule 1.360 compulsory examination.²⁷ For example, defendants in a personal injury lawsuit were not entitled to have a videographer record the examination even though the examinee had her own videographer present. *Prince v. Mallari*.²⁸ The Second and Third DCAs follow this opinion.

In most circumstances, the examinee's desire to have the examination videotaped should be approved. There is no reason that the presence at an examination of a videographer should



be treated differently from that of a court reporter. A trial court order that prohibits videotaping a compulsory examination without any evidence of valid, casespecific objections from the complaining party may result in irreparable harm to the requesting party and serve to justify extraordinary relief.²⁹ Similarly, an audiotape may be substituted to ensure that the examiner is not asking impermissible questions and that an accurate record of the examination is preserved.³⁰ Video or audio tape of the CME obtained by the examinee's attorney should be considered work product as long as the recording is not being used for impeachment or use at trial. See *McGarrah v. Bayfront Medical Center*.³¹

In *McClennan v. American Building Maintenance*,³² the court applied the rationale in *Toucet*, *supra*, and *Bartell*, *supra*, to workers' compensation disputes, and held that third parties, including attorneys, could attend an independent medical examination given under F.S. § 440.13(2)(b).

In *U.S. Security Ins. Co. v. Cimino*,³³ the Florida Supreme Court held that, for a medical examination conducted under F.S. § 627.736(7) for personal injury protection benefits, "the insured should be afforded the same protections as are afforded to plaintiffs for Rule 1.360 and workers' compensation examinations."

There are limitations on discovery of an examiner performing a CME. For example, an examiner will not be compelled to disclose CME reports of other non-party examinees or to testify about findings contained in those reports.³⁴ In *Allstate Insurance Co. v. Boecher*,³⁵ the Supreme Court held that neither *Elkins v. Syken*³⁶ nor Rule 1.280(b)(4)(A) prevents discovery of a party's relationship with a particular expert when the discovery is propounded directly to the party. In *Boecher*, the court held that the jury was entitled to know the extent of the financial connection between the party and the expert witness. *Boecher* and *Elkins* have spawned dozens of cases on the general issue of medical experts and their bias. However this section deals exclusively with the CME expert. (Commonly referred to by the Plaintiff's Bar as the "Insurance Company's Doctor.").

Fla. R. Civ. P. 1.280(b)(5) establishes the parameters of discovery directed to a non-party retained expert. It is critical that the trial judge read the Rule in every instance

and not get distracted by issues that simply do not relate to CME experts.

(5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.

2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.

3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.

4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to

compile or produce nonexistent documents....

In *Gramman v. Stachkunas*, 750 So. 2d 688 (Fla. 5th DCA 1999), the Fifth District quashed an order requiring a medical expert to disclose his billing records and payments for past medical examinations and 1099 forms from insurance companies, which had referred matters to the expert for a medical opinion. The Court stated:

[T]he discovery order which compels [the defendant] and the independent medical expert to answer interrogatories regarding the expert's financial remuneration for past examinations, depositions, and courtroom testimony must be quashed. The trial court departed from the essential requirements of law in compelling this discovery, and in requiring the expert to produce his billing/payment records and 1099s regarding his prior work as an expert in other cases.

A subpoena may not be used to secure discovery of financial or business records concerning a litigation expert unless "unusual or compelling circumstances" have been shown. *Smith v. Eldred*, 96 So. 3d 1102, 1104 (Fla. 4th DCA 2012); *Miller v. Harris*, 2 So. 3d 1070, 1073 (Fla. 2nd DCA 2009).

There are additional third party privacy concerns for the Court to consider when deciding CME Examiner bias discovery issues. Section 456.057(7)(a), Florida Statutes requires notice to patients whose medical records are sought before issuance of a subpoena for the records by a Court of competent jurisdiction. Simply redacting the non-party patients' information is not enough. *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012). Consider Judge May's concurring opinion in *Coopersmith* relative to the Court's frustration with this type of discovery practice.

I concur with the majority in its reasoning and result, but write to express my concern over recent discovery issues we have seen. We are increasingly reviewing orders on discovery requests that go above and beyond those relevant to the case. Attorneys are propounding interrogatories and making requests for production, which require physicians to divulge private, confidential information of other patients, and to "create" documents.



In an effort to discredit medical witnesses for the other side, attorneys for both plaintiffs and defendants are exceeding the bounds of the rules of civil procedure, confidentiality laws, and professionalism by engaging in irrelevant, immaterial, burdensome, and harassing discovery. Parameters have already been expanded to allow both sides to explore financial interests of medical witnesses and the volume of referrals to those witnesses. See *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). And now, attempts to expand the scope of that discovery to treating physicians as well as retained experts are usurping the limited resources of our trial courts. This not only creates unnecessary burdens on our over-strained justice system, it further taints the public's view of our profession.

For a more detailed discussion of expert witness discovery see Chapter Eleven of this handbook.

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

Footnotes

¹³ *Bartell v. McCarrick*, 498 So. 2d 1378 (Fla. 4th DCA 1986).

¹⁴ *Wilkins v. Palumbo*, 617 So. 2d 850 (Fla. 2d DCA 1993).

¹⁵ *Broyles v. Reilly*, 695 So. 2d 832 (Fla. 2d DCA 1997); *Wilkins*; *Stakely v. Allstate Ins. Co.*, 547 So. 2d 275 (Fla. 2d DCA 1989).

¹⁶ See *Broyles* (videographer and attorney); *Palank v. CSX Transportation, Inc.*, 657 So. 2d 48 (Fla. 4th DCA 1995) (in wrongful death case, mother of minor plaintiffs, counsel, and means of recording); *Wilkins* (court reporter); *McCorkle v. Fast*, 599 So. 2d 277 (Fla. 2d DCA 1992) (attorney); *Collins v. Skinner*, 576 So. 2d 1377 (Fla. 2d DCA 1991) (court reporter); *Stakely* (court reporter); *Bartell* (representative from attorney's office); *Gibson v. Gibson*, 456 So. 2d 1320 (Fla. 4th DCA 1984) (court reporter).

¹⁷ See *Wilkins*, *supra*.

¹⁸ See *Broyles*, *supra*.

¹⁹ *Freeman v. Latherow*, 722 So. 2d 885 (Fla. 2d DCA 1998); *Stephens v. State of Florida*, 932 So. 2d 563 (Fla. 1st DCA 2006) (the DCA held that the trial court did not deviate from the law when it denied plaintiff's



request that his expert witness be permitted to accompany him on a neuropsychological exam by a state-selected medical professional).

²⁰ See *Toucet*, supra.

²¹ *Gibson v. Gibson*, 456 So. 2d at 1320, 1321 (Fla. 4th DCA 1984).

²² See *Bartell*, supra.

²³ See *Broyles*, supra; See *Wilkins*, supra.

²⁴ See *Collins*, supra.

²⁵ See *McCorkle*, supra; See *Toucet*, supra.

²⁶ *Truesdale v. Landau*, 573 So. 2d 429 (Fla. 5th DCA 1991). See also *Broyles*, supra.

²⁷ See *Broyles*, supra.

²⁸ 36 So. 3d 128 (Fla. 5th DCA 2010).

²⁹ *Lunceford v. Florida Central Railroad Co., Inc.*, 728 So. 2d 1239 (Fla. 5th DCA 1999).

³⁰ *Medrano v. BEC Const. Corp.*, 588 So. 2d 1056 (Fla. 3d DCA 1991).

³¹ *McGarrah v. Bayfront Medical Center*, 889 So. 2d 923 (Fla. 2d DCA 2004).

³² 648 So. 2d 1214 (Fla. 1st DCA 1995).

³³ 754 So. 2d 697, 701 (Fla. 2000).

³⁴ *Crowley v. Lamming*, 66 So. 3d 355 (Fla. 2d DCA 2011); *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012) (sustaining objections to interrogatories directed to the examiner's "opinions and basis of the opinions" of other non-party examinees as same constituted an intrusion into those non-parties' privacy rights).

³⁵ 733 So. 2d 993 (Fla. 1999).

³⁶ 672 So. 2d 517 (Fla. 1996).

