

STATE BY STATE COMPENDIUM OF  
STATE RULES DEALING WITH  
MEDICAL EXAMINATIONS  
UNDER RULE 35  
OR SIMILAR PROVISIONS

Compiled and Submitted by the Utah Defense Lawyers Association 3/26/08

# ALABAMA

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AL R RCP Rule 35  
ARCP Rule 35

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C

Code of Alabama Currentness

Alabama Rules of Court

Alabama Rules of Civil Procedure

V. Depositions and Discovery

## → Rule 35. Physical and Mental Examination of Persons

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Examiner.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and, if an examiner fails or refuses to make a report, the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

AL R RCP Rule 35  
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(dc) District Court Rule. Rule 35 does not apply in the district courts.

[Amended effective October 1, 1995.]

COMMITTEE COMMENTS ON 1973 ADOPTION

Rule 35(a). The mental or physical condition of a party or a person in custody of a party can be made the basis of examination by a physician only upon a motion and good cause shown. Further, the physical or mental condition must be in controversy. The importance of these requirements were stressed in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Rule 35(b) requires the party causing the examination to furnish the examined party with all earlier examinations to which he may have access, including test results. The examined party must then make similar disclosure in return. Upon motion, a party may be required to deliver a report and failure to furnish a report could result in exclusion of the physician's testimony.

Rule 35(b) (2) is not intended to create a physician-patient privilege in Alabama.

Rule 35(b) (3) makes clear that this Rule applies to examinations by agreement and that other discovery devices may be used to obtain medical reports or testimony.

COMMITTEE COMMENTS TO OCTOBER 1, 1995, AMENDMENT TO RULE 35

The amendment adopts modifications to F.R.Civ.P. 35 under which examinations may be conducted by suitably licensed specialists such as clinical psychologists, dentists, and occupational therapists. The former rule was limited to physicians.

Alabama Rules of Civil Procedure, Rule 35, AL R RCP Rule 35

Current with amendments received through 5/1/2007

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# ALASKA

**C**

West's Alaska Statutes Annotated Currentness

Alaska Court Rules

<sup>Ⓜ</sup> Rules of Civil Procedure        <sup>Ⓜ</sup> Part V. Depositions and Discovery→ **Rule 35. Physical and Mental Examination of Persons**

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**(b) Report of Examiner.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

[Amended effective July 15, 1993.]

**NOTE**

Ch. 69, § 3, SLA 1989 provided that AS 25.20.050(e), enacted by ch. 69, § 1, SLA 1989, amended Civil Rule 35 by requiring the court, in action in which paternity is contested and to which the state is a party, to order certain genetic tests on the request of a party.

Sections 38 and 41 of ch. 87 SLA 1997 amend AS 25.20.050 relating to paternity actions. According to § 149 of the Act, §§ 38 and 41 have the effect of amending Civil Rule 35 by requiring the court to order genetic testing in contested paternity actions in certain circumstances and preventing the court from ordering such testing if good cause is shown.

Rules Civ. Proc., Rule 35, **AK R RCP Rule 35**

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# ARIZONA

## Arizona Revised Statutes Annotated Currentness

Rules of Civil Procedure for the Superior Courts of Arizona (Refs &amp; Annos)

▣ V. Depositions and Discovery

→ Rule 35. Physical and Mental Examination of Persons (Refs &amp; Annos)

**Rule 35(a). Order for Examination**

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The person to be examined shall have the right to have a representative present during the examination, unless the presence of that representative may adversely affect the outcome of the examination. The person to be examined shall have the right to record by audiotape any physical examination. A mental examination may be recorded by audiotape, unless such recording may adversely affect the outcome of the examination. Upon good cause shown, a physical or mental examination may be video-recorded. A copy of any record made of a physical or mental examination shall be provided to any party upon request.

**Rule 35(b). Report of Examiner**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requestor, within twenty days of the examination, a copy of the detailed written report of the examining licensed professional setting out the professional's findings, including the results of all tests made, diagnoses and conditions, together with like reports of all earlier examinations of the same condition and copies of all written or recorded notes filed out by the examiner and the person examined at the time of the examination, providing access to the original written or recorded notes for purposes of comparing same with the copies. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or psychologist fails or refuses to make a report the court may exclude the physician's or psychologist's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

**Rule 35(c). Alternate Procedure; Notice of Examination; Objections**

(1) When the parties agree that a mental or physical examination is appropriate but do not agree as to the examining physician or psychologist, the party desiring the examination may seek it by giving reasonable notice in writing to every other party to the action not less than 30 days in advance. The notice shall specify the name of the person to be examined, the time, place and scope of the examination, and the person or persons by whom it is to be made. The person to be physically examined shall have the right to have a representative present during the examination, unless the presence of that representative may adversely affect the outcome of the examination. The person to be examined shall have the right to record by audiotape any physical examination. A mental examination may be recorded by audiotape, unless such recording may adversely affect the outcome of the examination. Upon good cause shown, a physical or mental examination may be video-recorded. A copy of any record made of a physical or mental examination shall be provided to any party upon request.

(2) Upon motion by a party or by the person to be examined, and for good cause shown, the court in which the action is pending may, in addition to other orders appropriate under subdivision (a) of this rule, make an order that the examination be made by a physician or psychologist other than the one specified in the notice. If a party after being served with a proper notice under this subdivision does not make a motion under this rule and fails to appear for the examination or to produce for the examination the person in the party's custody or legal control, the court in which the action is pending may on motion make such orders in regard to the failure as are just, such as those specified in Rule 37(d).

(3) The provisions of Rule 35(b) shall apply to an examination made under this subdivision.

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**C**West's Arkansas Code Annotated Currentness  
State Court Rules (Arkansas Rules of Civil Procedure)  
Arkansas Rules of Civil Procedure  
V. Depositions and Discovery (Rules 26 to 37)**→RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS**

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician or a mental examination by a physician or a psychologist or to produce for the examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Examining Physician or Psychologist.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with all like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled, upon request to receive from the party against whom the order is made, a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just and if a physician or psychologist fails or refuses to make a report, the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule or statute of this state.

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(c) Medical Records.

(1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term "medical records" means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

(2) Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures.

[Amended effective July 1, 1991; March 1, 1997; amended January 22, 1998; January 22, 2004.]

REPORTER'S NOTES TO RULE 35

1. Rule 35 is identical to FRCP 35. Prior Arkansas law was governed by superseded Ark. Stat. Ann. 28-357 (Repl. 1962) which tracked FRCP 35 prior to its 1970 amendments. This rule does not work any appreciable changes in Arkansas law.

2. FRCP 35 provides that it does not preclude the taking of a deposition or discovery of a medical report in accordance with the provisions of any other rule. Rule 35 follows this and provides that any statute of this State may provide for additional discovery. Specifically, this rule does not affect Ark. Stat. Ann. 28-607 (Supp. 1975).

ADDITION TO REPORTER'S NOTE, 1990 AMENDMENT

New subdivision (c) of this rule sets out the circumstances under which a party must authorize release of his medical records to another party. It also makes plain that a party may not be required to allow an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process. This safeguard is deemed necessary to protect the confidential relationship between a party and his physician or psychotherapist.

ADDITION TO REPORTER'S NOTES, 1997 AMENDMENT

Subdivision (a) has been amended to permit the appointment of psychologists to conduct mental examinations, and subdivision (b) has been revised to reflect this

change. As amended, the Arkansas rule is similar to the version of the corresponding federal rule that was in effect from 1988 to 1991. The current federal rule is broader, allowing physical or mental examinations "by a suitably licensed or certified examiner." Because the impact of such an expansive provision at the state level could be considerable, only an incremental step--i.e., permitting mental examinations by psychologists--has been taken at this time, and that step is consistent with Arkansas practice. Under Rule 702 of the Arkansas Rule of Evidence, a psychologist may testify as an expert about the mental condition of a party or other person. See, e.g., *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993) (divorce); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978) (child custody). It makes little sense, therefore, to preclude a psychologist from conducting an examination pursuant to Rule 35. Moreover, psychologists are trained to conduct mental examinations, which are a routine, widely accepted part of the practice of psychology in both forensic and non-forensic settings.

The amendment to subdivision (c) imposes a 30-day deadline for responding to a request for an authorization to obtain copies of a party's medical records. A companion change in Rule 37(a) provides for a motion to compel if the authorization is not provided in a timely manner.

#### ADDITION TO REPORTER'S NOTES, 1998 AMENDMENT

Subdivision (c) has been divided into numbered paragraphs and reorganized. It has been also amended to address an issue on which the Arkansas federal courts have disagreed. Compare *Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992), *aff'd*, 982 F.2d 1255 (8th Cir. 1993), with *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992). Consistent with the result reached in *Harlan*, the first sentence of paragraph (2) provides that a party or his or her attorney cannot interview or otherwise informally contact another party's treating physician or psychotherapist without that party's consent. This new provision reflects the intent of the original version of the rule, i.e., to limit communications with a party's physician or psychotherapist to the formal discovery process. A corresponding change has been made in Rule 503(d)(3), Ark. R. Evid.

#### ADDITION TO REPORTER'S NOTES, 2004 AMENDMENT

A new sentence has been added to subdivision (c)(1) to provide that the 30-day response time may be lengthened or shortened by the court or by written agreement of the parties. Corresponding provisions appear in Rule 33(b) and Rule 34(b)(2), which apply to interrogatories and production of documents, respectively.

#### LIBRARY REFERENCES

Pretrial Procedure 451 to 457.  
Westlaw Key Number Searches: 307Ak451 to 307Ak457.  
C.J.S. Discovery §§ 69, 110 to 112.

## RESEARCH REFERENCES

## Treatises and Practice Aids

Arkansas Civil Practice and Procedure § 17-11, Physical and Mental Examination of Persons.

2 Arkansas Civil Practice and Procedure § 21:11, Medical Examinations and Records.

3 Trial Handbook for Arkansas Lawyers § 22:19, Physical and Mental Examinations of Parties and Others.

## NOTES OF DECISIONS

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 1. Powers and duties of court to require examination

Statute does not give absolute right to defendant to have complaining party examined by physician of its choice, but does authorize such examination for good cause shown. Ark.Stats. § 28-357(a). Mallet v. Brannon, 1968, 243 Ark. 898, 423 S.W.2d 880. Damages↪ 206(1)

Assertion by plaintiff of permanent injuries was sufficient cause for defendant to request a medical examination for plaintiff. Ark.Stats. § 28-357(a). Reed v. Marley, 1959, 230 Ark. 135, 321 S.W.2d 193, 71 A.L.R.2d 965. Damages↪ 206(1)

Refusal to require guest in truck, suing bus company for permanent injuries to back, to go to distant city for X-ray examination, held not abuse of discretion where guest had agreed to submit to X-ray examination if bus company would bring machine and expert to city in which guest resided, and guest had just returned from such distant city and was not in physical condition to make trip again, and granting of request would have required postponement of case. Southern Kansas Stage Lines Co. v. Ruff, 1937, 193 Ark. 684, 101 S.W.2d 968. Damages↪ 206(1)

It was not error to refuse to compel the plaintiff in a physical injury suit to

submit to a physical examination before the jury where, on defendant's motion, the court appointed a board of four physicians, two of whom were of defendant's selection, to examine the plaintiff's physical condition. *St. Louis, I.M. & S. Ry. Co. v. Carter*, 1910, 93 Ark. 589, 126 S.W. 99. Damages ↪ 206(1)

The court may require a plaintiff suing for personal injuries, alleged to be permanent, to submit to an examination of his person by experts, and may direct that it be made in court or elsewhere. *St. Louis Southwestern Ry. Co. v. Dobbins*, 1895, 60 Ark. 481, 30 S.W. 887, rehearing denied 60 Ark. 481, 31 S.W. 147. Damages ↪ 206(1)

Where a plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition, based upon personal examination; and the court should, upon demand of the defendant, compel the plaintiff to submit to such examination. But where the evidence of experts is already abundant, the court must exercise its sound discretion in compelling or refusing the examination; and its action is subject to review in case of abuse. *Sibley v. Smith*, 1885, 46 Ark. 275, 55 Am.Rep. 584, Unreported. Damages ↪ 206(1)

## 2. Jurisdiction

Trial judge had jurisdiction to enter order compelling discovery of medical records pertaining to injuries defendant received as result of automobile accident which killed plaintiffs' son and, thus, writ of prohibition against enforcement of order would be improper. *Rules Civ.Proc., Rule 35(c)*. *McGlothlin v. Kemp*, 1993, 314 Ark. 495, 863 S.W.2d 313. Prohibition ↪ 10(2)

## 3. Necessity for examination and objections

Patient's asserted lack of "ample notice" was not cause to excuse patient's failure to appear for court-ordered physical and psychological examinations, in patient's medical malpractice action, even if she only received one and a half days notice of examinations; court went to great lengths to ensure patient received order including by facsimile transmission, overnight mail, and regular mail, and patient acknowledged that she received facsimile at least five days prior to physical examination and letter from psychologist's office notifying her of appointment at least two weeks prior to examination. *Fed.Rules Civ.Proc.Rule 17(c)*, 28 U.S.C.A. *Chancellor ex rel. Chancellor v. Van Buren H.M.A., Inc.*, 2000, 202 F.R.D. 593. Damages ↪ 206(2)

One who is ill and whose right to compensation is the issue, or who is injured and alleges the cause to have been defendant's actionable negligence, should cooperate in all reasonable methods for honest determination of extent and probable consequences of such illness or injury, and order for examination of such plaintiff should be denied only where enforcement of examination would be unreasonable. *Mutual Life Ins. Co. of New York v. Phillips*, 1940, 200 Ark. 77, 137

S.W.2d 910. Damages↪ 206(2); Insurance↪ 3177

Where there was testimony that nerve could not be seen by X-ray, and that injury was permanent, overruling of motion for X-ray examination was not an abuse of discretion. Louisiana & A. Ry. Co. v. Woodson, 1917, 127 Ark. 323, 192 S.W. 174. Damages↪ 206(2)

Where plaintiff in an action for personal injuries alleges that they are of a permanent nature, defendant is entitled, as a matter of right, to have the opinion of a surgeon based upon a personal examination, unless the evidence of experts is already abundant, in which case the court, in its discretion, may refuse to order the examination. Sibley v. Smith, 1885, 46 Ark. 275, 55 Am.Rep. 584, Unreported. Damages↪ 206(2)

#### 4. Successive examinations

Even if injured party had been examined by physician on day of injury at request of insurance adjuster, insured would not be necessarily precluded from obtaining another examination in view of fact that it would have been difficult, if not impossible, to ascertain permanent nature of injuries so soon after they were incurred. Ark.Stats. § 28-357(a). Reed v. Marley, 1959, 230 Ark. 135, 321 S.W.2d 193, 71 A.L.R.2d 965. Damages↪ 206(3)

Plaintiff suing for injuries having submitted to one examination by railroad's doctors, denial of defendant's request for further examination by other doctors, including X-ray picture of plaintiff's back, held not abuse of discretion, where such examination would have delayed trial, and X-ray pictures would have neither confirmed nor refuted opinion evidence that tuberculosis of spine would probably result from injuries, the defendant's request not being timely in view of allegations in complaint of injuries to plaintiff's spine. St. Louis-San Francisco Ry. Co. v. Murphy, 1925, 168 Ark. 330, 270 S.W. 956. Damages↪ 206(3)

Where plaintiff, suing for personal injuries, had been compelled to submit to a physical examination by defendant's physicians before the first trial and those physicians testified for defendant at the second trial, it was not error to refuse to compel plaintiff to submit to a second examination. Scullin v. Vining, 1917, 127 Ark. 124, 191 S.W. 924. Damages↪ 206(3)

Where the court on defendant's motion appointed a board of four physicians to examine plaintiff, which examination was made during the progress of the trial, and two of the physicians were of defendant's own selection and testified fully concerning the examination and plaintiff's physical condition, it was not an abuse of discretion to refuse to compel plaintiff to submit to a physical examination before the jury. St. Louis, I.M. & S. Ry. Co. v. Carter, 1910, 93 Ark. 589, 126 S.W. 99. Damages↪ 206(3)

#### 5. Application and proceedings on application

Failure to grant motion to require further examination of plaintiff by neurologist was error, where defendant's doctor stated in his report, "this patient contains quite bizarre neurological findings that are difficult to evaluate, and suggest that" she should be examined by neurologist for completion of diagnosis.

Ark.Stats. § 28-357(a). Mallet v. Brannon, 1968, 243 Ark. 898, 423 S.W.2d 880. Damages↪ 206(5)

Where plaintiff did not object to form or content of defendant's motion for physical examination of plaintiff, plaintiff waived any deficiency in form. Ark.Stats. § 28-357(a). Reed v. Marley, 1959, 230 Ark. 135, 321 S.W.2d 193, 71 A.L.R.2d 965. Damages↪ 206(5)

In personal injury action, wherein defendant sought order, which would require plaintiff to submit to medical examination and which would require that plaintiff travel 121 miles for the examination, in view of fact that it was admitted that there were qualified physicians within 62 miles of plaintiff's home, defendant was required to show a good and valid reason for examination being held 121 miles away. Ark.Stats. § 28-357(a). Reed v. Marley, 1959, 230 Ark. 135, 321 S.W.2d 193, 71 A.L.R.2d 965. Damages↪ 206(5)

#### 6. Examiners

Under statute to effect that court may order party to submit to physical examination by physician selected by movant, moving party does not have an absolute right to select physician and that matter rests within discretion of trial court, and if there is timely objection upon part of party to be examined, moving party is required to show good cause for examination being made by particular physician requested, and the greater the distance to be traveled to obtain examination, the stronger the cause that must be shown. Ark.Stats. § 28-357(a). Reed v. Marley, 1959, 230 Ark. 135, 321 S.W.2d 193, 71 A.L.R.2d 965. Damages↪ 206(6)

#### 7. Mode of examination

Order directing injured plaintiff to submit to examination by physician designated by defendant was not an abuse of discretion because plaintiff was directed to go outside state for the examination. Ark.Stats. §§ 28-357(a), 28-359(b)(2). Reed v. Marley, 1959, 230 Ark. 135, 321 S.W.2d 193, 71 A.L.R.2d 965. Damages↪ 206(7)

For the court to send the jury and the parties to make a physical examination of plaintiff out of the presence of the court, to which defendant excepted on the return, is error, not cured by the court's offer then made to retire with them. Fordyce v. Key, 1905, 74 Ark. 19, 84 S.W. 797. Damages↪ 206(7)

Where the plaintiff in a personal injury suit asked leave to make exhibit of his injured parts, it was error, over defendant's objection, to allow the plaintiff to retire for this purpose, with the jury and opposing counsel, to another room and submit to an examination by the jury in the absence of the presiding judge.

Fordyce v. Key, 1905, 74 Ark. 19, 84 S.W. 797. Damages 206(7)

#### 8. Privileged matters generally

Under Arkansas law, rules concerning physician-patient privilege in medical malpractice actions do not give court authority to prohibit ex parte communications between defendant and patient's physicians; instead, they simply prohibit court from, by court order, requiring patient to allow such ex parte contacts; physician is free, in exercise of his discretion, to determine whether he will participate in informal discovery. Ark.Rules Civ.Proc., Rule 35; Ark.Rules of Evid., Rule 503. King v. Ahrens, 1992, 798 F.Supp. 1371, affirmed 16 F.3d 265, rehearing denied. Pretrial Procedure 33; Witnesses 211(1)

Under Arkansas law, even though physician-patient privilege is partially waived through filing of lawsuit, Arkansas citizens retain some control over manner in which information concerning their medical records and treatment is released; thus, defense counsel is limited to formal methods of discovery enumerated by Arkansas Rules of Civil Procedure, absent patient's express consent to counsel's ex parte contact with her treating physician. Ark.Rules of Evid., Rules 503, 503(d)(3); Ark.Rules Civ.Proc., Rules 35, 35 note. Harlan v. Lewis, 1992, 141 F.R.D. 107, affirmed 982 F.2d 1255, rehearing denied, certiorari denied 114 S.Ct. 94, 510 U.S. 828, 126 L.Ed.2d 61. Pretrial Procedure 33; Pretrial Procedure 382

#### 9. Paternity determinations

Chancellor had authority to order paternity testing during divorce proceedings as to child born during marriage, despite presumption that child born during marriage was legitimate child of parties. A.C.A. § 9-10-104. Golden v. Golden, 1997, 942 S.W.2d 282, 57 Ark.App. 143. Divorce 86

#### 10. Release of medical and hospital records

Under Arkansas law, plaintiff in medical malpractice action is required to authorize release of relevant medical records and formal discovery by defense counsel. Ark.Rules Civ.Proc., Rule 35; Ark.Rules of Evid., Rules 503, 503(d)(3). Harlan v. Lewis, 1993, 982 F.2d 1255, rehearing denied, certiorari denied 114 S.Ct. 94, 510 U.S. 828, 126 L.Ed.2d 61. Pretrial Procedure 382

#### 11. Witness competency

Medical malpractice defendant could not circumvent intent of Arkansas rules relating to physician-patient privilege by designating nonparty treating physicians as "defense experts." Ark.Rules of Evid., Rules 503, 503(d)(3); Ark.Rules Civ.Proc., Rules 35, 35 note. Harlan v. Lewis, 1992, 141 F.R.D. 107, affirmed 982 F.2d 1255, rehearing denied, certiorari denied 114 S.Ct. 94, 510 U.S. 828, 126 L.Ed.2d 61. Witnesses 208(1)

AR R RCP Rule 35  
Arkansas Rules of Civil Procedure (ARCP), Rule 35

12. Ex parte communications

Arkansas law prohibits unauthorized ex parte communications in medical malpractice actions between defense counsel and nonparty treating physicians. Ark. Rules Civ.Proc., Rules 35, 35 note; Ark.Rules of Evid., Rule 503(d)(3). Harlan v. Lewis, 1993, 982 F.2d 1255, rehearing denied, certiorari denied 114 S.Ct. 94, 510 U.S. 828, 126 L.Ed.2d 61. Attorney And Client 32(12)

Rules Civ. Proc., Rule 35, AR R RCP Rule 35

State Court Rules current through amendments received through Jan. 31, 2007; Federal Court Rules current through amendments received through October 1, 2007.

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# CALIFORNIA

C

Effective: July 1, 2005

West's Annotated California Codes Currentness

Code of Civil Procedure (Refs &amp; Annos)

Part 4. Miscellaneous Provisions (Refs &amp; Annos)

Title 4. Civil Discovery Act (Refs &amp; Annos)

☐ Chapter 15. Physical or Mental Examination (Refs &amp; Annos)

☐ Article 6. Reports of Examination (Refs &amp; Annos)

→ § 2032.610. Demand for copy of examination records; right to demand; time to deliver documents; waiver of work product protection

(a) If a party submits to, or produces another for, a physical or mental examination in compliance with a demand under Article 2 (commencing with Section 2032.210), an order of court under Article 3 (commencing with Section 2032.310), or an agreement under Section 2016.030, that party has the option of making a written demand that the party at whose instance the examination was made deliver both of the following to the demanding party:

(1) A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner.

(2) A copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner.

(b) If the option under subdivision (a) is exercised, a copy of the requested reports shall be delivered within 30 days after service of the demand, or within 15 days of trial, whichever is earlier.

(c) In the circumstances described in subdivision (a), the protection for work product under Chapter 4 (commencing with Section 2018.010) is waived, both for the examiner's writings and reports and to the taking of the examiner's testimony.

CREDIT(S)

(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005.)

## LAW REVISION COMMISSION COMMENTS

## 2004 Addition

Subdivision (a) of Section 2032.610 continues the first sentence of former Section 2032(h) without substantive change.

Subdivision (b) continues the second sentence of former Section 2032(h) without substantive change.

Subdivision (c) continues the third sentence of former Section 2032(h) without substantive change. [33 Cal.L.Rev.Comm. Reports 925 (2004)].

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## HISTORICAL AND STATUTORY NOTES

## 2007 Main Volume

For the source of this section's subject matter, see the Disposition and Derivation Tables at Title 4 of Part 4 of the Code of Civil Procedure preceding § 2016.010 et seq. (If using an electronic publication, see Refs & Annos (References, Annotations, or Tables).)

Legislative intent and operative effect relating to Stats.2004, c. 182 (A.B.3081), see Historical and Statutory Notes under Code of Civil Procedure § 2016.010.

**Derivation:** Former § 2032, added by Stats.1986, c. 1334, § 2, amended by Stats.1987, c. 86, § 14; Stats.1988, c. 553, § 5; Stats.1992, c. 163 (A.B.2641), § 65; Stats.1992, c. 615 (S.B.1804), § 6; Stats.1993, c. 219 (A.B.1500), § 71.

Former § 2032, added by Stats.1957, c. 1904, § 3, amended by Stats.1959, c. 1590, § 10; Stats.1980, c. 1206, § 1.

Former § 2034, added by Stats.1957, c. 1904, § 3, amended by Stats.1959, c. 1590, § 12; Stats.1961, c. 496, § 3; Stats.1965, c. 126, § 1; Stats.1968, c. 188, § 3; Stats.1974, c. 592, § 2; Stats.1974, c. 732, § 4; Stats.1978, c. 265, § 2; Stats.1980, c. 23, § 2; Stats.1981, c. 714, § 75; Stats.1982, c. 138, § 1.

## CROSS REFERENCES

Computation of time, see Code of Civil Procedure §§ 12 and 12a and Government Code § 6800 et seq.

"Court" defined for purposes of this Title, see Code of Civil Procedure § 2016.020.

"Writing" defined for purposes of this Title, see Code of Civil Procedure § 2016.020.

## LIBRARY REFERENCES

## 2007 Main Volume

Damages ↪ 206.

Pretrial Procedure ↪ 382, 451.

Westlaw Topic Nos. 115, 307A.

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C.J.S. Discovery §§ 86, 110.

## RESEARCH REFERENCES

## Encyclopedias

California Civil Practice Procedure § 13:245, Examinations Pursuant to Agreement.

California Civil Practice Procedure § 13:252, Demand and Exchange of Reports.

California Civil Practice Procedure § 13:253, Compelling Compliance.

California Civil Practice Procedure § 13:254, Matters to Consider in Initiating and Responding to Medical Ex-

amination Discovery.

California Civil Practice Procedure § 13:255, Stipulation for Examination [Code Civ. Proc., S2016.030].

California Civil Practice Procedure § 13:267, Demand for Report of Physical Examination [Code Civ. Proc., S2032.620, Subd. (a)].

Forms

West's California Code Forms, Civil Procedure § 2032.610 Form 1, Evidence--Discovery--Demand for Copy of Examiner's Report.

Treatises and Practice Aids

Avoiding and Defending Wrongful Discharge Claims § 22:35, Procedure.

California Medical Malpractice Law and Practice § 14:9, Physical and Mental Examinations -- by Stipulation.

California Medical Malpractice Law and Practice § 13:10, Expert Data Base -- Formal Discovery.

California Medical Malpractice Law and Practice § 14:11, Physical and Mental Examinations -- by Court Order.

Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 8I-1, Examinations by Stipulation.

Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 8I-5, Exchange of Medical Reports; Waiver of Privilege.

Rutter, Cal. Practice Guide: Family Law Ch. 11-C, C. Optional "Formal" Discovery Procedures.

Rutter, Cal. Practice Guide: Personal Injury Ch. 2-B, B. General Investigation Tactics.

Rutter, Cal. Practice Guide: Personal Injury Ch. 4-C, C. Effective Settlement Negotiations.

Rutter, Cal. Practice Guide: Personal Injury Ch. 6-A, A. Scope of Discovery and Limitations.

Rutter, Cal. Practice Guide: Personal Injury Ch. 6-C, C. Physical and Mental Examinations (CCP § 2032.020 et seq.).

Rutter, Cal. Practice Guide: Personal Injury Ch. 8-B, B. After Trial Date Set (Three to Four Months Before Trial).

Rutter, Cal. Practice Guide: Personal Injury Ch. 8-C, C. Two Months Before Trial.

Dunne on Depositions in California § 1:44, Advantages of Physical or Mental Examinations Over Depositions -- Obtain Adverse, Privileged Medical Reports.

Dunne on Depositions in California § 1:46, Advantages of Physical or Mental Examinations Over Depositions -- Separate Physical or Mental Examination.

Dunne on Depositions in California § 2:16, Exchange Reports and Qualifications Before Deposition.

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2 Witkin Cal. Evid. 4th Discovery § 155, (§ 155) in General.

2 Witkin Cal. Evid. 4th Discovery § 156, (§ 156) Waiver of Privileges.

Younger on California Motions § 29:24, "Good Faith Attempt" in Various Discovery Devices--Physical and Mental Examinations.

Younger on California Motions § 29:64, Various Motions.

## NOTES OF DECISIONS

Construction and application 1  
Recording examination 2  
Report of findings 3  
Review 4

### 1. Construction and application

Statutes relating to discovery procedures, § 2016 et seq., should be liberally construed in favor of disclosure. *Harabedian v. Superior Court In and For Los Angeles County* (App. 2 Dist. 1961) 15 Cal.Rptr. 420, 195 Cal.App.2d 26. Pretrial Procedure ⇨ 13

Discovery statutes, § 2016 et seq., were substantially adopted from federal rules of discovery and almost without exception alterations were made to create less restricted system of discovery procedures than that employed in federal courts. *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 15 Cal.Rptr. 90, 56 Cal.2d 355, 364 P.2d 266. Pretrial Procedure ⇨ 13

### 2. Recording examination

Plaintiff who submitted to a physical examination by defendant's examining physician was entitled to receive a report of that examination on demand, even if the physician had not prepared one, and assuming that the defendant could obtain a report from the physician, the defendant could be ordered to produce the report. *Kennedy v. Superior Court* (App. 1 Dist. 1998) 75 Cal.Rptr.2d 373, 64 Cal.App.4th 674, review denied. Pretrial Procedure ⇨ 382

### 3. Report of findings

Where minor plaintiff, in personal injury action against hospital, had requested and received delivery of report of examination of plaintiff made by physician at defendant's request, defendant was entitled to copy of report of examination subsequently made of plaintiff by another physician at request of plaintiff's counsel, notwithstanding claim that examining physician was advisor to plaintiff's counsel and that such report constituted work product, since, under mutual discovery provisions, all findings and conclusions obtained as result of physical examination of party become available to parties to litigation. *Queen of Angels Hospital v. Superior Court for Los Angeles County* (App. 2 Dist. 1976) 129 Cal.Rptr. 282, 57 Cal.App.3d 370. Damages ⇨ 206(3)

Under provision of this section requiring examining party to deliver, upon request, copy of physician's report to the party against whom an order was made "or the person examined", even one who submits voluntarily to examination by his adversary's physician, without requiring a formal order therefor, is entitled to copy of examin-

ing physician's report. *Grover v. Superior Court In and For San Mateo County* (App. 1958) 161 Cal.App.2d 644, 327 P.2d 212. Damages ↪ 206(5)

Under provision of this section that upon request of person examined opposing party shall deliver to him a copy of examining physician's report, any privilege against disclosure of medical report is waived by preparing physical examination upon which that report is based. *Grover v. Superior Court In and For San Mateo County* (App. 1958) 161 Cal.App.2d 644, 327 P.2d 212. Witnesses ↪ 219(5)

Where legislative consideration of state bar's proposal, for statute requiring opposing party to deliver copy of examining physician's report to person examined upon request therefor, was widely publicized among lawyers and statute was included in printed statutes and code amendments delivered to bar long before date of examination of plaintiff in personal injury action, counsel in that action would be deemed to have had full knowledge of statute when they stipulated to physical examination of plaintiff and to have entered that stipulation with complete cognizance that further proceedings in action, taken on or after effective date of statute, would be governed by it. *Grover v. Superior Court In and For San Mateo County* (App. 1958) 161 Cal.App.2d 644, 327 P.2d 212. Evidence ↪ 65

#### 4. Review

Writ review is appropriate in discovery matters only to review questions that are of general importance to trial courts and the profession, and when broad principles can be enunciated to guide courts in future cases. *Doyle v. Superior Court* (App. 6 Dist. 1996) 58 Cal.Rptr.2d 476, 50 Cal.App.4th 1878. Mandamus ↪ 32

West's Ann. Cal. C.C.P. § 2032.610, CA CIV PRO § 2032.610  
Current through Ch. 2 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

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Effective: January 1, 2006

West's Annotated California Codes Currentness

Code of Civil Procedure (Refs &amp; Annos)

Part 4. Miscellaneous Provisions (Refs &amp; Annos)

Title 4. Civil Discovery Act (Refs &amp; Annos)

Chapter 15. Physical or Mental Examination (Refs &amp; Annos)

Article 5. Conduct of Examination (Refs &amp; Annos)

→ § 2032.530. Recording mental examination by audio technology

(a) The examiner and examinee shall have the right to record a mental examination by audio technology.

(b) Nothing in this title shall be construed to alter, amend, or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the examination by agreement or court order.

## CREDIT(S)

(Added by Stats.2004, c. 182 (A.B.3081), § 23, operative July 1, 2005. Amended by Stats.2005, c. 294 (A.B.333), § 11.)

## LAW REVISION COMMISSION COMMENTS

## 2004 Addition

Subdivision (a) of Section 2032.530 continues the first sentence of former Section 2032(g)(2) without substantive change.

Subdivision (b) continues the second sentence of former Section 2032(g)(2) without substantive change. [33 Cal.L.Rev.Comm. Reports 924 (2004)].

## 2005 Amendment

Subdivision (a) of Section 2032.530 is amended to reflect advances in technology and for consistency of terminology throughout the Civil Discovery Act. See 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in the Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as the context required).

## HISTORICAL AND STATUTORY NOTES

## 2007 Main Volume

For the source of this section's subject matter, see the Disposition and Derivation Tables at Title 4 of Part 4 of the Code of Civil Procedure preceding § 2016.010 et seq. (If using an electronic publication, see Refs &amp; Annos (References, Annotations, or Tables).)

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Legislative intent and operative effect relating to Stats.2004, c. 182 (A.B.3081), see Historical and Statutory Notes under Code of Civil Procedure § 2016.010.

Stats.2005, c. 294 (A.B.333), in subd. (a), substituted "by audio technology" for "on audiotape".

**Derivation:** Former § 2032, added by Stats.1986, c. 1334, § 2, amended by Stats.1987, c. 86, § 14; Stats.1988, c. 553, § 5; Stats.1992, c. 163 (A.B.2641), § 65; Stats.1992, c. 615 (S.B.1804), § 6; Stats.1993, c. 219 (A.B.1500), § 71.

Former § 2032, added by Stats.1957, c. 1904, § 3, amended by Stats.1959, c. 1590, § 10; Stats.1980, c. 1206, § 1.

Former § 2034, added by Stats.1957, c. 1904, § 3, amended by Stats.1959, c. 1590, § 12; Stats.1961, c. 496, § 3; Stats.1965, c. 126, § 1; Stats.1968, c. 188, § 3; Stats.1974, c. 592, § 2; Stats.1974, c. 732, § 4; Stats.1978, c. 265, § 2; Stats.1980, c. 23, § 2; Stats.1981, c. 714, § 75; Stats.1982, c. 138, § 1.

#### CROSS REFERENCES

"Court" defined for purposes of this Title, see Code of Civil Procedure § 2016.020.

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 Pretrial Procedure ↪ 453.  
 Westlaw Topic Nos. 115, 307A.  
 C.J.S. Damages §§ 328 to 340.  
 C.J.S. Discovery § 110.

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California Civil Practice Procedure § 13:243, Participants.

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California Medical Malpractice Law and Practice § 14:11, Physical and Mental Examinations -- by Court Order.

Rutter, Cal. Practice Guide: Civ. Pro. Before Trial Ch. 8I-3, Examination Upon Court Order.

Rutter, Cal. Practice Guide: Family Law Ch. 11-C, C. Optional "Formal" Discovery Procedures.

Rutter, Cal. Practice Guide: Personal Injury Ch. 6-C, C. Physical and Mental Examinations (CCP § 2032.020 et seq.).

Dunne on Depositions in California § 1:53, Advantages of Depositions Over Medical Examinations -- Depositions May be Videotaped or Recorded by Instant Visual Display.

2 Witkin Cal. Evid. 4th Discovery § 151, Mental Examination.

2 Witkin Cal. Evid. 4th Discovery § 154, (§ 154) Recording.

#### NOTES OF DECISIONS

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##### 1. Construction and application

Statutes relating to discovery procedures, § 2016 et seq., should be liberally construed in favor of disclosure. *Harabedian v. Superior Court In and For Los Angeles County* (App. 2 Dist. 1961) 15 Cal.Rptr. 420, 195 Cal.App.2d 26. Pretrial Procedure ↩ 13

Discovery statutes, § 2016 et seq., were substantially adopted from federal rules of discovery and almost without exception alterations were made to create less restricted system of discovery procedures than that employed in federal courts. *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 15 Cal.Rptr. 90, 56 Cal.2d 355, 364 P.2d 266. Pretrial Procedure ↩ 13

##### 2. Discretion of court

Trial court in personal injury action did not abuse its discretion in requiring plaintiff to be examined by particular defense psychiatrist in spite of plaintiff's expressed fear and dislike of that psychiatrist, where plaintiff did not attempt to disprove defendant's assertion that its psychiatrist was an independent qualified psychiatrist who had conducted numerous psychiatric examinations by court appointment, and where the rather general objections of plaintiff and her own psychologist regarding plaintiff's negative reaction to the defense psychiatrist were insufficient to disqualify him as a matter of law. *Edwards v. Superior Court of Santa Clara County* (1976) 130 Cal.Rptr. 14, 16 Cal.3d 905, 549 P.2d 846. Damages ↩ 206(6)

Trial court did not abuse its discretion in requiring plaintiff to undergo a four-hour pretrial psychiatric examination by a defense psychiatrist, where plaintiff failed to show that an effective examination could be performed in

less than four hours, and where, though the psychiatrist requested a series of four 50-minute interviews, it was at plaintiff's urging that defendant agreed to a single examination. *Edwards v. Superior Court of Santa Clara County* (1976) 130 Cal.Rptr. 14, 16 Cal.3d 905, 549 P.2d 846. Damages ↪ 206(7)

### 3. In controversy

Employee's mental condition was not "in controversy" within meaning of statute providing for discovery by way of mental examination of party in action in which mental condition of that party is in controversy, in action in which employee did not allege any current mental injury; employee's present mental condition was not directly relevant to her allegation that she has suffered emotional distress in the past, and mental examination was not authorized to test employee's credibility. *Doyle v. Superior Court* (App. 6 Dist. 1996) 58 Cal.Rptr.2d 476, 50 Cal.App.4th 1878. Damages ↪ 206(2)

Mental condition of person who is suffering ongoing mental distress is "in controversy" in action seeking damages for that ongoing mental distress, for purposes of statute providing for discovery by means of mental examination of party in action in which mental condition of that party is in controversy. *Doyle v. Superior Court* (App. 6 Dist. 1996) 58 Cal.Rptr.2d 476, 50 Cal.App.4th 1878. Damages ↪ 206(2)

"Controversy" surrounding mental condition, for purposes of statute providing for discovery by means of mental examination of party in action in which mental condition of that party is in controversy, includes not only nature and extent of person's current mental injury, but also actual cause of this injury. *Doyle v. Superior Court* (App. 6 Dist. 1996) 58 Cal.Rptr.2d 476, 50 Cal.App.4th 1878. Damages ↪ 206(2)

Where plaintiff alleges that he or she is not suffering any current mental injury, but only that he or she has suffered emotional distress in past arising from defendant's misconduct, a mental examination, pursuant to statute providing for discovery by means of mental examination of party in action in which mental condition of that party is in controversy, is unnecessary because such allegation alone does not place nature and cause of plaintiff's current mental condition in controversy. *Doyle v. Superior Court* (App. 6 Dist. 1996) 58 Cal.Rptr.2d 476, 50 Cal.App.4th 1878. Damages ↪ 206(2)

### 4. Mental condition

"Condition," as used in statute providing for discovery by means of physical or mental examination of party in action in which mental or physical condition of that party is in controversy, means "state of being." *Doyle v. Superior Court* (App. 6 Dist. 1996) 58 Cal.Rptr.2d 476, 50 Cal.App.4th 1878. Damages ↪ 206(2)

### 5. Psychiatric examination

Simple sexual harassment claim seeking compensation for having to endure oppressive work environment or for wages lost following unjust dismissal would not normally create controversy regarding worker's mental state, for purposes of requiring plaintiff to undergo mental examination pursuant to former version of this section. *Vinson v. Superior Court (Peralta Community College Dist.)* (1987) 239 Cal.Rptr. 292, 43 Cal.3d 833, 740 P.2d 404. Pretrial Procedure ↪ 453

Worker who brought action against job interviewer and employer college district alleging sexual harassment and intentional infliction of severe emotional distress had placed existence and extent of her mental injuries in dispute and implicitly raised question of alternative sources for distress, thus placing her mental state in contro-

versy, for purposes of requiring mental examination pursuant to former version of this section. *Vinson v. Superior Court (Peralta Community College Dist.)* (1987) 239 Cal.Rptr. 292, 43 Cal.3d 833, 740 P.2d 404. Pretrial Procedure ↪ 453

Codefendant job interviewer and employer college district had shown "good cause" for compelling worker who had brought action alleging sexual harassment and intentional infliction of severe emotional distress to undergo mental examination, and defendants had to be allowed to investigate continued existence and severity of alleged damages, subject to limitations necessitated by worker's right to privacy, where worker alleged she continued to suffer diminished self-esteem, reduced motivation, sleeplessness, loss of appetite, fear, lessened ability to help others, loss of social contacts, anxiety, mental anguish, loss of reputation, and severe emotional distress as result of defendants' conduct. *Vinson v. Superior Court (Peralta Community College Dist.)* (1987) 239 Cal.Rptr. 292, 43 Cal.3d 833, 740 P.2d 404. Pretrial Procedure ↪ 453

In civil action arising from automobile accident in which son was injured and his father was killed, court properly required son whose mental condition was in controversy to submit to examination by child psychiatrist and submit to battery of tests administered by psychologist for benefit of psychiatrist's diagnosis. *Reuter v. Superior Court, San Diego County* (App. 4 Dist. 1979) 155 Cal.Rptr. 525, 93 Cal.App.3d 332. Damages ↪ 206(7)

Where petitioner was injured while walking near building being destroyed and brought action against wrecking company for damages, and in proceeding in mandate petitioner alleged that emotional damage was major issue and it appeared petitioner would call psychiatrist to testify, petitioner's "mental condition" was in controversy within meaning of discovery rule and wrecking company was entitled to have petitioner examined by psychiatrist of their own choice. *Whitfield v. Superior Court for Los Angeles County* (App. 2 Dist. 1966) 54 Cal.Rptr. 505, 246 Cal.App.2d 81. Damages ↪ 206(2)

#### 6. Psychologists

Owner's admission, made pursuant to contractor's request for admissions, that owner had agreed to make payments to contractor according to progressive payment schedule, was not conclusive on issue of breach of contract, but rather trial court had discretion to admit evidence of parties' understanding of schedule in determining that parties had no intention of financing each other and that they did not come to understanding concerning payment schedule despite admission. *Fredericks v. Filbert Co.* (App. 2 Dist. 1987) 234 Cal.Rptr. 395, 189 Cal.App.3d 272. Pretrial Procedure ↪ 481

A psychologist is not a "physician" as defined in this section providing for physical, mental and blood examinations and may not conduct a mental examination compelled under that statute. *Reuter v. Superior Court, San Diego County* (App. 4 Dist. 1979) 155 Cal.Rptr. 525, 93 Cal.App.3d 332. Pretrial Procedure ↪ 453

Where mother's mental condition was not in controversy in action arising from automobile accident in which son was injured and his father killed, mother could not be compelled to submit to battery of psychological tests to be administered by psychologist which were collateral to examination of son by psychiatrist whose mental condition was in controversy, even in her capacity as guardian ad litem for son. *Reuter v. Superior Court, San Diego County* (App. 4 Dist. 1979) 155 Cal.Rptr. 525, 93 Cal.App.3d 332. Pretrial Procedure ↪ 453

#### 7. Recording examination

Audio tape was to be made of entire mental examination of minor amusement park patron, in action for personal

injury against park, not just of patron's responses; recording only part of examination would defeat the purpose of ensuring that examiner would not overstep his bounds. *Golfland Entertainment Centers, Inc. v. Superior Court* (App. 3 Dist. 2003) 133 Cal.Rptr.2d 828, 108 Cal.App.4th 739. Damages ↪ 206(7)

Court sanctions ordering cause off calendar until such time as plaintiff submitted to medical examination and ordering plaintiff to pay fee of physician who was to conduct medical examination to which plaintiff refused to submit and to pay attorney's fees for defendant was appropriate for plaintiff who had not made application to record medical examination and who refused to submit to examination on ground that physician refused to conduct it if recorded. *Ebel v. Superior Court of Kern County* (App. 5 Dist. 1974) 114 Cal.Rptr. 722, 39 Cal.App.3d 934. Damages ↪ 206(8)

#### 8. Presence of reporter

Pursuant to discovery statute governing mental examinations, court reporter was not to be present at psychologist's mental examination of minor amusement park patron, for purposes of personal injury action against park. *Golfland Entertainment Centers, Inc. v. Superior Court* (App. 3 Dist. 2003) 133 Cal.Rptr.2d 828, 108 Cal.App.4th 739. Damages ↪ 206(7)

Provision of this section that a party subjected to a physical examination at instance of an opposing party may demand from the party causing the examination to be made a copy of a detailed written report of the examining physician, does not constitute a sufficient substitute for a transcript of the proceedings made by a reporter, and notwithstanding such section, the party submitting to the examination is entitled to have the examination conducted in the presence of a reporter. *Gonzi v. Superior Court of City and County of San Francisco* (1959) 51 Cal.2d 586, 335 P.2d 97. Damages ↪ 206(7)

#### 9. Specificity of order

Trial court order setting rules for mental examination of minor amusement park patron, in action against park for personal injury, was to be modified to allow psychologist to question patron only about facts and circumstances of accident not already stated in prior deposition or interview, rather than barring all questions that could elicit narrative responses; the term "narrative" was vague, preclusion of narrative answers did not protect patron from having to answer questions previously asked, and outright ban prevented psychologist from asking questions necessary to form professional opinion. *Golfland Entertainment Centers, Inc. v. Superior Court* (App. 3 Dist. 2003) 133 Cal.Rptr.2d 828, 108 Cal.App.4th 739. Damages ↪ 206(7)

#### 10. Additional examinations

While provision of Code of Civil Procedure allowing discovery by means of physical or mental examination does not limit the number of examinations, cumulative discovery is prohibited by separate provision of Code. *Sporich v. Superior Court* (App. 2 Dist. 2000) 91 Cal.Rptr.2d 752, 77 Cal.App.4th 422, review denied. Pretrial Procedure ↪ 451; Pretrial Procedure ↪ 453

Multiple mental examinations should not be ordered routinely pursuant to provision of Code of Civil Procedure authorizing discovery by means of physical or mental examination. *Sporich v. Superior Court* (App. 2 Dist. 2000) 91 Cal.Rptr.2d 752, 77 Cal.App.4th 422, review denied. Pretrial Procedure ↪ 453

No good cause existed to order mental examination of convicted sex offender who was subject of petition under

Sexually Violent Predators Act (SVPA), and thus, even if Code of Civil Procedure applies to SVPA petitions, Code could not support order directing offender, who had already been evaluated twice pursuant to SVPA, to submit to further examination to ensure currency of evaluation; while trial on SVPA petition had been delayed numerous times, mere passage of time did not translate into good cause for further examinations, and no showing was made that offender's mental status had changed at all. *Sporich v. Superior Court* (App. 2 Dist. 2000) 91 Cal.Rptr.2d 752, 77 Cal.App.4th 422, review denied. Mental Health ⤴ 461

Dentist's previous request in malpractice action that patient undergo examination by neuropsychologist did not preclude patient from being compelled to undergo second examination by psychiatrist upon showing of good cause. *Shapira v. Superior Court* (App. 1 Dist. 1990) 274 Cal.Rptr. 516, 224 Cal.App.3d 1249. Damages ⤴ 206(3)

#### 11. Sufficiency of evidence

Good cause which must be shown to obtain discovery by means of a mental examination should be such that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. *Sporich v. Superior Court* (App. 2 Dist. 2000) 91 Cal.Rptr.2d 752, 77 Cal.App.4th 422, review denied. Pretrial Procedure ⤴ 453

Requirement that good cause must be shown to warrant discovery by means of mental examination serves as a barrier to excessive and unwarranted intrusions. *Sporich v. Superior Court* (App. 2 Dist. 2000) 91 Cal.Rptr.2d 752, 77 Cal.App.4th 422, review denied. Pretrial Procedure ⤴ 453

#### 12. Review

Writ review is appropriate in discovery matters only to review questions that are of general importance to trial courts and the profession, and when broad principles can be enunciated to guide courts in future cases. *Doyle v. Superior Court* (App. 6 Dist. 1996) 58 Cal.Rptr.2d 476, 50 Cal.App.4th 1878. Mandamus ⤴ 32

West's Ann. Cal. C.C.P. § 2032.530, CA CIV PRO § 2032.530  
Current through Ch. 2 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

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# COLORADO

**C**

West's Colorado Revised Statutes Annotated Currentness  
 West's Colorado Court Rules Annotated  
 Colorado Rules of Civil Procedure  
 5 Chapter 4. Disclosure and Discovery (Refs & Annos)

→ **RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS**

**(a) Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**(b) Report of Examiner.**

(1) If requested by the party against whom an order is made under section (a) of this Rule or the person examined, the party causing the examination to be made shall deliver to said other party a copy of a detailed written report of the examiner setting out his or her findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he or she is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the person examined waives any privilege he or she may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the person in respect of the same mental or physical condition.

(3) This section (b) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This section (b) does not preclude discovery of a report of an examiner in accordance with the provisions of any other Rule.

**CREDIT(S)**

Amended eff. Jan. 1, 1993.

**CROSS REFERENCES**

Privileges recognized only as provided, see Evidence Rule 501.

Protective orders concerning discovery, see Civil Procedure Rule 26.

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C.R.C.P. Rule 35

Refusal to submit to examination, sanctions, see Civil Procedure Rule 37.

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6 Colorado Practice Series § 7.5, Scope of Discovery--Experts.

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C.R.C.P. Rule 35

- 7 Colorado Practice Series § 5.11, Independent Medical Examinations-- General.
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- 8 Colorado Practice Series App. B, Amended C.R.C.P. Rules 16 and 26.
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- 12 Colorado Practice Series § 35.5, Rule 35(B). Report of Examiner.
- 12 Colorado Practice Series § 35.11, Motion to Compel Plaintiff to Submit to a Physical Examination.
- 12 Colorado Practice Series § 35.13, Response in Opposition to Defendant's Motion to Compel Plaintiff to Submit to a Physical Examination.
- 12 Colorado Practice Series § 35.14, Order Denying Defendant's Motion to Compel Physical Examination.
- 12 Colorado Practice Series § 35.15, Motion to Compel Plaintiff to Submit to an Additional Examination.
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- 12 Colorado Practice Series § 35.17, Response in Opposition to Defendant's Motion to Compel Plaintiff to Submit to an Additional Examination.
- 12 Colorado Practice Series § 35.19, Motion for Protective Order.

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12 Colorado Practice Series § 35.20, Motion to Allow Third Party to Observe Court Ordered Mental Examination.

12 Colorado Practice Series § 35.21, Motion to Compel Report of Examiner or to Exclude the Examiner's Testimony.

12 Colorado Practice Series § 35.22, Motion to Disqualify Examiner.

12 Colorado Practice Series § 37.19, Motion for Sanctions Against Plaintiffs for Failure to Comply With C.R.C.P. Rule 35 Order for Examinations [C.R.C.P. Rule 37(B)(2)].

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#### NOTES OF DECISIONS

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 1. Construction and application

When mental or physical condition of party is in controversy, court in which action is pending may order party to submit to physical or mental examination by physician. *Borquez v. Robert C. Ozer, P.C.*, App.1995, 923 P.2d 166, rehearing denied, certiorari granted, affirmed in part, reversed in part 940 P.2d 371. Damages ↻ 206(1)

## C.R.C.P. Rule 35

Rule authorizing court to order party to submit to physical or mental examination requires that either the party's physical or mental condition be in controversy and that movant show good cause before the court may order that a party submit to examination. *Tyler v. District Court In and For Adams County*, 1977, 561 P.2d 1260, 193 Colo. 31. Pretrial Procedure ↪ 451; Pretrial Procedure ↪ 453

Rule relating to physical examination of parties is limited to medical examinations conducted at request of parties, and the reports, copies of which are subject to production, are reports made by physicians as result of such examination. *Palmer Park Gardens, Inc. v. Potter*, 1967, 425 P.2d 268, 162 Colo. 178. Damages ↪ 206(5)

## 2. Construction with other law

Where there had been a waiver of doctor-client privilege under Federal Civil Procedure Rule, the privilege could not be claimed under state law. *Bethel v. Thornbrough*, 1962, 311 F.2d 201. Witnesses ↪ 184(2)

Historically Colorado rule relating to physical examination of party was modeled after Rule 35 of the Federal Rules of Civil Procedure and is identical except for a waiver of privilege provision which was not adopted by Colorado. *Palmer Park Gardens, Inc. v. Potter*, 1967, 425 P.2d 268, 162 Colo. 178. Damages ↪ 206(1)

## 3. Condition in controversy

Determination of a motion filed pursuant to rule permitting court to order, upon showing of good cause, a mental examination of a party whose mental condition is in controversy lies within the sound discretion of the trial court. *People ex rel. A.W.R.*, App.2000, 17 P.3d 192, certiorari denied. Pretrial Procedure ↪ 453

Plaintiff's general allegations of mental suffering, mental anguish, and emotional distress do not place his or her mental condition in controversy under rule allowing trial court to order party to submit to physical or mental examination by physician when physical or mental condition of party is in controversy. *Borquez v. Robert C. Ozer*, P.C., App.1995, 923 P.2d 166, rehearing denied, certiorari granted, affirmed in part, reversed in part 940 P.2d 371. Damages ↪ 206(2)

Trial court may require parties to disclose at some stage prior to trial, such as in a pretrial statement or at a pretrial conference, whether they intend to present testimony as to their own physical or mental condition, and, if so, to make presentation of that testimony conditional on parties' making available to opposing party substance of that testimony, including any treatment records pertaining thereto. *Clark v. District Court, Second Judicial Dist., City and County of Denver*, 1983, 668 P.2d 3. Pretrial Procedure ↪ 30; Pretrial Procedure ↪ 744

A plaintiff's general allegations of mental suffering, mental anguish, emotional distress and the like do not place his mental condition in controversy under rule authorizing court to order party to submit to mental or physical examination. *Tyler v. District Court In and For Adams County*, 1977, 561 P.2d 1260, 193 Colo. 31. Damages ↪ 206(2)

Complaint seeking general damages for past mental suffering did not put petitioner's present mental condition in controversy under rule authorizing court to order party to submit to mental examination. *Tyler v. District Court In and For Adams County*, 1977, 561 P.2d 1260, 193 Colo. 31. Damages ↪ 206(2)

That litigant's mental condition may bear on his credibility as a witness does not place his mental condition in controversy within rule authorizing court to order party to submit to mental examination. *Tyler v. District Court*

In and For Adams County, 1977, 561 P.2d 1260, 193 Colo. 31. Pretrial Procedure ↪ 453

Where plaintiff alleged in his complaint that he had suffered personal injuries as a result of defendant's acts, plaintiff placed his physical condition in controversy and defendant, without further showing, had good cause to move court to order plaintiff to submit to physical examination. *Braxton v. Luff*, App.1976, 558 P.2d 444, 38 Colo.App. 451. Damages ↪ 206(2)

#### 4. Good cause for examination

A motion for physical examination is addressed to sound discretion of trial court, and it is necessary to demonstrate good cause therefor. *Hildyard v. Western Fasteners, Inc.*, App.1974, 522 P.2d 596, 33 Colo.App. 396. Damages ↪ 206(2)

Refusal of defendant's request for an examination by a physician in same specialty as each physician who had examined and treated plaintiff was not an abuse of discretion, though none of doctors who examined plaintiff were in complete agreement as to whether cervical sprain caused a nerve disorder, circulatory disorder, or both, where there was no indication that examination by additional physicians would resolve uncertainty, and physician selected by defendants was allowed to make two separate examinations. *Hildyard v. Western Fasteners, Inc.*, App.1974, 522 P.2d 596, 33 Colo.App. 396. Damages ↪ 206(6)

Refusal to force psychiatric examination of divorced wife was not abuse of discretion in absence of evidence necessitating such an examination. *Kane v. Kane*, 1964, 391 P.2d 361, 154 Colo. 440. Divorce ↪ 86

#### 5. Psychiatric or psychological examination

Juvenile court did not abuse its discretion in denying foster mother's motion for a psychological examination of biological mother, in dependency and neglect proceeding; prior order required biological mother to participate in parent-child interactional evaluation, which would adequately address impact of mother's mental health on her relationship with child, and mother had already undergone several psychological examinations before filing of dependency and neglect proceeding and one of these evaluations had been updated. *People ex rel. A.W.R.*, App.2000, 17 P.3d 192, certiorari denied. Infants ↪ 208

Participants in proceedings conducted under statute pertaining to release from commitment after verdict of not guilty by reason of insanity do not have broad right of discovery as provided in rules of civil procedure; procedure in such proceedings is so inconsistent or in conflict with rules of civil procedure as to make discovery rules inapplicable. *People v. District Court In and For Tenth Judicial Dist.*, 1976, 557 P.2d 414, 192 Colo. 225. Pretrial Procedure ↪ 21

Procedures set out in statutes pertaining to release from commitment after verdict of not guilty by reason of insanity are addressed to discretion of trial court and permit all participants to prepare adequately for the hearing and, upon a proper showing, trial court may use or authorize use of suitable discovery procedures reasonably fashioned to elicit facts necessary to help court dispose of matter as law and justice may require, even though there is no broad right of discovery as provided in rules of civil procedure. *People v. District Court In and For Tenth Judicial Dist.*, 1976, 557 P.2d 414, 192 Colo. 225. Mental Health ↪ 440

Trial court has power to order psychiatric examination of parties to divorce action even though rules of civil procedure do not so provide. *Kane v. Kane*, 1964, 391 P.2d 361, 154 Colo. 440. Divorce ↪ 86

On motion to vacate interlocutory decree of divorce on ground that defendant husband was insane at time of purported service of summons and complaint and throughout pendency of action and at time of alleged commission of acts relied upon as grounds for divorce, requiring husband who had absented himself from the state, to submit to an examination within the jurisdiction of the court by psychiatrists or physicians selected by wife as a condition to the admission in evidence of depositions of physicians who had examined husband in another state was not error. *Richardson v. Richardson*, 1951, 236 P.2d 121, 124 Colo. 240. Divorce ⇨ 161

#### 6. Evidentiary privileges

Where defendant during his deposition admitted, in response to questions from conservator's attorney, that he had received medical treatment by psychiatrist and psychologist during various periods, testimony was sufficient to establish privileged character of records pertaining to his prior treatment, and thus it was incumbent upon conservator to overcome defendant's prima facie showing of privilege by demonstrating that defendant either expressly or impliedly waived privilege. *Clark v. District Court, Second Judicial Dist., City and County of Denver*, 1983, 668 P.2d 3. Pretrial Procedure ⇨ 410

Where a conservator, as plaintiff in wrongful death action, placed defendant's physical or mental condition in issue by alleging his prior mental problems, including alcohol and drug abuse, as basis of her claims for relief against defendant, but defendant in his answer denied liability allegations and did not assert his physical or mental condition as an affirmative defense to conservator's claim, defendant's answer could not be construed as a manifestation of his intent to forego confidentiality attaching to his communications to a treating psychiatrist or psychologist, nor was his answer denying liability inconsistent with claim of privilege with respect to the communications. *Clark v. District Court, Second Judicial Dist., City and County of Denver*, 1983, 668 P.2d 3. Witnesses ⇨ 219(5)

#### 7. Notice

Defendant seeking to obtain order for independent psychological examination of plaintiff did not violate rule requiring reasonable effort to confer with opposing counsel concerning matter before seeking motion where before requesting order defendant first made unsuccessful effort by stipulation to examine plaintiff, plaintiff refused to appear for second examination, and plaintiff was without counsel for 10-month period prior to hearing to address examinations that were to follow. *Newell v. Engel*, App.1994, 899 P.2d 273, rehearing denied, certiorari denied. Damages ⇨ 206(2)

The notice provisions of rule authorizing court to order party to submit to physical or mental examination are mandatory and, absent proper notice, court may refuse to order a physical or a mental examination. *Tyler v. District Court In and For Adams County*, 1977, 561 P.2d 1260, 193 Colo. 31. Pretrial Procedure ⇨ 455

#### 8. Order

Grant of motion for independent psychiatric examination did not fail to conform with rule requiring that order granting motion specify time, place, manner, conditions, and scope of examination where parties at later hearing clarified details of examination and party to be examined raised no objection on that ground before testing occurred. *Newell v. Engel*, App.1994, 899 P.2d 273, rehearing denied, certiorari denied. Damages ⇨ 206(5)

In action for personal injuries sustained in automobile accident, order requiring plaintiff to submit to physical examination was not defective in failing to set forth all details of examination where order specified date by

which examination had to be made and physician who was to make examination and plaintiff raised no objection to being subjected to physical examination, to scope of examination, or to doctor who was to perform examination. *Braxton v. Luff*, App.1976, 558 P.2d 444, 38 Colo.App. 451. Damages ↪ 206(5)

#### 9. Identity of examining physician

Fact that certain doctors allegedly testify only for the defense in matters of personal injury is relevant only to weight and credibility and does not demand disqualification of such a doctor to make examination and testify, and cross-examination affords full protection to the plaintiff's rights. *Timpte v. District Court In and For City and County of Denver*, 1966, 421 P.2d 728, 161 Colo. 309. Damages ↪ 206(6); Evidence ↪ 571(10); Witnesses ↪ 35

Court may, on a finding, sustained by showing of bias and prejudice, reject a particular physician designated by defendant for examination of plaintiff and order defendant to submit the names of other physicians. *Timpte v. District Court In and For City and County of Denver*, 1966, 421 P.2d 728, 161 Colo. 309. Damages ↪ 206(6)

Defendant's right to designate physician for physical examination of a plaintiff is subject to protective orders by court such as, among others, those limiting the number of doctors who may examine, those providing who may be present at examinations, including plaintiff's attorney if court deems it wise, and those setting the time, type, place, scope and conduct of examination. *Timpte v. District Court In and For City and County of Denver*, 1966, 421 P.2d 728, 161 Colo. 309. Damages ↪ 206(6)

So long as plaintiff may select his own doctor to testify as to his physical condition, fundamental fairness dictates that a defendant shall have the same right, in absence of agreement by parties, to select who the examining physician will be. *Timpte v. District Court In and For City and County of Denver*, 1966, 421 P.2d 728, 161 Colo. 309. Damages ↪ 206(6)

#### 10. Duty of examining physician

Whether psychiatrist had a duty to avoid causing former insured harm during independent psychiatric examination conducted in insured's action against her insurer could not be determined from trial record, requiring remand in action brought by insured against the psychiatrist. *Dalton v. Miller*, App.1999, 984 P.2d 666, rehearing denied, certiorari denied. Appeal And Error ↪ 1178(6)

Physician examining patient, at request of defendant in personal injury lawsuit brought by patient, owed patient duty of care to not subject her to tests of lower back capabilities which would cause her harm; physician had knowledge of patient's susceptibilities through presence of scars from earlier back operations, and patient's medical history of back problems and surgery. *Greenberg v. Perkins*, 1993, 845 P.2d 530. Health ↪ 709(1)

#### 11. Immunity

Quasi-judicial immunity is generally not extended to an examination conducted at the request of one of the parties to the litigation. *Dalton v. Miller*, App.1999, 984 P.2d 666, rehearing denied, certiorari denied. Health ↪ 709(1)

Professionals conducting an independent medical or psychiatric examination, pursuant to discovery rule permitting such examinations, are not entitled to absolute quasi-judicial immunity for their activities. *Dalton v. Miller*, App.1999, 984 P.2d 666, rehearing denied, certiorari denied. Health ↪ 770

## C.R.C.P. Rule 35

Psychiatrist who conducted independent medical examination of insured in insured's action against her insurer was entitled to absolute witness immunity, in action alleging, inter alia, misrepresentation and deceit, invasion of privacy, intentional infliction of emotional distress, and outrageous conduct, in connection with statements psychiatrist made during his videotaped trial preservation deposition testimony that would have been played at trial in lieu of actual testimony as well as contents of report he prepared for insurer. *Dalton v. Miller*, App.1999, 984 P.2d 666, rehearing denied, certiorari denied. Damages ↻ 57.49; Fraud ↻ 36; Torts ↻ 359

## 12. Inappropriate conduct

Psychiatrist who conducted independent psychiatric examination of insured in insured's action against her insurer was not entitled to absolute quasi-judicial immunity, in action alleging, inter alia, misrepresentation and deceit, invasion of privacy, intentional infliction of emotional distress, and outrageous conduct, in connection with his conduct during the examination and alleged discrepancies between his report to insurer and videotaped deposition testimony. *Dalton v. Miller*, App.1999, 984 P.2d 666, rehearing denied, certiorari denied. Damages ↻ 57.49; Fraud ↻ 36; Torts ↻ 359

## 13. Report of examining physician

Postconviction relief motions must be filed in the court rendering the sentence because that court maintains the records relating to the conviction and sentence. *Leske v. Golder*, App.2005, 124 P.3d 863, rehearing denied, certiorari denied 2005 WL 3739698. Criminal Law ↻ 1587

Physician's medical report was not discoverable under rule governing report of examining physician when examination was not "of the same condition" as required by rule. *Phillips v. District Court In and For Second Judicial Dist.*, 1978, 573 P.2d 553, 194 Colo. 455. Pretrial Procedure ↻ 379

There was no error in permitting treating physician to testify concerning treatment of plaintiff where defendant had been furnished with copy of only report made by physician of medical examination of plaintiff and his further visits with plaintiff were for the purpose of treatment only, a report of which he was not required to furnish under rule. *Palmer Park Gardens, Inc. v. Potter*, 1967, 425 P.2d 268, 162 Colo. 178. Damages ↻ 206(5)

## 14. Failure to appear for examination

Dismissal with prejudice of plaintiff's personal injury complaint was proper sanction and not abuse of discretion, where, without warning or explanation, plaintiff failed to appear for six scheduled physical examinations, including one examination scheduled pursuant to court order stating that case would be dismissed if he did not submit to examination by specified date. *Braxton v. Luff*, App.1976, 558 P.2d 444, 38 Colo.App. 451. Damages ↻ 206(8)

## 15. Multiple examinations

Rule permitting court to order, upon showing of good cause, a mental examination of a party whose mental condition is in controversy does not limit a party to one examination; a second examination may be ordered if there is a substantial time between the initial examination and the trial. *People ex rel. A.W.R.*, App.2000, 17 P.3d 192, certiorari denied. Pretrial Procedure ↻ 453

## 16. Summary judgment

C.R.C.P. Rule 35

Summary judgment affidavit from expert who reviewed psychiatrist's performance and found that it did not fall below prevailing professional standards did not establish that former insured was not harmed by psychiatrist during independent psychiatric examination held in insured's action against insurer; expert reviewed psychiatrist's written report and videotaped trial preservation deposition, but because he was provided no information concerning the actual conduct of the examination, he could not render an opinion as to what had transpired during examination. *Dalton v. Miller*, App.1999, 984 P.2d 666, rehearing denied, certiorari denied. Judgment ↩ 185.3(21)

## 17. Mandamus

Mandamus was proper remedy for obtaining relief from order of district court that petitioner submit to mental and psychiatric examinations. *Tyler v. District Court In and For Adams County*, 1977, 561 P.2d 1260, 193 Colo. 31. Mandamus ↩ 32

Rules Civ. Proc., Rule 35, **CO ST RCP Rule 35**

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# CONNECTICUT

**C****Connecticut General Statutes Annotated Currentness****Rules for the Superior Court (Refs & Annos)****Procedure in Civil Matters****Chapter 13. Discovery and Depositions****→ § 13-11. Requests for Production, Inspection and Examination--Physical or Mental Examination**

(a) In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, in which the **mental or physical condition** of a party, or of a person in the custody of or under the legal control of a party, is material to the prosecution or defense of said action, the judicial authority may order the party to submit to a **physical or mental examination** by a physician or to produce for examination the person in the party's custody or legal control.

(b) In the case of an action to recover damages for personal injuries, any party adverse to the plaintiff may file and serve in accordance with Sections 10-12 through 10-17 a request that the plaintiff submit to a **physical or mental examination** at the expense of the requesting party. That request shall specify the time, **place**, manner, **conditions** and scope of the **examination** and the person or persons by whom it is to be made. Any such request shall be complied with by the plaintiff unless, within ten days from the filing of the request, the plaintiff files in writing an objection thereto specifying to which portions of said request objection is made and the reasons for said objection. The objection shall be **placed** on the short calendar list upon the filing thereof. The judicial authority may make such order as is just in connection with the request. No plaintiff shall be compelled to undergo a **physical examination** by any physician to whom he or she objects in writing.

(c) In any other case, such order may be made only on motion for good cause shown to be heard at short calendar. The motion shall specify the time, **place**, manner, **conditions** and scope of the **examination** and the person or persons by whom it is to be made.

(d) If requested by the party against whom an order is made under this rule, or who has voluntarily agreed to an **examination**, the party causing the **examination** to be made shall deliver to such party a copy of a written report of the **examining** physician, setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier **examinations** of the same **condition**. After delivery the party causing the **examination** shall be entitled upon request to receive from the party against whom the order is made, or who has voluntarily agreed to an **examination**, a like report of any **examination**, previously or thereafter made, of the same **condition**. The judicial authority on motion may make an order requiring delivery by a party of a report on such terms as are just, and if a physician fails or refuses to make a report the judicial authority may exclude the physician's testimony if offered at the trial.

(e) By requesting and obtaining a report of the **examination** so ordered or by taking the deposition of the examiner, the **party examined** waives, in that action, or in any other action involving the same controversy, any privilege he or she may have regarding the testimony of every other person who has **examined** or may thereafter **examine** the party in respect to the same **mental or physical condition**.

(f) This section does not preclude discovery of a report of an **examining** physician or the taking of a deposition of the physician in accordance with the provisions of any other section of this chapter.

Practice Book 1998, § 13-11

Practice Book 1998, § 13-11, CTR SUPER CT CIV § 13-11

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West's Delaware Code Annotated Currentness  
Delaware Rules of Court  
    Chancery Court Rules  
        V. Depositions and Discovery

→ **RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS**

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **Report of Examiner.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requestor a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The Court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the Court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This paragraph applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This paragraph does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

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# DISTRICT OF COLOMBIA

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WEST'S DISTRICT OF COLUMBIA RULES OF COURT  
SUPERIOR COURT RULES OF CIVIL PROCEDURE  
V. DEPOSITIONS AND DISCOVERY

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## RULE 35. PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS

(a) **Order for Examination.** When the **mental** or **physical** condition of a **party** or of a person in the custody or under the legal control of a **party**, is in controversy, the Court may order the **party** to submit to a **physical** or **mental examination** by a suitable licensed or certified examiner or to produce for **examination** the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be **examined** and to all **parties**. A showing of good cause shall include specified allegations of a **mental** or **physical** condition that is material to the Court's determination of an **issue** in the case. The order shall specify the time, **place**, manner, conditions, and scope of the **examination**; the person or persons by whom it is to be made; and it shall set forth the limitations on the use and dissemination of the **examination** report as appropriate under the circumstances of the case.

(b) **Report of Examiner.**

(1) Unless otherwise ordered, the report of the **examination** shall be served on each **party** but shall not be filed with the Court.

(2) This paragraph does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other Rule.

## Comment

While this Rule by its terms provides a general framework for **examinations** where a person's **physical** or **mental** condition is in controversy, it is not intended to preclude the use of court-ordered medical, genetic blood and tissue grouping tests where such tests are relevant to matters at **issue**. These tests, when used to establish parentage, are specifically authorized by D.C. Code § 16-2343.

Civil Rule 35

DC R RCP Rule 35

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# FLORIDA

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West's Florida Statutes Annotated Currentness  
Florida Rules of Civil Procedure (Refs & Annos)  
→ **Rule 1.360. Examination of Persons**

**(a) Request; Scope.**

(1) A party may request any other party to submit to, or to produce a person in that other party's custody or legal control for, examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.

(A) When the physical condition of a party or other person under subdivision (a)(1) is in controversy, the request may be served on the plaintiff without leave of court after commencement of the action, and on any other person with or after service of the process and initial pleading on that party. 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. The party to whom the request is directed shall serve a response within 30 days after service of the request, except that a defendant need not serve a response until 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. The response shall state that the examination will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated.

(B) In cases where the condition in controversy is not physical, a party may move for an examination by a qualified expert as in subdivision (a)(1). The order for examination shall be made only after notice to the person to be examined and to all parties, and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(C) Any minor required to submit to examination pursuant to this rule shall have the right to be accompanied by a parent or guardian at all times during the examination, except upon a showing that the presence of a parent or guardian is likely to have a material, negative impact on the minor's examination.

(2) An examination under this rule is authorized only when the party submitting the request has good cause for the examination. At any hearing the party submitting the request shall have the burden of showing good cause.

(3) Upon request of either the party requesting the examination or the party or person to be examined, the court may establish protective rules governing such examination.

**(b) Report of Examiner.**

(1) If requested by the party to whom a request for examination or against whom an order is made under subdivision (a)(1)(A) or (a)(1)(B) or by the person examined, the party requesting the examination to be made shall deliver to the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis, and conclusions, with similar reports of all earlier examinations of the same condition. After delivery of the detailed written report, the party requesting the exam-

ination to be made shall be entitled upon request to receive from the party to whom the request for examination or against whom the order is made a similar report of any examination of the same condition previously or thereafter made, unless in the case of a report of examination of a person not a party the party shows the inability to obtain it. On motion, the court may order delivery of a report on such terms as are just; and if an examiner fails or refuses to make a report, the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or requested or by taking the deposition of the examiner, the party examined waives any privilege that party may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine that party concerning the same condition.

(3) This subdivision applies to examinations made by agreement of the parties unless the agreement provides otherwise. This subdivision does not preclude discovery of a report of an examiner or taking the deposition of the examiner in accordance with any other rule.

(c) **Examiner as Witness.** The examiner may be called as a witness by any party to the action, but shall not be identified as appointed by the court.

#### CREDIT(S)

Amended July 26, 1972, effective Jan. 1, 1973 (265 So.2d 21); Oct. 6, 1988, effective Jan. 1, 1989 (536 So.2d 974); July 16, 1992, effective Jan. 1, 1993 (604 So.2d 1110); July 7, 1995, effective Jan. 1, 1996 (663 So.2d 1047); Nov. 22, 1995, effective Jan. 1, 1996 (663 So.2d 1049); Sept. 27, 2007, effective Jan. 1, 2008 (966 So.2d 943).

#### COMMITTEE NOTES

**1972 Amendment.** Derived from Federal Rule of Civil Procedure 35 as amended in 1970. The good cause requirement under this rule has been retained so that the requirements of *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), have not been affected. Subdivision (b) is changed to make it clear that reports can be obtained whether an order for the examination has been entered or not and that all earlier reports of the same condition can also be obtained.

**1988 Amendment.** This amendment to subdivision (a) is intended to broaden the scope of rule 1.360 to accommodate the examination of a person by experts other than physicians.

#### AUTHORS' COMMENT--1967

Rule 1.360 is the same as former Rule 1.29, 1954 Rules of Civil Procedure and quite similar to Federal Rule 35. As such, 2A Barron and Holtzoff, Federal Practice and Procedure, Rules Edition (West 1961) should be consulted.

It should be noted that the order of the court may be made only on good cause shown, and failure to show good cause by the moving party will defeat the issuance of the order. By operation of Rule 1.380(b)(2)(iv), a party is protected from arrest for disobeying an order under this rule, although remaining subject to the other consequences for failure to comply with the order.

Under the practice heretofore in Florida many attorneys have arranged between themselves for examinations

without the entry of any order and such practice is not prohibited by this rule. The order provided for under this rule makes it possible to obtain a copy of the physician's report. This rule is not mandatory, the granting of the order is discretionary.

If the examined party takes advantage of this rule, he becomes obligated to furnish all of his medical reports. The plaintiff's physician holds the key to this rule because if he refuses to make the report available the only penalty is that his testimony is barred. Thus the examined person could obtain from the defendant the report of the defendant's physician and then not furnish reports made by his, the plaintiff's physician if that physician fails or refuses to make such report.

#### HISTORICAL NOTES

##### Source:

1954 RCP 1.29. Title shortened from "Examination. Physical and mental examination of parties and examination of property."

##### Prior Provisions:

**Law.** 1950 Common Law Rule 28. Derived from Federal Rule 35.

**Equity.** Laws 1931, c. 14658, § 47; Comp.Gen.Laws 1936 Supp., § 4921(3); F.S.A. § 63.47; 1950 Equity Rule 47(d) (Depositions de bene esse--optional procedure). Superseded by 1954 RCP 1.21 to 1.31.

**Law and equity.** 1954 RCP 1.29. Derived from 1950 Common Law Rule 28.

#### CROSS REFERENCES

Application to probate and guardianship proceedings, see Probate Rule 5.080.

Patient records, persons to whom copies are to be furnished, see F.S.A. § 455.667.

Refusal to permit discovery, see Civil Procedure Rule 1.380.

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Compulsory examinations re-examined. Joel Miller, 56 Fla.B.J. 700 (1982).

Discovery of medical experts' records in connection with compulsory medical examinations. Michael Snowden, 66 Fla.B.J. 50 (Jan. 1992).

Faults in Florida no-fault divorce. Virginia Anne Church, 45 Fla.B.J. 568 (1971).

Paternity suits, blood tests and the law. Raymond T. Elligett, Jr., 57 Fla.B.J. 715 (1983).

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Statutory marriage counseling. Richard T. Shankweiler, 45 Fla.B.J. 566 (1971).

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M. Minnette Massey, Nancy Little Hoffmann and Larry C. Linder, 28 U.Miami L.Rev. 257 (1974).

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Why third-party observers should be excluded from Rule 1.360 psychological examinations. Lyndall Lambert, 26 Trial Advocate Quarterly 6 (Winter 2007).

Work-product privilege in a nutshell. Judge Thomas D. Sawaya, 67 Fla.B.J. 32 (July/Aug. 1993).

#### LIBRARY REFERENCES

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C.J.S. Discovery §§ 69, 110-112.

#### RESEARCH REFERENCES

##### ALR Library

84 ALR 4th 558, Right of Party to Have Attorney or Physician Present During Physical or Mental Examination at Instance of Opposing Party.

7 ALR 3rd 881, Right of Party to Have His Attorney or Physician, or a Court Reporter, Present During His Physical or Mental Examination by a Court-Appointed Expert.

86 ALR 2nd 138, Pretrial Deposition-Discovery of Opinions of Opponent's Expert Witnesses.

71 ALR 2nd 973, Court's Power to Order Physical Examination of Personal Injury Plaintiff as Affected by Distance or Location of Place of Examination.

108 ALR 142, Power to Require Plaintiff to Submit to Physical Examination.

##### Encyclopedias

Intentional Spoliation of Evidence, 18 Am. Jur. Proof of Facts 3d 515.

Proof of Failed Back Syndrome, 59 Am. Jur. Proof of Facts 3d 203.

Waiver or Preclusion of Issue Not Preserved Below, FL Jur. 2d Appellate Review § 97.

Absence of Other Sufficient Remedy; Adequate Remedy by Appeal, FL Jur. 2d Appellate Review § 461.

Evidence; Depositions and Discovery, FL Jur. 2d Decedents' Property § 482.

Medical Records, FL Jur. 2d Discovery & Depositions § 34.

Where Expert Not Expected to be Called as Witness, FL Jur. 2d Discovery & Depositions § 89.

Scope and Types of Examination Permitted, FL Jur. 2d Discovery & Depositions § 100.

Conduct of Examination, FL Jur. 2d Discovery & Depositions § 102.

Conduct of Examination--Place, FL Jur. 2d Discovery & Depositions § 103.

Conduct of Examination--Persons Who May Attend, FL Jur. 2d Discovery & Depositions § 104.

Reports of Examiners, FL Jur. 2d Discovery & Depositions § 105.

Motion for Order Compelling Discovery--Grounds for Motion, FL Jur. 2d Discovery & Depositions § 163.

Contempt, FL Jur. 2d Discovery & Depositions § 177.

Sanctions for Failure to Submit to or Produce Another for Examination, FL Jur. 2d Discovery & Depositions § 178.

Fitness of Parent as Issue, FL Jur. 2d Family Law § 807.

Social Investigation and Study, FL Jur. 2d Family Law § 952.

Discovery, Generally, FL Jur. 2d Family Law § 965.

Expert Witnesses, FL Jur. 2d Family Law § 987.

#### Forms

Florida Pleading and Practice Forms § 3:2, Scope of Discovery.

Florida Pleading and Practice Forms § 3:133, Procedural Guide.

Florida Pleading and Practice Forms § 3:134, Checklist--Procedural Steps in Connection With Examination of Persons [Fla. R. Civ. P. 1.360].

Florida Pleading and Practice Forms § 3:135, Stipulation--For Physical Examination of Plaintiff [Fla. R. Civ. P. 1.360].

Florida Pleading and Practice Forms § 3:136, Motion--For Order Directing Plaintiff to Submit to Physical Examination [Fla. R. Civ. P. 1.360].

Florida Pleading and Practice Forms § 3:138, Affidavit--By Attorney--In Support of Motion for Order Directing Plaintiff to Submit to Physical Examination [Fla. R. Civ. P. 1.360].

Florida Pleading and Practice Forms § 44:250, Physical and Mental Examinations.

1 La Coe's Forms for Pleading Under Fla. Rules of Civ. Pro. R 1.280(246), Privileged Medical Information.

2 La Coe's Forms for Pleading Under Fla. Rules of Civ. Pro. R 1.360(10), Confidentiality or Privacy of Examination or Results.

#### Treatises and Practice Aids

1 Florida Practice Series § 503.5, Psychotherapist-Patient Privilege--Exceptions.

- 1 Florida Practice Series § 503.7, Doctor-Patient Privilege.
- 3 Florida Practice Series § 360.1, Request for Examination.
- 3 Florida Practice Series § 360.3, Motion for Examination.
- 3 Florida Practice Series § 360.4, Affidavit in Support of Motion for Compulsory Physical Examination.
- 3 Florida Practice Series § 360.6, Request for Report Findings.
- 3 Florida Practice Series § 360.7, Request for Report of Other Examinations.
- 3 Florida Practice Series § 360.9, Motion for Report of Other Examinations.
- 3 Florida Practice Series § 360.10, Order for Delivery of Report.
- 4 Florida Practice Series R 1.360, Examination of Persons.
- 5 Florida Practice Series § 10.12, Examination of Persons.
- 6 Florida Practice Series § 25.7, Examination of the Person.
- 6 Florida Practice Series § 25.8, Sanctions for Discovery Violations.
- 6 Florida Practice Series § 12.22, Immunities and Privileges.
- 9 Florida Practice Series § 22D:3, Spoliation by Employees.

UNITED STATES CODE ANNOTATED

Federal Rule 35, Text, Notes of Advisory Committee, Commentaries and Notes of Decisions, see 28 U.S.C.A.

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#### 1. In general

Restricting an insurer's choice of defense medical expert to a physician consulted for a reason other than that for which the examiner was retained is inconsistent with the purpose and plain language of rule permitting examination of party by a qualified expert when the condition that is the subject of the requested examination is in controversy. *GEICO General Ins. Co. v. Berner*, App. 3 Dist., 2007 WL 4409786 (2007). Damages ↪ 206(6)

Medical reports based on examination requested by a party do not need to be delivered to the other party absent request for such. *State v. Mark Marks, P.A.*, App. 4 Dist., 654 So.2d 1184 (1995), rehearing denied, review granted 668 So.2d 603, approved 698 So.2d 533. Pretrial Procedure ↪ 403

Defendant does not have absolute right to select expert to perform examination of plaintiff. *State Farm Mut. Auto. Ins. Co. v. Shepard*, App. 2 Dist., 644 So.2d 111 (1994). Damages ↪ 206(6)

After ruling in plaintiff's favor on her objection to location of defendant's requested independent medical examination of plaintiff, trial court abused its discretion in not allowing defendant to select which expert defendant could use. *State Farm Mut. Auto. Ins. Co. v. Shepard*, App. 2 Dist., 644 So.2d 111 (1994). Damages ↪ 206(6)

If trial judge determines from evidence presented that mental condition of children is in controversy and that good cause has been shown necessitating psychological examinations, he may order independent examinations by appropriate professionals. *Russenberger v. Russenberger*, App. 1 Dist., 623 So.2d 1244 (1993), review granted 632 So.2d 1027, approved 639 So.2d 963. Child Custody ↪ 425

Where defendant county hired and named physician as trial witness in personal injury action, but subsequently revised expert witness list deleting him after he gave opinion in videotaped deposition that plaintiff had suffered permanent injury, he was properly permitted to testify, and plaintiff was properly permitted to refer to him as having been originally hired by County. *Broward County v. Cento*, App. 4 Dist., 611 So.2d 1339 (1993). Pretrial Procedure ↪ 3

Under this rule providing that mental examination may be ordered only when mental condition of party is in controversy and good cause is shown for necessity of examination, two requirements of "in controversy" and

“good cause” are not met by mere conclusory allegations of pleadings, nor by mere relevance to case, but require affirmative showing by movant that each condition as to which examination is sought is really and genuinely in controversy and that good cause exists for ordering such particular examination. *Fruh v. State, Dept. of Health & Rehabilitative Services*, App. 5 Dist., 430 So.2d 581 (1983). Pretrial Procedure ↪ 455

Under this rule providing that mental examination may be ordered only when mental condition of party is in controversy and good cause is shown for necessity of examination, “in controversy” means that party's condition is directly involved in some material element of cause of action or defense; “good cause” means that mental condition of party, even though in controversy, could not adequately be evidenced without assistance of expert medical testimony. *Fruh v. State, Dept. of Health & Rehabilitative Services*, App. 5 Dist., 430 So.2d 581 (1983). Pretrial Procedure ↪ 453

Two essential prerequisites that must be clearly manifested before party can be subjected to compulsory mental or physical examination by the court are that petitioner's mental condition be “in controversy,” i.e., directly involved in some material element of cause of action or defense and that “good cause” be shown, i.e., that mental state of party, even though “in controversy,” could not adequately be evidenced without assistance of expert medical testimony. *Gasparino v. Murphy*, App. 2 Dist., 352 So.2d 933 (1977). Damages ↪ 206(2); Pretrial Procedure ↪ 451; Pretrial Procedure ↪ 453; Pretrial Procedure ↪ 455

Allegations of negligent conduct coupled with claim that there is controversy as to party's mental state does not place party's mental state “in controversy” nor constitute showing of “good cause” sufficient to warrant compulsory mental or physical examination. *Gasparino v. Murphy*, App. 2 Dist., 352 So.2d 933 (1977). Pretrial Procedure ↪ 455

## 2. Federal rule 35

The word “party” in federal rule 35 providing that on good cause shown and if mental or physical condition of a party is in controversy the court may order him to submit to physical or mental examination by physician includes defendant; the rule as so construed does not constitutionally invade defendant's privacy and is within scope of enabling act. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ↪ 33; Federal Civil Procedure ↪ 1653

The “good cause” and “in controversy” requirements of federal rule 35 authorizing physical or mental examination of a party are not met by mere conclusory allegations of pleadings, nor by mere relevance to the case; there must be an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination; the ability of the movant to obtain the desired information by other means is also relevant. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ↪ 1651

The federal rule 35 authorizing physical or mental examination of a party requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the movant has adequately demonstrated “in controversy” and “good cause”; this does not mean that the movant must prove his case on the merits, nor does it mean that an evidentiary hearing is required in all cases; this may be necessary in some cases, but in other cases the showing may be made by affidavits or other usual methods short of a hearing. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ↪ 1651

## 3. Routine ordering of examination

Mental or physical examinations of a party should not be ordered routinely in automobile accident cases. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ⚡ 1654

Sweeping mental or physical examinations of a party who has not affirmatively put into issue his own mental or physical condition should not be automatically ordered merely because the person has been involved in an accident and a general charge of negligence is lodged. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ⚡ 1654

#### 4. Request for examination

Rule providing that party may request any other party to submit to examination by a qualified expert when the condition that is the subject of the requested examination is in controversy does not limit the party requesting an independent medical exam (IME) to a single examination of the other party. *Royal Caribbean Cruises, Ltd. v. Cox*, App. 3 Dist., 2008 WL 183719 (2008). Damages ⚡ 206(3)

Defendant school board in action by student to recover for injuries allegedly caused by another student due to board's alleged negligence was entitled to continuance to conduct independent neurological examination of student, despite student's claim that, because he had not retained neurology expert, school board should not be allowed examination, as student's neurological state was central issue in trial, and student's psychiatric expert testified based on his experience as physician to neurological component of injury. *Broward County School Bd. v. Cruz* ex rel. Cruz, App. 4 Dist., 761 So.2d 388 (2000), rehearing denied, review granted 779 So.2d 270, approved 800 So.2d 213. Pretrial Procedure ⚡ 714

While respondents might be entitled to medical examination that included invasive testing, petitioner was likewise entitled to know extent of such tests in order to seek protection of court in providing for reasonable measures to assure that such testing would not cause injury, and thus, request for examination was deficient to extent it failed to disclose nature of urological examination or extent of testing. *Schagrin v. Nacht*, App. 4 Dist., 683 So.2d 1173 (1996). Damages ⚡ 206(2); Damages ⚡ 206(5)

Defendant in action arising from automobile accident, in which plaintiff sought damages for physical and non-physical injuries she received in accident, had good cause for requesting independent examinations of plaintiff. *Blagrove v. Smith*, App. 5 Dist., 701 So.2d 584 (1997), review denied 717 So.2d 528. Damages ⚡ 206(2)

Request for independent examination must specify reasonable place for examination. *Blagrove v. Smith*, App. 5 Dist., 701 So.2d 584 (1997), review denied 717 So.2d 528. Damages ⚡ 206(5)

Trial court did not abuse its discretion in determining that defendant's request for independent examination of plaintiff, who brought action arising from automobile accident, in county other than county where action was pending was reasonable, even though county where action was brought was also where accident occurred and plaintiff and medical providers were located, since counties were geographically close to one another. *Blagrove v. Smith*, App. 5 Dist., 701 So.2d 584 (1997), review denied 717 So.2d 528. Damages ⚡ 206(7)

#### 5. Time and place of examination

Rule governing physical examinations, does not restrict where examination is to be performed. *McKenney v. Airport Rent-A-Car, Inc.*, App. 4 Dist., 686 So.2d 771 (1997). Damages ⚡ 206(7)

No hard and fast rule exists that party cannot be required to submit to physical examination except in county where party resides, and instead, question is matter for trial court's discretion. *McKenney v. Airport Rent-A-Car, Inc.*, App. 4 Dist., 686 So.2d 771 (1997). Damages ⇨ 206(7)

Trial court order requiring that plaintiff in personal injury action submit to physical examination in county in which accident occurred, rather than county in which he resided was not abuse of discretion, considering nature of injuries, fact that plaintiff's treating neurologist, who would be testifying, practiced in county other than county where plaintiff resided, and fact that trial would be held in county in which accident occurred. *McKenney v. Airport Rent-A-Car, Inc.*, App. 4 Dist., 686 So.2d 771 (1997). Damages ⇨ 206(7)

Trial court order that motorist who had been Florida resident at time of automobile accident and at time he filed action arising from accident, but who had voluntarily moved to Virginia after filing action and who had already traveled to Florida at his expense for deposition, submit to independent medical examination (IME) in Florida at unspecified time at motorist's expense did not establish reasonable place for IME; court could either set IME at location which had appropriate medical specialties and was convenient for motorist, or could require that defense cover expenses of trip. *Tsutras v. Duhe*, App. 5 Dist., 685 So.2d 979 (1997). Damages ⇨ 206(7)

Availability of appropriate medical speciality will influence extent to which nonresident plaintiff may be accommodated in determining what is reasonable place for independent medical examination (IME). *Tsutras v. Duhe*, App. 5 Dist., 685 So.2d 979 (1997). Damages ⇨ 206(7)

Physical examination of party in personal injury case could take place only in county of party's residence. *Youngblood v. Michaud*, App. 4 Dist., 593 So.2d 568 (1992). Damages ⇨ 206(5)

#### 6. Good cause.

Where defendant did not assert his mental or physical condition either in support or in defense of a claim and his condition was sought to be placed in issue by codefendants, the latter were required to make an affirmative showing that defendant's mental or physical condition was in controversy and that there was good cause for the examinations requested. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ⇨ 1651

A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly "in controversy" and provides the defendant with "good cause" for an examination to determine the existence and extent of such asserted injury; this is not only true as to a plaintiff, but applies equally to a defendant who asserts his mental or physical condition as a defense to a claim. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ⇨ 1651

Because seaman's physical condition underwent a substantial change after cruise ship's expert's first independent medical exam (IME) of seaman, namely seaman underwent second operation on his shoulder, ship proved good cause for requesting and conducting another IME in Jones Act action. *Royal Caribbean Cruises, Ltd. v. Cox*, App. 3 Dist., 2008 WL 183719 (2008). Damages ⇨ 206(3)

In a negligence action where a plaintiff asserts that he or she has sustained mental or physical injuries, the defendant's good cause for conducting an initial independent medical exam (IME) is normally shown without any further inquiry; however, when a defendant requests a subsequent IME, the defendant should make a stronger showing of necessity before that request is authorized. *Royal Caribbean Cruises, Ltd. v. Cox*, App. 3 Dist., 2008

WL 183719 (2008). Damages ⇨ 206(3)

At a motion hearing to require one to submit to a mental examination, it was incumbent upon the movant to establish good cause, beginning with proof of the facts on which they relied as proponents of the examination; the question of protective rules or protective orders never arises and the burden never shifts unless the proponent of the examination shows good cause for an examination in the first place. *Olges v. Dougherty*, App. 1 Dist., 856 So.2d 6 (2003), rehearing denied. Pretrial Procedure ⇨ 455

Not every automobile accident case gives rise to good cause to require the plaintiff to undergo a mental examination. *Olges v. Dougherty*, App. 1 Dist., 856 So.2d 6 (2003), rehearing denied. Damages ⇨ 206(2)

When a plaintiff in a negligence action asserts that he has sustained a mental or physical injury, he places his condition in controversy, and good cause for a medical examination is therefore shown; it is not enough that the defendants are allowed to review the plaintiff's medical or psychiatric records and to depose plaintiff's medical or psychiatric experts. *Florida Emergency Physicians-Kang and Associates, M.D., P.A. v. Parker*, App. 5 Dist., 800 So.2d 631 (2001), rehearing denied. Damages ⇨ 206(2)

Plaintiff in personal injury action could be required to submit to independent medical examination by orthopedic doctor on basis of showing of good cause for examination, despite fact that he already had independent medical examination by chiropractor, and despite fact that he would have to travel to adjacent county for examination. *Scales v. Swill*, App. 5 Dist., 715 So.2d 1059 (1998), rehearing denied. Damages ⇨ 206(2)

Complaint alleging personal injuries is in and of itself sufficient to show good cause for physical examination. *Dominique v. Yellow Freight System, Inc.*, App. 4 Dist., 642 So.2d 594 (1994), rehearing and rehearing en banc denied, review denied 651 So.2d 1193. Damages ⇨ 206(5)

Orders requiring divorced father to submit himself for a complete psychological examination, and restricting child visitation pending review of such examination, were not supported by "good cause," and the father's mental condition was not "in controversy," as required by this rule, where the only matter in the record which put the mental stability of the father in controversy was conclusory allegations contained in the pleadings of the mother, a neuropsychiatric evaluation report of father did not reflect any problem which would warrant termination of visitation, and an evaluation of the child found that child was well adjusted, affectionate, and attached to both parents. *Williams v. Williams*, App. 2 Dist., 550 So.2d 166 (1989). Divorce ⇨ 86; Child Custody ⇨ 638

Requirement of good cause necessary to support compulsory mental examination was not met by showing, in postdivorce decree proceedings, that children were sometimes upset when they returned from visitation with their father, or by desire of father, who was multimillionaire, to give his children sense of value about money, and thus it was improper to order examination and counseling of the children. *Schottenstein v. Schottenstein*, App. 3 Dist., 384 So.2d 933 (1980), review denied 392 So.2d 1378. Divorce ⇨ 85

In action in which mental or physical condition of party is in controversy, examination of party with respect thereto may be ordered, when good cause is shown therefor, without regard to form or type of civil action in which it is involved. *Gordon v. Davis*, App. 3 Dist., 267 So.2d 874 (1972). Pretrial Procedure ⇨ 451

#### 7. Physical examination

Where the requisite good cause exists to conduct an independent medical exam (IME), a mere review of the op-

posing party's medical records is not a sufficient substitute for a firsthand, physical examination. *Royal Caribbean Cruises, Ltd. v. Cox*, App. 3 Dist., 2008 WL 183719 (2008). Damages ↪ 206(7)

Orthopedic specialist's examination of insured to resolve claim for personal injury protection (PIP) benefits did not preclude insurer from having another examination by different physician to resolve claim for uninsured/underinsured motorist (UM/UIM) benefits; insurer's evaluation of the insured for the two claims involved substantial legal and practical difference, and the specialist was supplied by third-party vendor and was not charged with examining causation and foreseeability. *GEICO General Ins. Co. v. Berner*, App. 3 Dist., 2007 WL 4409786 (2007). Damages ↪ 206(3)

Tortfeasor waived right to appeal denial of request for independent medical examination (IME) of automobile accident victim, where, after trial court denied request and motion for rehearing, tortfeasor never again requested IME or took a single step towards asking the court to revisit its ruling, despite delay before trial began. *Gulf Industries, Inc. v. Nair*, App. 4 Dist., 953 So.2d 590 (2007). Appeal And Error ↪ 179(1)

Rule permitting party to call examining physician as witness would apply to require admission of testimony of independent medical examination (IME) physician, who had examined accident victim in connection with claim for personal injury protection (PIP) benefits, in action for underinsured motorist (UM) benefits if UM claim was pending or anticipated at time of IME; otherwise, victim's need for IME physician's testimony would have to be weighed against insurer's argument that testimony was cumulative and prejudicial. *Cooney v. Pearl*, App. 4 Dist., 755 So.2d 742 (2000). Pretrial Procedure ↪ 456

Trial court did not abuse its discretion in allowing physical examination of plaintiff by physician chosen by defendants in action in which plaintiff's medical condition was at issue and all physicians previously examining and treating plaintiff had been selected by plaintiff. *Toucet v. Big Bend Moving & Storage, Inc.*, App. 1 Dist., 581 So.2d 952 (1991). Damages ↪ 206(6)

Section 455.241 requiring physicians to provide patients with reports and records of examinations was intended to protect individuals in their capacity as patients and was not intended to control examinations performed at request of opposing party for sole purpose of obtaining evidence in personal injury action. *West v. Branham*, App. 4 Dist., 576 So.2d 381 (1991), review dismissed 583 So.2d 1034 Damages ↪ 206(7)

Brassiere manufacturer's visual inspection of user's alleged injury that consisted of permanent stain on her skin in shape of brassiere and straps was not "physical examination" to be conducted by physician, where extent of damages as consequence of disfigurement could probably be more accurately assessed by counsel than by physician; only permanence or physiological consequences of injury required examination by expert. *King v. Loveable Co.*, App. 5 Dist., 506 So.2d 1127 (1987). Pretrial Procedure ↪ 451

#### 8. Autopsy

Trial court was warranted in ordering exhumation and autopsy of deceased personal injury plaintiff, who died shortly after filing complaint, where the plaintiff had allegedly died from mesothelioma, which was allegedly contracted due to prolonged occupational exposure to asbestos dust from products manufactured by defendants, and medical opinions tended to show an autopsy would likely provide relevant information, but widow of plaintiff was entitled to ten days from issuance of order to determine whether her religious beliefs would allow her to comply with order before case would be dismissed. *Hammer v. Rosenthal Jewelers Supply Corp.*, App. 4 Dist., 558 So.2d 460 (1990). Pretrial Procedure ↪ 451; Pretrial Procedure ↪ 457

Trial court's order, requiring autopsy to be performed on body of plaintiff in asbestos exposure related suit in event of plaintiff's death during litigation, and requiring collection of sufficient tissue to allow postautopsy microscopic analysis did not depart from essential requirements of law. *Landrum v. Armstrong World Industries, Inc.*, App. 3 Dist., 535 So.2d 656 (1988). Pretrial Procedure ↪ 451

#### 9. Matters in controversy

Seaman's physical condition after the second shoulder operation was "in controversy" within meaning of rule providing that party may request any other party to submit to examination by a qualified expert when the condition that is the subject of the requested examination is in controversy; seaman's claims against cruise ship in Jones Act action arose out of alleged injuries he sustained on board ship and seaman asserted that these injuries were continuing in nature, and one of the central issues in case was whether seaman had reached maximum medical improvement (MMI), or was owed maintenance and cure benefits. *Royal Caribbean Cruises, Ltd. v. Cox*, App. 3 Dist., 2008 WL 183719 (2008). Damages ↪ 206(2)

When a plaintiff in a negligence action asserts that she has sustained a mental or physical injury, she places her condition in controversy, and good cause for an independent medical examination is shown. *Leinhart v. Jurkovich*, App. 4 Dist., 882 So.2d 456 (2004), rehearing denied. Damages ↪ 206(2)

Because Department of Children and Family Services had not yet filed termination of parental rights petition containing allegations that placed parents' mental state at issue, trial court departed from essential requirements of law in compelling parents to submit to mental examinations in connection with determining whether court's interlocutory order merited certiorari review; departure from essential requirements of law was necessary for issuance of writ of certiorari, rule stated that party may request any other party to submit to exam when condition that is subject of exam is in controversy, and parents' mental state was not at issue until termination petition was filed. *In re G.D.*, App. 2 Dist., 870 So.2d 235 (2004). Certiorari ↪ 17

Condition that is subject of requested examination must directly involve a material element of the cause of action in order for a parent's mental health to be "in controversy" as that term is used in rule providing that party may request any other party to submit to examination by a qualified expert when the condition that is subject of the requested examination is in controversy. *In re G.D.*, App. 2 Dist., 870 So.2d 235 (2004). Pretrial Procedure ↪ 453

Trial court was precluded from ordering the automobile accident victim to submit to a psychological evaluation once victim abandoned his original efforts to recover damages for mental anguish, emotional distress and other emotional damages, because victim's mental condition ceased to be "in controversy" as contemplated by the rule allowing for mental examinations. *Olges v. Dougherty*, App. 1 Dist., 856 So.2d 6 (2003), rehearing denied. Damages ↪ 206(2)

When a plaintiff in a negligence action asserts that he has sustained a mental or physical injury, he places his condition in controversy, and good cause for an independent medical examination is therefore shown; it is not enough that the defendants are allowed to depose plaintiff's medical experts and then review plaintiff's medical records. *Broward County School Bd. v. Cruz ex rel. Cruz*, App. 4 Dist., 761 So.2d 388 (2000), rehearing denied, review granted 779 So.2d 270, approved 800 So.2d 213. Damages ↪ 206(2)

Trial court's order granting former husband's motion for compulsory examination of parties' minor children failed to conform to essential requirements of law; trial court failed to determine whether mental condition of

children was "in controversy" and whether "good cause" was demonstrated requiring requested psychological examinations, and trial court relied on conclusory allegations and arguments of counsel instead of sworn testimony or other evidence. *Russenberger v. Russenberger*, App. 1 Dist., 623 So.2d 1244 (1993), review granted 632 So.2d 1027, approved 639 So.2d 963. Divorce ↪ 86

In proceedings involving custody of children, conclusory allegations alone do not put child's mental health "in controversy" or demonstrate "good cause" for ordering psychological examination of child. *Russenberger v. Russenberger*, App. 1 Dist., 623 So.2d 1244 (1993), review granted 632 So.2d 1027, approved 639 So.2d 963. Child Custody ↪ 425

Husband's claim that wife drank, abused drugs, and was susceptible to undue influence were irrelevant to any issue being litigated where trial court was not being asked to award wife permanent periodic alimony, rehabilitative alimony, or custody of minor children, wife sought no support from husband, and where, in filing for dissolution of marriage, wife sought only order restraining husband so as to protect her safety, special equity in marital property, and partition of jointly owned property; thus, order compelling wife to submit to physical and mental examinations was not warranted. *Anderson v. Anderson*, App. 4 Dist., 470 So.2d 52 (1985). Mental Health ↪ 86

Where issue of divorcing husband's physical or mental condition had not been raised in any prior pleadings, wife's unverified and unsupported motion to require husband to submit to a physical and mental examination, reciting merely that the husband was "a person of unstable neurological background" and was "incompetent and mentally deranged" was not sufficient to fulfill requirement of a showing that the husband's mental or physical condition was in controversy and that there was good cause for the examinations. *Paul v. Paul*, App. 3 Dist., 366 So.2d 853 (1979). Divorce ↪ 85

Where wife as moving party failed to make an affirmative showing that husband's mental or physical condition was in controversy and that there was good cause for requiring husband to submit to compulsory mental and physical examination, husband could not be required to submit to such examination in connection with marriage dissolution proceeding. *Paul v. Paul*, App. 3 Dist., 366 So.2d 853 (1979). Divorce ↪ 85

Where what was at issue in wrongful death action was not defendant policeman's mental state but rather specifically whether his conduct was negligent, unreasonable or involved use of excessive force and no showing had been made that behavior, acts or conduct of policeman could not be adequately evidenced without expert testimony, and since it went without saying that policeman could suffer irreparable injury by virtue of compulsory psychiatric examination, no basis had been demonstrated for invasion of policeman's right of privacy through such an examination. *Gasparino v. Murphy*, App. 2 Dist., 352 So.2d 933 (1977). Pretrial Procedure ↪ 453

This rule permitting compulsory examination of party to action in which party's mental or physical condition is in controversy does not affect substantive rights of litigants but is procedural right relating to obtaining evidence. *Gordon v. Davis*, App. 3 Dist., 267 So.2d 874 (1972). Pretrial Procedure ↪ 451

#### 10. Discretion of court

The issue of whether to permit a defendant's requested independent medical examination is a matter of discretion. *Leinhart v. Jurkovich*, App. 4 Dist., 882 So.2d 456 (2004), rehearing denied. Pretrial Procedure ↪ 455

The age of a child does not automatically exempt the child from submitting to a compulsory medical examination in a negligence action, although a child's age may be considered by a judge when ruling on an objection to a request for a compulsory examination and, if appropriate, in fashioning protective orders. *Florida Emergency Physicians-Kang and Associates, M.D., P.A. v. Parker*, App. 5 Dist., 800 So.2d 631 (2001), rehearing denied. Damages ↪ 206(2)

Whether to permit defendant's requested expert examination of plaintiff is matter of discretion. *State Farm Mut. Auto. Ins. Co. v. Shepard*, App. 2 Dist., 644 So.2d 111 (1994). Damages ↪ 206(1)

In employee's personal injury action against employer and coemployee, court did not abuse its discretion in appointment of physician requested by employer. *Chorak v. Naughton*, App. 2 Dist., 409 So.2d 35 (1981). Damages ↪ 206(1)

Granting of order for physical examination of injured plaintiff is discretionary with trial judge and until it is shown that such discretion has been abused, order will not be disturbed, and a showing of mere failure to appoint more than one type of physician is not sufficient to demonstrate abuse of that discretion. *Pepsi-Cola Bottling Co. of Miami v. Modesta*, App. 3 Dist., 107 So.2d 43 (1958). Appeal And Error ↪ 961; Damages ↪ 206(1)

In action for personal injuries sustained by plaintiff, appointment of physicians to examine plaintiff is discretionary, and trial court did not abuse its discretion in denying request of defendant's counsel that court appoint both an orthopedist and a neurosurgeon to examine plaintiff before trial so that defendant would have comparable medical testimony to that offered by plaintiff in both specialized fields, and in naming an orthopedist which was the first type of doctor requested by defendant's counsel. *Red Top Cab & Baggage Co. v. Grady*, App. 3 Dist., 99 So.2d 871 (1958). Damages ↪ 206(1); Damages ↪ 206(6)

Under the predecessor to this rule the granting of an order for physical examination of the injured plaintiff is at the discretion of the trial court in view of the use of the word "may". *Martin v. Tindell*, 98 So.2d 473 (1957), certiorari denied 78 S.Ct. 545, 355 U.S. 959, 2 L.Ed.2d 534. Damages ↪ 206(1)

Denying motion of defendant for physical examination of the injured plaintiff prior to trial was not an abuse of discretion where plaintiff was treated for his injuries at a hospital supported in part by the defendant who had access to the hospital records and could have obtained therefrom the information which would have been revealed by a compulsory physical examination. *Martin v. Tindell*, 98 So.2d 473 (1957), certiorari denied 78 S.Ct. 545, 355 U.S. 959, 2 L.Ed.2d 534. Damages ↪ 206(2)

#### 11. Denial of motion

University was not entitled to independent medical examination of student, in student's personal injury action based on van collision, where university requested examination only 10 days before trial date, after case had been pending for four years, and even without examination, university was able to present its defense that accident did not cause disc herniation and subsequent damages. *Leinhart v. Jurkovich*, App. 4 Dist., 882 So.2d 456 (2004), rehearing denied. Damages ↪ 206(2); Damages ↪ 206(4)

Under provision of F.S.A. § 768.09 (repealed; see, now, this rule) to the effect that in action in which mental or physical condition of party is in controversy, court may order such party to submit to physical or mental examination by physician or other qualified expert, denial of motion for compulsory mental examination of plaintiff

whose claimed injuries were both mental and physical was not an abuse of discretion in view of fact that court granted request for appointment of orthopedic specialist to examine plaintiff, and overruling objections to admissibility of testimony as to plaintiff's mental condition was not improper. *Pepsi-Cola Bottling Co. of Miami v. Modesta*, App. 3 Dist., 107 So.2d 43 (1958). Damages ↪ 206(6)

#### 11.5. Protective orders

Due process rights of state Department of Transportation (DOT) were not violated by trial court's protective order, which allowed motorist's attorney to retain copy of videotape of motorist's compulsory medical examination (CME) by neuropsychologist after completion of case, in motorist's action for negligent road design, although order may have prevented DOT from obtaining CME from a neuropsychologist, who testified that he would not perform examination unless all copies of videotape would be returned to him at close of litigation; expert that motorist had contacted was psychiatrist, not neuropsychologist, and record did not disclose that psychiatrists, neurologists, and psychologists shared same types of concerns that DOT's expert testified neuropsychologists have with regard to administration of examinations. *Florida Dept. Of Transp. v. Piccolo*, App. 2 Dist., 964 So.2d 773 (2007). Constitutional Law ↪ 3986; Pretrial Procedure ↪ 413.1

#### 12. Counsel

Defendant that requested psychological examination of plaintiff pursuant to discovery rule offered no case-specific reason why presence of plaintiff's attorney would disrupt examination and presented no evidence that no other qualified individual in the area would be willing to conduct the examination with plaintiff's attorney present, and therefore plaintiff was entitled to presence of attorney at psychological examination, for purposes of his negligence action based on physical and psychological injuries suffered due to collision with vehicle driven by defendant's employee. *Byrd v. Southern Prestressed Concrete, Inc.*, App. 1 Dist., 928 So.2d 455 (2006). Damages ↪ 206(7)

The purpose underlying the requirement that parties are entitled to have an attorney present at a physical, psychiatric, or psychological examination pursuant to discovery rule is to protect plaintiffs from improprieties that might otherwise be committed by the examiners, who are retained by the defendant and who frequently end up testifying as expert witnesses on behalf of the defendant. *Byrd v. Southern Prestressed Concrete, Inc.*, App. 1 Dist., 928 So.2d 455 (2006). Damages ↪ 206(7)

Parties are entitled to have an attorney present at examinations conducted pursuant to discovery rule, regardless of whether the examination is a physical, psychiatric or psychological one, unless the party seeking to prevent the attorney's presence establishes (1) a case-specific reason why the attorney's presence would disrupt the examination and (2) that no other qualified individual in the area would be willing to conduct the examination with the attorney present. *Byrd v. Southern Prestressed Concrete, Inc.*, App. 1 Dist., 928 So.2d 455 (2006). Damages ↪ 206(7)

As a general rule, absent any valid reason to prohibit presence of patient's counsel or other representative during court-ordered independent medical exam, their presence should be allowed. *Brompton By and Through Brompton v. Poy-Wing*, App. 4 Dist., 704 So.2d 1127 (1998). Damages ↪ 206(7)

Burden of proof of showing that patient's counsel or other representative should be excluded from court-ordered independent medical exam rests with party opposing third party attendance to show why court should deny examinee's right to have counsel, physician, or other representative present. *Brompton By and Through Brompton*

v. Poy-Wing, App. 4 Dist., 704 So.2d 1127 (1998). Damages ↪ 206(5)

Trial court's general belief in inappropriateness of counsel's presence at court-ordered independent medical exams was not a proper ground upon which to exclude plaintiff's counsel from exam. *Brompton By and Through Brompton v. Poy-Wing*, App. 4 Dist., 704 So.2d 1127 (1998). Damages ↪ 206(7)

Conflicting evidence concerning presence of third parties did not support trial court's exclusion of counsel and sound or video recording equipment from independent psychiatric examination of minor plaintiffs, ages eight and four, in wrongful death action. *Palank v. CSX Transp., Inc.*, App. 4 Dist., 657 So.2d 48 (1995), review denied 662 So.2d 931. Damages ↪ 206(7)

Absent a valid reason to exclude the patient's counsel or other representative, their presence should be allowed during compulsory physical examination by physician. *McCorkle v. Fast*, App. 2 Dist., 599 So.2d 277 (1992). Damages ↪ 206(7)

Court may consider matters such as unique qualifications of chosen examiner, or lack of available physicians willing to perform testing under such conditions, when objection is raised to presence of attorneys or third parties at compulsory physical examinations. *McCorkle v. Fast*, App. 2 Dist., 599 So.2d 277 (1992). Damages ↪ 206(7)

Physician's objections, standing alone, were insufficient to exclude automobile negligence plaintiff's attorney from attending compulsory physical examination, absent any showing that chosen physician was uniquely qualified to perform examination or otherwise essential to preparation of defendant's case. *McCorkle v. Fast*, App. 2 Dist., 599 So.2d 277 (1992). Damages ↪ 206(7)

Order permitting counsel for both parties and court reporter to be present at compulsory physical examination of personal injury plaintiff, at plaintiff's request, was not abuse of discretion; court specifically ordered counsel not to interfere with examination. *High v. Burrell*, App. 5 Dist., 509 So.2d 385 (1987). Pretrial Procedure ↪ 455

### 13. Clinical psychologists

Subdivision (a) of this rule did not authorize court to compel personal injury plaintiff to submit to examination by clinical psychologist. *Loomis v. Kaplaneris*, App. 2 Dist., 519 So.2d 1058 (1988).

### 14. Expert witnesses

There is no requirement or need for the opposing party to take the deposition of every expert where the party has been provided a report pursuant to the mandatory requirements of the rule; nor is it necessary to exhaustively question the expert to discover whether the expert has come to other significant opinions not expressed in the report. *Suarez-Burgos v. Morhaim*, App. 4 Dist., 745 So.2d 368 (1999), rehearing denied, review denied 767 So.2d 461. Pretrial Procedure ↪ 97; Pretrial Procedure ↪ 182

Section 455.241 requiring physicians to provide patients with reports and records of examinations did not grant plaintiff's counsel open discovery right to communicate ex parte with independent medical examiner, retained by defense, and did not restrict defense counsel to conferring with examining physicians by deposition or at trial. *West v. Branham*, App. 4 Dist., 576 So.2d 381 (1991), review dismissed 583 So.2d 1034. Attorney And Client ↪ 32(12); Damages ↪ 206(7)

Trial court's discovery order directing minor plaintiff to submit to physical examination by defendant's selected medical expert and providing that the expert's report would not be subject to discovery by any other party unless the expert were listed as an expert witness to testify at trial violated the rules of civil procedure. *V.S.H. By and Through Hudson v. Hellinger*, App. 5 Dist., 445 So.2d 691 (1984). Pretrial Procedure ↪ 456

Order commanding that woman be examined by expert witness who was vocational rehabilitative counselor but not physician for purpose of determining extent of woman's illness from alcoholism and her ability to be rehabilitated constituted departure from essential requirements of law. *Barry v. Barry*, App. 4 Dist., 426 So.2d 1229 (1983). Pretrial Procedure ↪ 455

#### 15. Court reporters

Workers' compensation claimant was entitled to have a court reporter present at employer's scheduled independent medical examination (IME) without having to pay additional fee to accommodate the reporter, where there was no proof that the reporter's presence at the examination would be disruptive and should not be allowed, that the requested fee was reasonable or necessary, of that employer/carrier could not obtain a doctor to perform an IME within the \$400 limit established by the legislature. *Thompson v. Awnclean USA, Inc.*, App. 1 Dist., 849 So.2d 1129 (2003). Workers' Compensation ↪ 1305

As a general rule, a workers' compensation claimant has the right to have a court reporter present at his independent medical examination (IME). *Thompson v. Awnclean USA, Inc.*, App. 1 Dist., 849 So.2d 1129 (2003). Workers' Compensation ↪ 1305

In the event a party opposes the attendance of a court reporter at an IME, the party opposing attendance has the burden of proof to show why the examinee should not be entitled to the presence of a court reporter. *Thompson v. Awnclean USA, Inc.*, App. 1 Dist., 849 So.2d 1129 (2003). Workers' Compensation ↪ 1305

An independent medical examination (IME) physician who charges a fee in excess of the maximum allowable fee under rules adopted by the Division of Workers' Compensation pursuant to legislative directive is prohibited from testifying in a workers' compensation hearing. *Thompson v. Awnclean USA, Inc.*, App. 1 Dist., 849 So.2d 1129 (2003). Workers' Compensation ↪ 1703

Burden of proof to show why personal injury plaintiffs' entitlement to presence of third party at compulsory physical examination should be denied lies with party opposing third party's attendance; absent valid reason for denial, examinee's request should be upheld. *Collins By and Through Burton v. Skinner*, App. 2 Dist., 576 So.2d 1377 (1991). Damages ↪ 206(5)

Insured did not have right under either this rule governing compulsory examinations or terms of her policy to insist that court reporter be present during medical examination which was requested by insurer prior to insured's initiation of declaratory judgment action. *Klipper v. Government Employees Ins. Co.*, App. 2 Dist., 571 So.2d 26 (1990), review denied 576 So.2d 288. Insurance ↪ 3177

Insured, seeking recovery of underinsured motorist benefits from its automobile insurer, was entitled to have court reporter present at compulsory physical examination. *Stakley v. Allstate Ins. Co.*, App. 2 Dist., 547 So.2d 275 (1989). Damages ↪ 206(7)

Wife was entitled to presence of court reporter at her psychiatric examination ordered by trial court in dissolu-

tion proceeding, since trial court had already authorized attendance of counsel for both sides, and since privacy of wife, not that of the examiner, was involved. *Gibson v. Gibson*, App. 4 Dist., 456 So.2d 1320 (1984). Trial ↪ 23

#### 16. Third parties

Plaintiff had right to have videographer present at compelled independent medical examination in personal injury action, and videographer should not have been excluded based merely on averment in motion for protective order that physician preferred it otherwise. *Lunceford v. Florida Cent. R. Co., Inc.*, App. 5 Dist., 728 So.2d 1239 (1999). Damages ↪ 206(7)

Plaintiff has the right to have his counsel, a court reporter, or both present at compelled independent medical examination, unless a valid, case-specific reason is given by the examining doctor why such would be unreasonably disruptive, and evidence is presented further that no other medical specialist is available who will conduct the examination under those circumstances. *Lunceford v. Florida Cent. R. Co., Inc.*, App. 5 Dist., 728 So.2d 1239 (1999). Damages ↪ 206(7)

Burden is on the party opposing the presence of third persons at compelled independent medical examination to establish grounds for prohibiting the third party's presence. *Lunceford v. Florida Cent. R. Co., Inc.*, App. 5 Dist., 728 So.2d 1239 (1999). Damages ↪ 206(7)

Principles that apply to request to have compelled independent medical examination conducted in presence of the patient's attorney or court reporter also apply to request that examination be conducted in presence of videographer. *Lunceford v. Florida Cent. R. Co., Inc.*, App. 5 Dist., 728 So.2d 1239 (1999). Damages ↪ 206(7)

If person undergoing independent medical examination wants to ensure that the compelled examination is accurately preserved, that person should generally be entitled to do so. *Lunceford v. Florida Cent. R. Co., Inc.*, App. 5 Dist., 728 So.2d 1239 (1999). Damages ↪ 206(7)

Affidavits opposing presence of third parties during court-ordered independent medical exam should contain case-specific justifications for such conclusion. *Brompton By and Through Brompton v. Poy-Wing*, App. 4 Dist., 704 So.2d 1127 (1998). Damages ↪ 206(5)

Conclusory, general allegation that presence of third party would render examination invalid was insufficient to overcome plaintiff's right to have counsel present during court-ordered neuropsychological exam. *Brompton By and Through Brompton v. Poy-Wing*, App. 4 Dist., 704 So.2d 1127 (1998). Damages ↪ 206(5)

Burden of proof to show why examinee's entitlement to presence of third party compulsory medical examination pursuant to Rules of Civil Procedure should be denied lies with party opposing third party's attendance. *Broyles v. Reilly*, App. 2 Dist., 695 So.2d 832 (1997). Pretrial Procedure ↪ 455

In order to justify denial of plaintiff's right to have third party present at compulsory medical examination pursuant to Rules of Civil Procedure, examining physician must provide case-specific justification to support claim that presence of court reporter, and by extension plaintiff's attorney, at examination will be disruptive; once this test is satisfied, defendant must prove at evidentiary hearing that no other qualified physician can be located in area who would be willing to perform examination with court reporter or attorney present. *Broyles v. Reilly*, App. 2 Dist., 695 So.2d 832 (1997). Pretrial Procedure ↪ 455

Motorist who was compelled to undergo medical examination in connection with her action arising from automobile accident was entitled to have her attorney and videographer present during examination; defendant's physician had provided no case-specific reason why third parties should be excluded from examination. *Broyles v. Reilly*, App. 2 Dist., 695 So.2d 832 (1997). Pretrial Procedure ⚡ 455

Issue of presence of videographer at compulsory medical examination is treated no differently from presence of court reporter. *Broyles v. Reilly*, App. 2 Dist., 695 So.2d 832 (1997). Pretrial Procedure ⚡ 455

Exceptional circumstance is required to permit anyone other than videographer or court reporter and plaintiff's attorney to be present on behalf of plaintiff at compulsory medical examination pursuant to Rules of Civil Procedure. *Broyles v. Reilly*, App. 2 Dist., 695 So.2d 832 (1997). Pretrial Procedure ⚡ 455

Trial court has authority to bar third-party attendees from compulsory medical examinations upon a showing that their presence would be disruptive, superfluous, or otherwise inappropriate. *McCorkle v. Fast*, App. 2 Dist., 599 So.2d 277 (1992). Damages ⚡ 206(7)

If either independent examination or examination by party's expert is undertaken, trial court may, under proper circumstances, allow third party to witness that examination or order that examination be recorded. *F.M. v. Old Cutler Presbyterian Church, Inc.*, App. 3 Dist., 595 So.2d 201 (1992). Damages ⚡ 206(7)

Circuit judge's policy not to permit court reporters to be present at compulsory physical examinations was departure from essential requirements of law which allows presence of third parties absent any valid reason to prohibit their presence. *Stakley v. Allstate Ins. Co.*, App. 2 Dist., 547 So.2d 275 (1989). Damages ⚡ 206(7)

Remand was necessary for trial court to reconsider whether it should, in its discretion based upon facts and circumstances of case, prohibit any third party from attending court-ordered medical examination of plaintiff in suit arising from automobile accident, upon determining whether it was imperative that physician who cancelled examination as result of third party's attendance perform examination or whether other doctors were available to do so with third party present. *Bartell v. McCarrick*, App. 4 Dist., 498 So.2d 1378 (1986). Certiorari ⚡ 69

#### 17. Waiver of privilege

Plaintiff's request for defense psychologist's raw data from testing performed on plaintiff effected a waiver of privilege by plaintiff under discovery rule governing examinations of persons; psychologist's assembly and transmission of her raw data in written or recorded form was a "report" within meaning of rule. *Lifemark Hospitals of Florida, Inc. v. Hernandez*, App. 3 Dist., 748 So.2d 378 (2000). Pretrial Procedure ⚡ 382; Witnesses ⚡ 219(1)

Insured did not waive any privilege of confidentiality to medical information he had under § 455.241 by requesting and receiving report of physician who examined him pursuant to court order under Rules of Civ.Proc., Rule 1.360; Rule 1.360 provided only for waiver of privilege in regard to testimony of other persons who had examined or will in the future examine the insured as to the condition in controversy. *Franklin v. Nationwide Mut. Fire Ins. Co.*, App. 1 Dist., 566 So.2d 529 (1990), review dismissed 574 So.2d 142. Witnesses ⚡ 219(5)

#### 18. Blood tests

Natural father's present wife's desire that natural father, mother and child submit to human leukocyte antigen blood test to ascertain if father really was natural father of child did not demonstrate good cause to grant motion

for HLA blood test 12 years after paternity action in which father admitted he was natural father of child. State, Dept. of Health and Rehabilitative Services v. Sadiki, App. 2 Dist., 561 So.2d 304 (1990). Children Out-of-wedlock ⤴ 68

Trial court in divorce action should have ordered HLA blood test of minor child conceived and born during marriage before awarding monthly child support; wife had admitted that during time of that child's conception she had sexual intercourse with two other men and had agreed to time for that test, and husband could not exercise his right to have child tested without court order because child was out-of-state. Rymer v. Rymer, App. 5 Dist., 508 So.2d 789 (1987). Divorce ⤴ 86

Taking of a human leukocyte antigens blood test is ordinarily a proper aspect of discovery in a paternity action. Nostrand v. Olivieri, App. 2 Dist., 427 So.2d 374 (1983). Children Out-of-wedlock ⤴ 58

Before putative father, i.e., natural mother's present husband, could obtain discovery relating to paternity of child born of wife during prior marriage he was required to first prove the requisite standing to go forward with the suit and if such standing were shown, a human leukocyte antigens blood test of former husband would be proper subject of discovery. Nostrand v. Olivieri, App. 2 Dist., 427 So.2d 374 (1983). Children Out-of-wedlock ⤴ 13

Where putative father did not object to order requiring submission to blood test before, during or after trial, and order was not cited as error in motion for new trial, putative father did not preserve his challenge to court order for appeal. Carlyon v. Weeks, App. 1 Dist., 387 So.2d 465 (1980). Children Out-of-wedlock ⤴ 73

In paternity action, predicate required by trial court concerning degree of reliability and validity of human leukocyte antigen (HLA) blood tests performed was sufficient to establish that results were probative on issue of establishing paternity, and thus admission of written report of blood testing and deposition of doctor who performed such testing was within trial court's discretion. Carlyon v. Weeks, App. 1 Dist., 387 So.2d 465 (1980). Children Out-of-wedlock ⤴ 45

In light of pathologist's testimony that human leukocyte antigens blood test was not in general use to prove paternity but was more sophisticated procedure with higher probabilities than those yielded by traditional blood grouping tests, party seeking to establish paternity was entitled to require putative father to submit to such test. Simons v. Jorg, App. 2 Dist., 384 So.2d 1362 (1980). Children Out-of-wedlock ⤴ 58

Possibility that blood test results would be inadmissible in paternity proceeding was not sufficient to prevent discovery. Simons v. Jorg, App. 2 Dist., 384 So.2d 1362 (1980). Children Out-of-wedlock ⤴ 58

Even if test for Leukocyte Antigen typing was group test, within this rule providing that when mental or physical condition, including blood group, of person in custody is in controversy, court may, on motion for good cause shown, order party to submit to physical or mental examination, rule did not authorize compelling man to admit to test in suit for determination of paternity, in absence of showing of requisite good cause. Simons v. Jorg, App. 2 Dist., 375 So.2d 288 (1979). Children Out-of-wedlock ⤴ 58

Blood test would not be admissible to prove paternity; thus court erred in ordering man to submit to blood test necessary for Human Leukocyte Antigen typing in suit against him for determination of paternity. Simons v. Jorg, App. 2 Dist., 375 So.2d 288 (1979). Children Out-of-wedlock ⤴ 45

Results of blood grouping tests excluding paternity are admissible into evidence, but tests failing to exclude paternity are inadmissible. *Simons v. Jorg*, App. 2 Dist., 375 So.2d 288 (1979). Children Out-of-wedlock ⤴ 67

#### 19. Manner and scope of examination

General work product rule limited personal representative of patient's estate to asking deposition questions of city's employee concerning facts and opinions held prior to employee becoming specially employed by city in preparation for trial in personal representative's medical negligence action against city concerning paramedics' response to patient's complaints of chest pains, and thus personal representative could not discover employee's expert opinions concerning paramedics' standard of care and compliance with city fire and rescue department patient treatment protocol. *City of Jacksonville v. Rodriguez*, App. 1 Dist., 851 So.2d 280 (2003). Pretrial Procedure ⤴ 184

Seaman's action of having surgery to repair a herniated disc, without availing himself of a second opinion requested by defendant via letter, was not intentional "spoliation" of evidence warranting sanctions, in seaman's action alleging Jones Act and general maritime law claims for his injuries arising from fall from his bunk while employed as a seaman; no precedent supported argument that seaman's herniated disc was evidence in litigation, and even if seaman's back was evidence, missing from facts of case was any legal or contractual duty to preserve evidence which was relevant to potential civil action, defendant made no attempt to obtain a court order prior to surgery, defendant did not make an appropriate request for a defense medical examination, and defendant failed to present any evidence that it was prejudiced by any loss of evidence. *Vega v. CSCS International, N.V.*, App. 3 Dist., 795 So.2d 164 (2001), rehearing denied. Pretrial Procedure ⤴ 434

Defendant's letter requesting plaintiff seaman to postpone his surgery to repair a herniated disc in order for defendant to provide plaintiff with opportunity to receive a second opinion as to necessity of surgery was not an appropriate request for a defense medical examination of seaman, as letter did not contain any of necessary criteria required by rule, and thus, letter was insufficient to impose a duty on plaintiff to postpone surgery, in action alleging Jones Act and general maritime law claims for injuries arising from plaintiff's fall from his bunk while employed as a seaman. *Vega v. CSCS International, N.V.*, App. 3 Dist., 795 So.2d 164 (2001), rehearing denied. Damages ⤴ 206(5)

Trial court's order that psychological examination be performed on nonconsenting child in connection with adoption proceeding failed to specify manner and scope of examination as required by rule governing psychological examinations; precise purpose of examination, means to be employed, and general nature of conditions and scope should have been stated in order. *In Interest of T.M.W.*, App. 1 Dist., 553 So.2d 260 (1989). Adoption ⤴ 13; Pretrial Procedure ⤴ 455

#### 20. Slander action

Alleged libeled party could not be compelled by broadcaster to submit to mental examination in absence of an allegation that alleged libeled party was a psychotic or otherwise mentally disturbed; the only mental harm mentioned was the mental anguish the party claimed as a result of the defamation, and went only to proof of damages, not to proof of the alleged defamation itself. *Boyles v. Mid-Florida Television Corp.*, App. 5 Dist., 431 So.2d 627 (1983), approved 467 So.2d 282. Pretrial Procedure ⤴ 455

This rule authorizing court to order party to submit to physical or mental examination is not limited to actions for personal injuries and applies to slander action in which plaintiff claimed that defendant, who sought mental

examination of plaintiff, had stated that plaintiff was sick and was psychotic. *Gordon v. Davis*, App. 3 Dist., 267 So.2d 874 (1972). Pretrial Procedure ¶ 453

Where plaintiff in slander action claimed that defendant had stated plaintiff was sick and was psychotic, and defendant asserted statement was true and that no malice was involved, mental condition of plaintiff was in controversy so as to authorize mental examination of plaintiff. *Gordon v. Davis*, App. 3 Dist., 267 So.2d 874 (1972). Pretrial Procedure ¶ 453

Record established that there was good cause for order permitting mental examination of plaintiff who based slander action on claim that defendant had asserted that plaintiff was sick and psychotic. *Gordon v. Davis*, App. 3 Dist., 267 So.2d 874 (1972). Pretrial Procedure ¶ 455

#### 21. Child custody actions

Trial court's interlocutory order compelling parents to submit to mental examination did not violate parents' Fifth Amendment rights, and thus, court's order did not depart from the essential requirements of the law in connection with determining whether court's interlocutory order merited certiorari review; by merely compelling examination, court had not interfered with parents' Fifth Amendment rights, and any harm that might result from violation of parents' Fifth Amendment rights could be cured by having offending information excluded at trial. *In re G.D.*, App. 2 Dist., 870 So.2d 235 (2004). Certiorari ¶ 17

Trial court was without authority to order compulsory physical examination of adjudicated father prior to ruling on motion of state Department of Revenue (DOR) to hold him in contempt for failure to pay court-ordered child support, in absence of any condition in controversy or showing of good cause. *Department of Revenue v. Allen*, App. 4 Dist., 717 So.2d 130 (1998). Children Out-of-wedlock ¶ 69(7)

Under statute authorizing social investigations in custody cases, trial court was permitted to order psychological examination of mother of child born out-of-wedlock without complying with requirements of discovery rule governing examinations of persons. *Arthur v. Anderson*, App. 3 Dist., 681 So.2d 796 (1996), rehearing denied. Children Out-of-wedlock ¶ 20.4

Trial court did not err in holding hearing on renewed motion by former husband for psychological evaluation of children where court found psychological impact of proposed move of former wife, who was in physical custody of children, was matter in issue, even though hearing was not required. *Russenberger v. Russenberger*, App. 1 Dist., 654 So.2d 207 (1995), review granted 661 So.2d 825, approved 669 So.2d 1044. Child Custody ¶ 425

Trial court erred in ordering psychological evaluation of children in custody case under discovery rule permitting such examination for good cause when subject of examination is in controversy without determining whether rule's good cause and in controversy requirements had been satisfied; proceedings before trial judge were also insufficient without evidentiary hearing to establish good cause, because they consisted of conclusory allegations in pleadings and argument by counsel. *Russenberger v. Russenberger*, 639 So.2d 963 (1994). Divorce ¶ 86

In custody cases, verified pleadings or affidavits may be sufficient to satisfy requirements of rule permitting psychological evaluations if they can enable court to determine whether rule's "good cause" and "in controversy" requirements have been met. *Russenberger v. Russenberger*, 639 So.2d 963 (1994). Divorce ¶ 86; Child Custody ¶ 425

Under statute authorizing social investigations in custody cases, trial court has discretion to include psychological evaluation of children as part of social investigation and, in doing so, need not comply with the "good cause" and "in controversy" requirements of rule of civil procedure specifically authorizing mental examinations. *Russenberger v. Russenberger*, 639 So.2d 963 (1994). Divorce ↪ 86; Child Custody ↪ 425

Trial court did not abuse discretion by refusing to grant father's motion for appointment of psychiatrist to examine mother as to psychological fitness to have custody of minor child, even though mother had been hospitalized for serious psychiatric problem more than ten years earlier, in light of absence of evidence of any psychiatric or psychological problem or treatment experienced by mother after the prior incident and in light of mother's strength and ability to function during critical years of separation and uncertainty after father and minor child departed. *Frisard v. Frisard*, App. 4 Dist., 453 So.2d 1150 (1984). Divorce ↪ 86

With regard to child custody determinations, mental or psychological examinations of parties are not automatic, and should not be, since they are not always warranted by the circumstances and since the cost of the examination may pose an unnecessary burden on the parties. *Frisard v. Frisard*, App. 4 Dist., 453 So.2d 1150 (1984). Pretrial Procedure ↪ 453

Trial court was not authorized to order compulsory mental examination of parent of dependent children. *Fruh v. State, Dept. of Health & Rehabilitative Services*, App. 5 Dist., 430 So.2d 581 (1983). Infants ↪ 208

Trial court in dissolution action improperly required both parties to submit to compulsory mental and physical examinations pursuant to this rule, because in absence of allegation that either party was unfit to have custody of children or that either had any kind of mental or physical illness or condition which would adversely affect his or her ability to be a custodial parent, their mental and physical health was not "in controversy," and because there was no "good cause" why the forced examinations were necessary. *Kristensen v. Kristensen*, App. 5 Dist., 406 So.2d 1210 (1981). Child Custody ↪ 424; Child Custody ↪ 425

Mental health of any parent seeking custody of his or her child is not in controversy so as to justify compulsory mental and physical examinations simply because there are allegations that one or the other would be the better parent to have custody. *Kristensen v. Kristensen*, App. 5 Dist., 406 So.2d 1210 (1981). Child Custody ↪ 62

## 22. Paternity issues

A compulsory physical examination in a paternity proceeding requires a showing that the condition is in controversy as well as good cause. *Department of Revenue ex rel. King v. Blocker*, App. 4 Dist., 806 So.2d 607 (2002). Children Out-of-wedlock ↪ 58

Prior paternity order that ordered alleged father to pay child support was res judicata with regard to issue of whether court could order DNA testing at contempt proceeding that arose after alleged father failed to pay ordered support; only matter pending before court was contempt proceeding, and order failed to comport with rule setting forth requirements for examinations of persons. *Department of Revenue ex rel. King v. Blocker*, App. 4 Dist., 806 So.2d 607 (2002). Children Out-of-wedlock ↪ 69(7)

Mother failed to carry burden in paternity action of showing good cause for physical examination of alleged father which would require him to submit to genetic testing; although mother swore in affidavit that alleged father was the father of her child, just a few months earlier, she gave sworn testimony in deposition in circuit court that alleged father was not the father of her child; moreover, at hearing on motion for physical examination,

mother presented no evidence to support her claim of paternity. *Kennedy v. State, Dept. of Revenue*, App. 1 Dist., 659 So.2d 344 (1995). Children Out-of-wedlock ↪ 58

Order requiring scientific testing to determine paternity in proceeding to hold putative father in contempt for failing to pay court-ordered child support did not comply with rule governing physical and mental examinations, absent showing that condition to be tested was "in controversy" or that there was "good cause" for testing; only matter pending before court was repayment of past public assistance debt and motion for contempt for failure to make support payments. *Department of Revenue on Behalf of Freckleton v. Goulbourne*, App. 4 Dist., 648 So.2d 856 (1995). Children Out-of-wedlock ↪ 58

### 23. Failure to furnish report

Defendant violated rule requiring party requesting medical examination of another party to produce upon request detailed reports of examiner, including diagnoses and conclusions, when defendant failed to disclose fact that physician had changed his opinion that causal relationship existed between accident and plaintiff's injuries and would testify at trial that there was no such connection. *Office Depot, Inc. v. Miller*, App. 4 Dist., 584 So.2d 587 (1991). Pretrial Procedure ↪ 382

Failure of defendant to disclose to personal injury plaintiff substantial reversal in his expert's opinion prejudiced plaintiff entitling plaintiff to new trial of personal injury action; defense counsel allowed plaintiff to present her entire case in chief, wholly unaware that defense's case would include critical live testimony by an expert negating plaintiff's claim, and plaintiff asserted that her trial strategy had been planned and executed on reasonable assumption that the witness would either not testify or his testimony would be favorable to her case. *Office Depot, Inc. v. Miller*, App. 4 Dist., 584 So.2d 587 (1991). New Trial ↪ 27

Spirit and purpose of rule requiring party requesting medical examination of another party to produce upon request detailed reports of examiner, including diagnoses and conclusions, requires disclosure of substantial reversal of opinion if party intends to offer changed opinion at trial, and parties who fail to make that disclosure do so at their peril, depending on circumstances of particular case. *Office Depot, Inc. v. Miller*, App. 4 Dist., 584 So.2d 587 (1991). Pretrial Procedure ↪ 382

Belated discovery made by plaintiffs of a more serious injury sustained by one plaintiff could not be labeled a mistake of such inadvertence and excusable neglect as to entitle plaintiffs to relief from final judgment entered on stipulation for dismissal of cause following a negotiated settlement, notwithstanding that defendants had knowledge of and failed to reveal contents of report, where motion for relief from judgment was devoid of any allegation or suggestion that plaintiffs relied on any expectation of receiving a copy of court-appointed physician's report and, since plaintiffs never requested report, defendants were under no obligation to provide it. *Smiles v. Young*, App. 3 Dist., 271 So.2d 798 (1973), certiorari denied 279 So.2d 305. Judgment ↪ 90

When request for report made by court-appointed physician is not made, this rule simply does not require that report be furnished to examined party, and party, after making decision not to request a copy of report and accepting benefits of his choice, should not be allowed to label his decision a mistake of such inadvertence or excusable neglect as to require relief from judgment. *Smiles v. Young*, App. 3 Dist., 271 So.2d 798 (1973), certiorari denied 279 So.2d 305. Judgment ↪ 364

In personal injury action, there was no reversible error in admitting testimony of physician bearing on question of permanent disability of plaintiff despite failure of plaintiff to furnish a report thereon as required by this rule,

where such testimony was cumulative to that of two other doctors on the subject, and since the matter of rejection of such testimony in those circumstances was one as to which the trial court had a measure of discretion. *Bill Kelley Chevrolet, Inc. v. Kerr*, App. 3 Dist., 258 So.2d 280 (1972). Appeal And Error ↪ 970(2); Appeal And Error ↪ 1050.1(7)

Copy of report of examination of adverse party or his property must be furnished adverse party when examination is performed by expert designated by court and expert, to that extent, is an officer of the court. *Ford Motor Co. v. Havee*, App. 3 Dist., 123 So.2d 572 (1960). Pretrial Procedure ↪ 379

Where personal injury action was brought against automobile manufacturer for injuries sustained allegedly as result of defective tie rod, plaintiff was required to produce tie rod for examination and chemical analysis by manufacturer, but court did not designate experts to examine tie rod or prescribe condition and scope of examination, thereafter tie rod was returned undamaged and not disassembled or changed and it was not shown that information contained in report of examination of manufacturer's expert was not as readily available to plaintiffs as to manufacturer, order for production of report was without authority in that good cause was not shown. *Ford Motor Co. v. Havee*, App. 3 Dist., 123 So.2d 572 (1960). Pretrial Procedure ↪ 379

#### 24. Discovery

Videotape of compulsory medical examination (CME) made with parties' consent, at direction of plaintiff's attorney, and not intended for use at trial was attorney work product prepared in anticipation of litigation or for trial, subject to discovery only upon a showing of need and undue hardship; videotape was prepared pursuant to the instructions of plaintiff's counsel and not as an objective recording of the CME, and examiner was designated as expert who was to testify against plaintiff at trial. *McGarrah v. Bayfront Medical Center, Inc.*, App. 2 Dist., 889 So.2d 923 (2004), rehearing denied. Pretrial Procedure ↪ 383

Patient's expert could be required to be deposed following patient's waiver of privilege under discovery rule governing examinations of persons; exclusion of expert's testimony at trial was not the exclusive remedy in the face of patient's claim of work-product privilege. *Lifemark Hospitals of Florida, Inc. v. Hernandez*, App. 3 Dist., 748 So.2d 378 (2000). Pretrial Procedure ↪ 97

#### 25. Sanctions

Trial court's exclusion of blood test results in paternity action as sanction for mother's failure to deliver copy of report to alleged father upon his request was abuse of discretion, where alleged father never filed motion to compel, alleged father made no attempt to demonstrate any prejudice or surprise caused by omission, and test results were critical evidence due to diametrically opposed conclusions of two prior tests. *Stiles v. Barger*, App. 1 Dist., 559 So.2d 365 (1990). Children Out-of-wedlock ↪ 58

In personal injury action, entry of involuntary dismissal without prejudice, rather than with prejudice, for failure of one plaintiff to comply with trial court's order to submit to medical examination as required by rule was not abuse of discretion. *Brodbeck v. Gonzalez*, App. 3 Dist., 336 So.2d 475 (1976). Pretrial Procedure ↪ 690

Where trial court in action by wife for dissolution of marriage entered order requiring wife to submit to physical and mental examination to determine her capacity for supporting herself and wife, who was not self-supporting and was without present means of support, failed to appear, trial court order striking claim for alimony went too far, and it was an abuse of discretion to continue sanction after wife subsequently offered to submit to examina-

tion. *Goldstein v. Goldstein*, App. 3 Dist., 284 So.2d 225 (1973). Divorce ⇨ 86

#### 25.5. Certiorari

Trial court's order denying cruise ship's motion to compel a supplemental compulsory physical examination of seaman by ship's orthopedic expert in Jones Act action was reviewable by certiorari because the order was a departure from essential requirements of law, resulting in material injury for remainder of case that could not be corrected on post-judgment appeal; order allowed seaman to continue to receive maintenance and cure benefits from ship unchecked, thereby depriving ship of its rights as Jones Act employer, and certiorari was appropriate because on appeal it would be impossible to determine exactly how trial court's order affected both ship's defense and the final outcome of the case. *Royal Caribbean Cruises, Ltd. v. Cox*, App. 3 Dist., 2008 WL 183719 (2008). Certiorari ⇨ 17

Trial court's protective order, which allowed motorist's attorney to retain copy of videotape of motorist's compulsory medical examination (CME) by neuropsychologist, did not depart from essential requirement of law, and thus certiorari relief was not warranted in motorist's action against state Department of Transportation (DOT) for negligent road design; there was no clearly established law on who could maintain copy of videotape after completion of case, trial court had discretion to determine conditions of CME, and trial court considered profession concerns of DOT's expert and addressed them by placing specific limits on use of tape by attorney. *Florida Dept. Of Transp. v. Piccolo*, App. 2 Dist., 964 So.2d 773 (2007). Pretrial Procedure ⇨ 413.1

Plaintiff demonstrated that any injury caused by trial court's order prohibiting his attorney from attending a psychological examination requested by defendant could not be corrected on appeal, so as to support issuance of writ of certiorari quashing order, in plaintiff's negligence action based on physical and psychological injuries suffered due to collision with vehicle driven by defendant's employee, since it would be impossible to demonstrate on appeal how the absence of plaintiff's attorney affected the outcome of the examination. *Byrd v. Southern Prestressed Concrete, Inc.*, App. 1 Dist., 928 So.2d 455 (2006). Certiorari ⇨ 5(2)

#### 26. Review

Record failed to show that mental or physical condition of driver of bus colliding with rear of tractor-trailer was in controversy or that there was good cause for his physical or mental examination. *Schlagenhauf v. Holder*, U.S.Ind.1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. Federal Civil Procedure ⇨ 1651

Interlocutory orders requiring mental examinations are held to cause harm of a kind that cannot be remedied on appeal from final judgment; in the context of compelled mental examinations, the required element of irreparable harm may be found based on the notion that once the invasive harm of the examination occurs, it cannot be undone on appeal. *Olges v. Dougherty*, App. 1 Dist., 856 So.2d 6 (2003), rehearing denied. Certiorari ⇨ 5(1)

One petitioning for a writ of certiorari from an interlocutory order requiring a mental examination has the burden to demonstrate that the trial court departed from the essential requirements of law in ruling as it did. *Olges v. Dougherty*, App. 1 Dist., 856 So.2d 6 (2003), rehearing denied. Certiorari ⇨ 15

Trial court's decision to exclude medical report, on basis that proffering party has failed to deliver copy of report to tested party upon request, is subject to review for abuse of discretion. *Stiles v. Barger*, App. 1 Dist., 559 So.2d 365 (1990). Appeal And Error ⇨ 961

Trial court's ruling sustaining alleged father's objection to motion that he submit to human leukocyte antigen testing had to be reversed, since decision was grounded solely on conclusion that complaint failed to state cause of action against him, which conclusion was reversed. *Holliman v. Green*, App. 1 Dist., 439 So.2d 955 (1983). Children Out-of-wedlock ⇨ 73

Certiorari is proper method to review grant of discovery order. *Simons v. Jorg*, App. 2 Dist., 375 So.2d 288 (1979). Certiorari ⇨ 17

#### 27. New trial

Where plaintiff alleged in her complaint that her injuries were permanent and continuing in nature, where doctor stated in his deposition that plaintiff would be all right and would have no further problems, but he also stated that ligaments and muscles of plaintiff's low back were weakened and she might have problems with her job, where at no time during deposition did defendant ask doctor if plaintiff suffered permanent disability, and where, although defendant was given right to move for independent physical examination, it did not choose to do this, defendant was not entitled to new trial on ground that it was surprised by physician's trial testimony of permanent disability. *Ganey v. Goodings Million Dollar Midway, Inc.*, App. 1 Dist., 360 So.2d 62 (1978), dismissed 362 So.2d 1053. New Trial ⇨ 90

#### 28. Mistrial

Mistrial was warranted based on surprise testimony of defense expert that plaintiff did not suffer permanent injury as a result of automobile accident; trial was the first occasion on which expert had unequivocally stated that plaintiff had suffered no permanent injury, and expert admitted that some of his conclusions were based on material that he had seen just hours before testifying. *Suarez-Burgos v. Morhaim*, App. 4 Dist., 745 So.2d 368 (1999), rehearing denied, review denied 767 So.2d 461. Pretrial Procedure ⇨ 221

West's F.S.A. RCP Rule 1.360, FL ST RCP Rule 1.360  
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### Updating Documents

1 Amended by 2007 FLORIDA COURT ORDER 28 (C.O. 28).

→ **Rule 1.360. Examination of Persons**

CREDIT(S)

Amended July 26, 1972, effective Jan. 1, 1973 (265 So.2d 21); Oct. 6, 1988, effective Jan. 1, 1989 (536 So.2d 974); July 16, 1992, effective Jan. 1, 1993 (604 So.2d 1110); July 7, 1995, effective Jan. 1, 1996 (663 So.2d 1047); Nov. 22, 1995, effective Jan. 1, 1996 (663 So.2d 1049); Sept. 27, 2007, effective Jan. 1, 2008 (966 So.2d 943).

COMMITTEE NOTES

**1972 Amendment.** Derived from Federal Rule of Civil Procedure 35 as amended in 1970. The good cause requirement under this rule has been retained so that the requirements of *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), have not been affected. Subdivision (b) is changed to make it clear that reports can be obtained whether an order for the examination has been entered or not and that all earlier reports of the same condition can also be obtained.

**1988 Amendment.** This amendment to subdivision (a) is intended to broaden the scope of rule 1.360 to accommodate the examination of a person by experts other than physicians.

AUTHORS' COMMENT--1967

Rule 1.360 is the same as former Rule 1.29, 1954 Rules of Civil Procedure and quite similar to Federal Rule 35. As such, 2A Barron and Holtzoff, Federal Practice and Procedure, Rules Edition (West 1961) should be consulted.

It should be noted that the order of the court may be made only on good cause shown, and failure to show good cause by the moving party will defeat the issuance of the order. By operation of Rule 1.380(b)(2)(iv), a party is protected from arrest for disobeying an order under this rule, although remaining subject to the other consequences for failure to comply with the order.

Under the practice heretofore in Florida many attorneys have arranged between themselves for examinations without the entry of any order and such practice is not prohibited by this rule. The order provided for under this rule makes it possible to obtain a copy of the physician's report. This rule is not mandatory, the granting of the order is discretionary.

If the examined party takes advantage of this rule, he becomes obligated to furnish all of his medical reports. The plaintiff's physician holds the key to this rule because if he refuses to make the report available the only penalty is that his testimony is barred. Thus the examined person could obtain from the defendant the report of

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the defendant's physician and then not furnish reports made by his, the plaintiff's physician if that physician fails or refuses to make such report.

#### HISTORICAL NOTES

##### Source:

1954 RCP 1.29. Title shortened from "Examination. Physical and mental examination of parties and examination of property."

##### Prior Provisions:

**Law.** 1950 Common Law Rule 28. Derived from Federal Rule 35.

**Equity.** Laws 1931, c. 14658, § 47; Comp.Gen.Laws 1936 Supp., § 4921(3); F.S.A. § 63.47; 1950 Equity Rule 47(d) (Depositions de bene esse—optional procedure). Superseded by 1954 RCP 1.21 to 1.31.

**Law and equity.** 1954 RCP 1.29. Derived from 1950 Common Law Rule 28.

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# GEORGIA

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Ga. Code Ann., § 9-11-35

**C**

West's Code of Georgia Annotated Currentness

Title 9. Civil Practice

Chapter 11. Civil Practice Act

Article 5. Depositions and Discovery (Refs &amp; Annos)

**→ § 9-11-35. Physical and mental examination of persons**

(a) *Order for examination.* When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician or to submit to a mental examination by a physician or a licensed psychologist or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of examining physician or psychologist.*

(1) If requested by the party against whom an order is made under subsection (a) of this Code section or by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition.

(2) Any party shall be entitled, upon request, to receive from the party whose physical or mental condition is in issue, or who is in control of, or has legal custody of, a person whose physical or mental condition is in issue, a report of any and every examination, previously or thereafter made, of the condition in issue, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it.

(3) The court, on motion, may make an order against a party requiring delivery of a report under paragraph (1) or (2) of this subsection on such terms as are just; and, if a physician or psychologist fails or refuses to make a report, the court may exclude his testimony if offered at the trial.

(4) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action, or any other action involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

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Ga. Code Ann., § 9-11-35

(5) Paragraphs (1) through (4) of this subsection apply to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. Paragraphs (1) through (4) of this subsection do not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with any other Code section of this chapter.

Laws 1966, p. 609, § 35; Laws 1972, p. 510, § 8; Laws 2001, p. 808, § 1.

#### CROSS REFERENCES

Evidence, production of medical records, see § 24-10-70 et seq.

#### LAW REVIEW AND JOURNAL COMMENTARIES

Casnote: I Didn't Volunteer for This @&#!: The Application of Georgia's Psychologist-Patient Privilege to Court-Ordered Mental Health Treatment. John Scott Husser, Jr., 57 Mercer L. Rev. 1327 (2006).

#### LIBRARY REFERENCES

Pretrial Procedure 451 to 457.  
Westlaw Key Number Searches: 307Ak451 to 307Ak457.  
C.J.S. Discovery §§ 69, 110 to 112.

#### RESEARCH REFERENCES

##### Encyclopedias

15 Am. Jur. Proof of Facts 3d 259, Proof of Damages for Sexual Assault.  
65 Am. Jur. Trials 65, Taking the Deposition of the Sexual Harassment Plaintiff.  
Ga. Jur. Insurance § 18:30, Court-Ordered Examinations.

##### Forms

2 Brown Georgia Pleading, Prac. & Legal Forms Anno. § 9-11-26, General Provisions Governing Discovery (Text of Code Section).  
2 Brown Georgia Pleading, Prac. & Legal Forms Anno. § 9-11-27, Depositions Before Action or Pending Appeal (Text of Code Section).  
2 Brown Georgia Pleading, Prac. & Legal Forms Anno. § 9-11-37, Failure to Make Discovery; Motion to Compel; Sanctions; Expenses (Text of Code Section).  
2 Brown Georgia Pleading, Prac. & Legal Forms Anno. § 9-11-27(A) Form 5, Depositions Before Action--Petition; Notice; Order for Inspection of Premises.

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# HAWAII

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 District Court Rules of Civil Procedure, Rule 35

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**WEST'S HAWAI'I COURT RULES**  
**DISTRICT COURT RULES OF CIVIL PROCEDURE**  
**V. DEPOSITIONS AND DISCOVERY**

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Current with amendments received through 1/1/2008

**RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS**

(a) **Order for Examination.** In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order that party to submit to a physical or mental **examination** by a physician. The order may be made only on motion for good cause shown upon notice to the party to be **examined** and to all other parties and shall specify the time, place, manner, conditions, and scope of the **examination** and the person or persons by whom it is to be made.

(b) **Report of Findings.**

(1) If requested by a person against whom an order is made under **Rule 35(a)** or the person **examined**, the party causing the **examination** to be made shall deliver to that requesting person a copy of a detailed written report of the **examining** physician setting out the physician's finding and conclusions. After such request and delivery the party causing the **examination** to be made shall be entitled upon request to receive from the party **examined** a like report of any **examination**, previously or thereafter made, of the same mental or physical condition. If the party **examined** refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude the physician's testimony if offered at the trial.

(2) By requesting and obtaining a report of the **examination** so ordered or by taking the deposition of the examiner, the party **examined** waives any privilege the party **examined** may have in that action or any other involving the same controversy, regarding the testimony of every other person who has **examined** or may thereafter **examine** that party in respect of the same mental or physical condition. The deposition of the **examining** physician may be taken without leave of court, notwithstanding the provisions of **Rule 26(a)(2)**.

[Amended effective April 1, 1996.]

District Court Civil **Rule 35**

HI R DIST CT RCP **Rule 35**

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HI R DIST CT RCP Rule 35  
District Court **Rules** of Civil Procedure, **Rule 35**

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# IDAHO

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ID R RCP Rule 35  
Idaho Rules of Civil Procedure (I.R.C.P.), Rule 35

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**C**WEST'S IDAHO CODE ANNOTATED  
IDAHO COURT RULES  
IDAHO RULES OF CIVIL PROCEDURE**Rule 35. Physical and mental examinations****(a) Physical and mental examination** of persons.

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the parties by stipulation or the court in which the action is pending may order the party to submit to a physical or mental **examination** by a physician, or a qualified mental health professional as defined in section 6-1901, Idaho Code, excluding nurses, if the mental, emotional, or psychological condition of a party is at issue, or to produce for **examination** the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be **examined** and to all parties and shall specify the time, place, manner, conditions, and scope of the **examination** and the person or persons by whom it is to be made.

**(b) Report of Examining Physician.**

(1) If requested by the party against whom an order is made under **Rule 35(a)** or the person **examined**, the party causing the **examination** to be made shall deliver to the requesting party a copy of a detailed written report of the **examining** physician setting out the **examiner's** findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier **examinations** of the same condition. After delivery the party causing the **examination** shall be entitled upon request to receive from the party against whom the order is made a like report of any **examination**, previously or thereafter made, of the same condition, unless, in the case of a report of **examination** of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude the **examiner's** testimony if offered at the trial.

(2) By requesting and obtaining a report of the **examination** so ordered or by taking the deposition of the examiner, the party **examined** waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has **examined** or may thereafter **examine** the party in respect of the same mental or physical condition.

(3) This subdivision applies to **examinations** made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an **examining** physician or the taking of a deposition of the physician in accordance with the provisions of any other **rule**.

[Amended March 31, 1998, effective July 1, 1998; March 17, 2006, effective July 1, 2006.]

Current with amendments received through 9-7-2007

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ID R RCP Rule 35

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ID R RCP Rule 35  
Idaho **Rules** of Civil Procedure (I.R.C.P.), **Rule 35**

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# ILLINOIS

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ILCS S. Ct. Rule 215

**C**

Formerly cited as IL ST S CT R CH 110A ¶ 215

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness

Court Rules

Illinois Supreme Court Rules (Refs &amp; Annos)

▣ Article II. Rules on Civil Proceedings in the Trial Court (Refs &amp; Annos)

▣ Part E. Discovery, Requests for Admission, and Pretrial Procedure (Refs &amp; Annos)

→ **Rule 215. Physical and Mental Examination of Parties and Other Persons**

(a) **Notice; Motion; Order.** In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court, upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved. The motion shall suggest the identity of the examiner and set forth the examiner's specialty or discipline. The court may refuse to order examination by the examiner suggested but in that event shall permit the party seeking the examination to suggest others. A party or person shall not be required to travel an unreasonable distance for the examination. The order shall fix the time, place, conditions, and scope of the examination and designate the examiner. The party calling an examiner to testify at trial shall disclose the examiner as a controlled expert witness in accordance with these rules.

(b) **Examiner's Fee and Compensation for Loss of Earnings.** The party requesting the examination shall pay the fee of the examiner and compensation for any loss of earnings incurred or to be incurred by the party or person to be examined in complying with the order for examination, and shall advance all reasonable expenses incurred or to be incurred by the party or person in complying with the order.

(c) **Examiner's Report.** Within 21 days after the completion of the examination, the examiner shall prepare and mail or deliver to the attorneys for the party requesting the examination and the party examined duplicate originals of a written report of the examination, setting out the examiner's findings, results of all tests made, and the examiner's diagnosis and conclusions. The court may enforce compliance with this requirement. If the report is not delivered or mailed to the attorney for the party examined within the time herein specified or within any extensions or modifications thereof granted by the court, neither the examiner's report, the examiner's testimony, the examiner's findings, X-ray films, nor the results of any tests the examiner has made may be received in evidence except at the instance of the party examined or who produced the person examined. No examiner under this rule shall be considered a consultant.

**(d) Impartial Medical Examiner.**

(1) *Examination Before Trial.* A reasonable time in advance of the trial, the court may on its own motion or that of any party, order an impartial physical or mental examination of a party whose mental or physical condition is in issue, when in the court's discretion it appears that such an examination will materially aid in the just determination of the case. The examination shall be made by a member or members of a panel of physicians chosen for their special qualifications by the Administrative Office of the Illinois Courts.

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## ILCS S. Ct. Rule 215

(2) *Examination During Trial.* Should the court at any time during the trial find that compelling considerations make it advisable to have an examination and report at that time, the court may in its discretion so order.

(3) *Copies of Report.* A copy of the report of examination shall be given to the court and to the attorneys for the parties.

(4) *Testimony of Examining Physician.* Either party or the court may call the examining physician or physicians to testify. Any physician so called shall be subject to cross-examination.

(5) *Costs and Compensation of Physician.* The examination shall be made, and the physician or physicians, if called, shall testify without cost to the parties. The court shall determine the compensation of the physician or physicians.

(6) *Administration of Rule.* The Administrative Director and the Deputy Administrative Director are charged with the administration of the rule.

## CREDIT(S)

Amended June 1, 1995, eff. Jan. 1, 1996; March 28, 2002, eff. July 1, 2002.

## FORMER REVISED STATUTES CITATION

Formerly Ill.Rev.Stat.1991, ch. 110A, ¶ 215.

## COMMITTEE COMMENTS

(Revised June 1, 1995)

This **rule** is derived from former **Rules** 17-1 and 17-2. The language of **Rule** 17- 1 was not changed except that the time in which the **examining** physician shall present his findings has been extended to 21 days in paragraph (c) of **Rule** 215. Under former **Rule** 17-1(3) that period was 20 days. Paragraph (c) of the new **rule** also requires that the physician present his report 14 days before trial. Former **Rule** 17-1(3) required the physician to present his findings not later than 10 days before trial. These changes are consistent with the committee's general policy of establishing time periods in multiples of seven days.

Former **Rule** 17-2 has been revised as paragraph (d) of the new **rule**, but the substance is not changed, except that the provision is no longer limited to personal injury cases.

This **rule** is intended to provide an orderly procedure for the **examination** of civil litigants whose physical or mental condition is in controversy. Originally, the **rule** concerned only physicians. The new **rule** recognizes that a number of professionals in other health-related disciplines are licensed to perform physical and mental **examinations** and therefore the designation "licensed professional" is substituted for "physician." The new language was adopted to effectuate the objectives of the **rule** with minimal judicial involvement. The requirement of "good cause" was therefore eliminated as grounds for seeking an **examination**.

Timing is the critical consideration. **Examining** professionals under the **rule** fall within the classification of opinion witnesses under Supreme Court **Rule** 213(g) as opposed to consultants under Supreme

# INDIANA

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IN ST TRIAL P Rule 35  
Trial Procedure Rule 35

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**C**West's Annotated Indiana Code Currentness  
Title 34 Appendix Court Rules (Civil)  
    § Indiana Rules of Trial Procedure  
    § V. Depositions and Discovery→ **Rule 35. Physical and mental examination of persons**

**(A) Order for examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**(B) Report of licensed or certified examiner.**

(1) If requested by the party against whom an order is made under Rule 35(A) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examiner setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

CREDIT(S)

Amended Dec. 14, 1970, effective March 1, 1971; Amended Dec. 21, 2001, effective April 1, 2002.

## HISTORICAL NOTES

2003 Main Volume

The 1971 amendment, eff. March 1, 1971, deleted "without limitation" preceding "the blood group", deleted "or

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I.C.A. Rule 1.515

**C**

Formerly cited as IA R RCP R 132

Iowa Code Annotated Currentness

Iowa Court Rules

I. Rules of Practice and Procedure

§ Chapter I. Rules of Civil Procedure (Refs &amp; Annos)

§ Division V. Discovery and Inspection (Refs &amp; Annos)

**→ Rule 1.515. Physical and mental examination of persons**

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a health care practitioner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

CREDIT(S)

Renumbered from Rule 132 and amended Nov. 9, 2001, eff. Feb. 15, 2002.

## OFFICIAL COMMENT

2002 Main Volume

**ENACTMENT 1943****Federal practice.**

Under Federal Rule 35, an order for the physical or mental examination of a party is not granted as of right. The matter is addressed to the sound discretion of the trial court. *Teche Lines v. Boyette*, C.C.A.5th, 1949, 111 F.2d 579. The moving party must make a showing of good cause. Usually this is very perfunctory, *Martin v. Tindell*, Fla. 1957, 98 So.2d 473, 475, certiorari denied 78 S.Ct. 545, 355 U.S. 959, 2 L.Ed. 2d 534, as for example a statement in the motion that defendant does not believe plaintiff to be injured as seriously as he claims to be, *Leach v. Greif Bros. Cooperage Corp.*, D.C.Miss.1942, 2 F.R.D. 444. Sometimes, however, the courts are more exacting, and the motion has been denied where the court has not been satisfied that the **examination** is needed. *Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres*, C.A. 1st, 1958, 255 F.2d 149. In personal injury cases the general practice is to allow the defendant to have at least one **medical examination** of the plaintiff as of course, since good cause is necessarily implied in the very nature of the litigation.

**----Report of findings.**

Under Federal **Rule 35(b) (1)** the party **examined** has an absolute right to receive from the party who caused the **examination** to be made a copy of the report of the findings of the **examining** physician.

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I.C.A. Rule 1.516

**C**

Formerly cited as IA R RCP R 133

Iowa Code Annotated Currentness

Iowa Court **Rules**I. **Rules** of Practice and Procedure    Chapter I. **Rules** of Civil Procedure (Refs & Annos)

Division V. Discovery and Inspection (Refs &amp; Annos)

    → **Rule 1.516. Report** of health care practitioner

**1.516(1)** If requested by the party against whom an order is made under **rule 1.515** or the person **examined**, the party causing the **examination** shall deliver a copy of the **examiner's** detailed written **report** setting out the findings, including results of all **tests** made, diagnosis and **conclusions**, together with like **reports** of all earlier **examinations** of the same condition. After delivery, if requested by the party causing the **examination**, the party against whom the order is made shall deliver a like **report** of any **examination** of the same condition, previously or thereafter made, unless the party shows an inability to obtain a **report** of **examination** of a nonparty. The court on motion may order a party to deliver a **report** on such terms as are just. If an examiner fails or refuses to make a **report** the court may exclude the **examiner's** testimony if offered at the trial.

**1.516(2)** By requesting and obtaining a **report** of the **examination** so ordered or by taking the deposition of the examiner, the party **examined** waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has **examined** or may thereafter **examine** the party in respect of the same mental or physical condition.

**1.516(3)** This **rule** applies to **examination** made by agreement of the parties, unless the agreement expressly provides otherwise. This **rule** does not preclude discovery of a **report** of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other **rule** or statute.

CREDIT(S)

Renumbered from **Rule 133** and amended Nov. 9, 2001, eff. Feb. 15, 2002.

HISTORICAL AND STATUTORY NOTES

2002 Main Volume

**Derivation:****Rule 133.**

Amended Oct. 31, 1997, eff. Jan. 24, 1998.

**Rule 133.**

Acts 1973 (65 G.A.) ch. 316.

**Rule 133.****Report 1943.**

LIBRARY REFERENCES

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# KANSAS

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KS R RCP CODE 60-235  
 Rules of Civil Procedure, K.S.A. 60-235

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C

WEST'S KANSAS COURT RULES AND PROCEDURE  
 CODE OF CIVIL PROCEDURE  
 ARTICLE 2. RULES OF CIVIL PROCEDURE

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Current with amendments received through 10/15/2007

§ 60-235. Physical and Mental **Examination** of Persons

(a) **Order for Examination.** When the mental or physical condition, including the blood group, of a party, or of a person in the custody or under the legal control of a party, is in **controversy**, the court in which the action is pending may order the party to submit to a physical or mental **examination** by a suitably licensed or certified examiner or to produce for **examination** the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be **examined** and to all parties and shall specify the time, place, manner, conditions and scope of the **examination** and the person or persons by whom it is to be made. The moving party shall advance the expenses which will necessarily be incurred by the party to be **examined**.

(b) **Report of Examiner.**

(1) If requested by the party against whom an order is made under subsection (a) or by the person **examined**, the party causing the **examination** to be made shall deliver to the party or person making the request a copy of a detailed written **report** of the examiner, setting out the **examiner's** findings, including results of all tests made, diagnoses and conclusions, together with like **reports** of all earlier **examinations** of the same condition.

(2) This subsection applies to **examinations** made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a **report** of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other **rule**.

(c) **Reports of Other Examinations.** Any party shall be entitled upon request to receive from a party a **report** of any **examination**, previously or thereafter made, of the condition in **controversy**, except that the party shall not be required to provide such a **report** if the **examination** is of a person not a party and the party is unable to obtain a **report** thereof. **Reports** required to be provided under this subsection shall contain the same information as specified for **reports** under subsection (b).

(d) **Order Requiring Delivery of Report.** The court on motion may make an order against a party requiring delivery of a **report** under subsection (b) or (c) on such terms as are just. If an examiner fails or refuses to make or deliver such a **report**, the court may exclude the **examiner's** testimony if offered at the trial.

[Amended effective July 1, 1997.]

Rules Civ. Proc., K. S. A. 60-235

KS R RCP CODE 60-235

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KS R RCP CODE 60-235  
Rules of Civil Procedure, K.S.A. 60-235

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# KENTUCKY

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Kentucky Rules of Civil Procedure (CR) Rule 35.01

**C**

Baldwin's Kentucky Revised Statutes Annotated Currentness

Rules of Civil Procedure

V Depositions and Discovery

Cr 35 Physical and Mental Examination of Persons (Refs &amp; Annos)

→ **CR 35.01 Order for examination**

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, dentist or appropriate health care expert, or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**HISTORY:** Amended by Order 91-2, eff. 11-15-91; prior amendment eff. 10-1-71; adopted eff. 7-1-53

**CROSS REFERENCES**

Failure to comply with order, CR 37.02

Mental or physical examinations made in connection with criminal case, discovery of, RCr 7.24

Report of examining physician, CR 35.02

**LIBRARY REFERENCES**

Damages ~~206(.5)~~ 206(8).

Westlaw Topic No. 115.

C.J.S. Damages § 174.

**RESEARCH REFERENCES****Encyclopedias**

58 Am. Jur. Trials 283, Representing Automobile Accident Victims.

**Forms**

Kentucky Practice, Civil Procedure Forms § 66:2, Mental or Physical Condition Must be in Controversy--Good Cause.

Kentucky Practice, Civil Procedure Forms § 66:3, Motion for Compulsory Physical Examination--Form.

Kentucky Practice, Civil Procedure Forms § 66:8, Order on Refusal of Party to Submit to Examination--Form.

**Treatises and Practice Aids**

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Kentucky Rules of Civil Procedure (CR) Rule 35.02

**C**

Baldwin's Kentucky Revised Statutes Annotated Currentness

**Rules of Civil Procedure**

- ▣ V Depositions and Discovery

- ▣ Cr 35 Physical and Mental **Examination** of Persons (Refs & Annos)

- **CR 35.02** Report of **examining** physician or health care expert

(1) If requested by the party against whom an order is made under **Rule 35.01** or the person **examined**, the party causing the **examination** to be made shall deliver to that person or party a copy of a detailed written report of the **examining** health care expert setting out all findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier **examinations** of the same condition. After delivery, the party causing the **examination** shall be entitled upon request to receive from the party against whom the order is made a like report of any **examination**, previously or thereafter made, of the same condition, unless, in the case of a report of **examination** of a person not a party, the party shows an inability to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or examining health care expert fails or refuses to make a report the court may exclude such testimony if offered at the trial.

(2) This rule applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This rule does not preclude discovery of a report of an examining physician or health care expert or the taking of a deposition of the physician or health care expert in accordance with the provisions of any other rule.

HISTORY: Amended by Order 91-2, eff. 11-15-91; prior amendment eff. 10-1-71; adopted eff. 7-1-53

## CROSS REFERENCES

Physical and mental **examination** of persons, order for **examination**, CR 35.01

Scope of discovery: trial preparation, experts, CR 26.02

## LIBRARY REFERENCES

Damages ↪ 206(5).

Westlaw Topic No. 115.

C.J.S. Damages § 174.

## RESEARCH REFERENCES

**Forms**

Kentucky Practice, Civil Procedure Forms § 63:8, Interrogatories--Identity of Witnesses and Expert Witnesses--Form.

Kentucky Practice, Civil Procedure Forms § 66:9, Request by **Examined** Party for Report of Findings--Form.

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# LOUISIANA

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LSA-C.C.P. Art. 1464

**C**

West's Louisiana Statutes Annotated Currentness  
Louisiana Code of Civil Procedure acts 1960, No. 15 (Refs & Annos)  
Book II. Ordinary Proceedings  
Title III. Production of Evidence  
Chapter 3. Discovery (Refs & Annos)  
Section 2. Depositions: General Dispositions

→ **Art. 1464. Order for physical or mental examination of persons**

When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control, except as provided by law. In addition, the court may order the party to submit to an examination by a vocational rehabilitation expert or a licensed clinical psychologist who is not a physician, provided the party has given notice of intention to use such an expert. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

CREDIT(S)

Acts 1976, No. 574, § 1. Amended by Acts 1991, No. 324, § 1; Acts 1997, No. 1056, § 1.

COMMENT--1997

2005 Main Volume

The amendment expands the category of examiner to include a licensed clinical psychologist if the other party has given notice of an intent to use such an expert.

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

**Source:**

Former R.S. 13:3783A; *cf.* Fed.Rule 35(a).  
Acts 1960, No. 15, § 1.  
C.C.P. art. 1493.

Chapter 3 of Title III of Book II of the Code of Civil Procedure, formerly containing C.C.P. arts. 1421 to 1439, 1451 to 1457, 1469, 1471 to 1473, 1491 to 1496, and 1511 to 1515, was amended and reenacted by Acts 1976, No. 574, § 1 to contain C.C.P. arts. 1421 to 1474. For disposition of the subject matter of the former articles of Book II, Title III, Chapter 3, see table preceding C.C.P. art. 1420.

The 1991 amendment inserted a new second sentence relating to examinations by vocational rehabilitation experts.

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LSA-C.C.P. Art. 1465

**C**

West's Louisiana Statutes Annotated Currentness  
Louisiana Code of Civil Procedure acts 1960, No. 15 (Refs & Annos)  
Book II. Ordinary Proceedings  
Title III. Production of Evidence  
Chapter 3. Discovery (Refs & Annos)  
Section 2. Depositions: General Dispositions

→ **Art. 1465. Report of examining physician**

A. If requested by the party against whom an order is made under Article 1464 or by the person **examined**, the party causing the **examination** to be made shall deliver to him a copy of a detailed written **report** of the **examining** physician setting out his findings, including results of all tests made, diagnoses, and conclusions, together with like **reports** of all earlier **examinations** of the same condition. After delivery the party causing the **examination** shall be entitled upon request to receive from the party against whom the order is made a like **report** of any **examination**, previously or thereafter made, of the same condition, unless, in the case of a **report** of **examination** of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a **report** on such terms as are just, and if a physician fails or refuses to make a **report** the court may exclude his testimony if offered at the trial.

B. By requesting and obtaining a **report** of the **examination** so ordered or by taking the deposition of the examiner, the party **examined** waives any privilege he may have in that action or any other involving the same **controversy**, regarding the testimony of every other person who has **examined** or may thereafter **examine** him in respect of the same mental or physical condition.

C. This Article applies to **examinations** made by agreement of the parties, unless the agreement expressly provides otherwise. This Article does not preclude discovery of a **report** of an **examining** physician or the taking of a deposition of the physician in accordance with the provisions of any other **rule**.

CREDIT(S)

Acts 1976, No. 574, § 1. Amended by Acts 1993, No. 619, § 1.

HISTORICAL AND STATUTORY NOTES

2005 Main Volume

Source:

Former R.S. 13:3783B, 13:3783C; cf. Utah **Rules** of Civil Procedure, **Rule 35**; cf. Fed. Rule 35(b).  
Acts 1960, No. 15, § 1.  
C.C.P. arts. 1494, 1495.

Chapter 3 of Title III of Book II of the Code of Civil Procedure, formerly containing C.C.P. arts. 1421 to 1439, 1451 to 1457, 1469, 1471 to 1473, 1491 to 1496, and 1511 to 1515, was amended and reenacted by Acts 1976,

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# MAINE

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ME R RCP Rule 35  
Maine Rules of Civil Procedure, Rule 35

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C

Maine Revised Statutes Annotated Currentness  
Maine Rules of Court  
    Rules of Civil Procedure  
        V. Depositions and Discovery

## → Rule 35. Physical and Mental Examination of Persons

(a) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental **examination** by a licensed physician or a mental **examination** by a licensed psychologist, or to produce for **examination** the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be **examined** and to all parties and shall specify the time, place, manner, conditions, and scope of the **examination** and the person or persons by whom it is to be made.

(b) **Report of Examining Physician or Psychologist.**

(1) If requested by the party against whom an order is made under **Rule 35(a)** or the person **examined**, the party causing the **examination** to be made shall deliver to the requestor a copy of a detailed written report of the examiner setting out the **examiner's** findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier **examinations** of the same condition. After delivery the party causing the **examination** shall be entitled upon request to receive from the party against whom the order is made a like report of any **examination**, previously or thereafter made, of the same condition, unless, in the case of a report of **examination** of a person not a party, the person against whom the order is made shows that it is unobtainable. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the **examiner's** testimony if offered at the trial.

(2) By requesting and obtaining a report of the **examination** so ordered or by taking the deposition of the examiner, the party **examined** waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has **examined** or may thereafter **examine** the party in respect of the same mental or physical condition.

(3) This subdivision applies to **examinations** made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of the deposition of the examiner in accordance with the provision of any other **rule**.

CREDIT(S)

[Amended effective February 15, 1993.]

Rules Civ. Proc., **Rule 35**, ME R RCP **Rule 35**

Current with amendments received through 7/15/07

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ME R RCP Rule 35  
Maine **Rules** of Civil Procedure, **Rule 35**

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# MARYLAND

*Md. Rule 2-423*

Michie's Annotated Code of Maryland  
Maryland Rules  
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\*\*\* Rules current through December 4, 2007 \*\*\*  
\*\*\* Annotations current through November 14, 2007 \*\*\*

MARYLAND RULES  
TITLE 2. CIVIL PROCEDURE -- CIRCUIT COURT  
CHAPTER 400. DISCOVERY

Md. Rule 2-423 (2007)

Review Court Orders which may amend this Rule

Rule 2-423. Mental or physical examination of persons.

When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties. It shall specify the time and place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The order may regulate the filing and distribution of a report of findings and conclusions and the testimony at trial by the examiner, the payment of expenses, and any other relevant matters.

**HISTORY:** (Amended July 23, 1997. )

# MASSACHUSETTES

MASSACHUSETTS COURT RULES

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED AS OF DECEMBER 12, 2007 \*\*\*

MASSACHUSETTS RULES OF CIVIL PROCEDURE  
V. DEPOSITIONS AND DISCOVERY

ALM R. Civ. P. Rule 35 (2007)

Review Court Orders which may amend this rule.

Rule 35. Physical and Mental Examination of Persons

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of an examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition; but he does not otherwise waive his right to object at the trial to the introduction into evidence of the report or any part thereof.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

# MICHIGAN

\* THIS RULE IS UPDATED THROUGH MICHIGAN SUPREME COURT ORDERS ISSUED 3/07/08  
\*

MICHIGAN COURT RULES OF 1985  
CHAPTER 2 CIVIL PROCEDURE  
Subchapter 2.300. Discovery

MCR 2.311 (2008)

Review Court Orders which may amend this Rule.

Rule 2.311 Physical and **Mental Examination** of Persons.

(A) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

(B) Report of Examining Physician.

(1) If requested by the party against whom an order is entered under subrule (A) or by the person examined, the party causing the examination to be made must deliver to the requesting person a copy of a detailed written report of the examining physician setting out the findings, including results of all tests made, diagnosis, and conclusions, together with like reports on all earlier examinations of the same condition, and must make available for inspection and examination X-rays, cardiograms, and other diagnostic aids.

(2) After delivery of the report, the party causing the examination to be made is entitled on request to receive from the party against whom the order is made a similar report of any examination previously or thereafter made of the same condition, and to a similar inspection of all diagnostic aids unless, in the case of a report on the examination of a nonparty, the party shows that he or she is unable to obtain it.

(3) If either party or a person examined refuses to deliver a report, the court on motion and notice may enter an order requiring delivery on terms as are just, and if a physician refuses or fails to comply with this rule, the court may order the physician to appear for a discovery deposition.

(4) By requesting and obtaining a report on the examination ordered under this rule, or by taking the deposition of the examiner, the person examined waives any privilege he or she may have in that action, or another action involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the person as to the same mental or physical condition.

(5) Subrule (B) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

(6) Subrule (B) does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician under any other rule.

**NOTES:**

NOTES

MCR 2.311 is based on GCR 1963, 311 and FR Civ P 35.

In the last sentence of subrule (A), the word "must" is changed to "may", allowing the trial court to direct that the examination take place without the attorney for the party being examined present.

New subrule (B)(5) is added to make clear that the provisions also apply to examinations conducted by agreement of the parties, unless the agreement provides otherwise.

# MINNESOTA

MINNESOTA STATUTES -- COURT RULES

\*\*\* THIS DOCUMENT IS CURRENT THROUGH JULY 1, 2007 \*\*\*

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

V. DEPOSITIONS AND DISCOVERY

RULE 35. PHYSICAL, MENTAL, AND BLOOD EXAMINATION OF PERSONS

Minn. R. Civ. P. 35.01 (2007)

Review Court Orders which may amend this Rule.

35.01 Order of Examinations

In an action in which the physical or mental condition or the blood relationship of a party, or of an agent of a party, or of a person under control of a party, is in controversy, the court in which the action is pending may order the party to submit to, or produce such agent or person for a physical, mental, or blood examination by a suitably licensed or certified examiner. The order may be made only on motion for good cause shown and upon notice to the party or person to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is made.

Review Court Orders which may amend this Rule.

35.02 Report of Findings

(a) If requested by the party against whom an order is made pursuant to Rule 35.01 or by the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examination setting out the examiner's findings and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery, the party causing the examination to be made shall be entitled, upon request, to receive from the party or person examined a like report of any examination, previously or thereafter made, of the same physical, mental, or blood condition. If the party or person examined refuses to deliver such report, the court, on motion and notice, may make an order requiring delivery on such terms as are just, and, if an examiner fails or refuses to make such a report, the court may exclude the examiner's testimony if offered at the trial.

(b) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the adverse party waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party or the person under the party's control with respect to the same physical, mental, or blood condition.

35.03 Waiver of Medical Privilege

If at any stage of an action a party voluntarily places in controversy the physical, mental, or blood condition of that party, a decedent, or a person under that party's control, such party thereby waives any privilege that party may have in that action regarding the testimony of every person who has examined or may thereafter examine that party or the person under that party's control with respect to the same physical, mental, or blood condition.

#### 35.04 Medical Disclosures and Depositions of Medical Experts

When a party has waived medical privilege pursuant to Rule 35.03, such party within ten days of a written request by any other party,

(a) shall furnish to the requesting party copies of all medical reports previously or thereafter made by any treating or examining medical expert, and

(b) shall provide written authority signed by the party of whom request is made to permit the inspection of all hospital and other medical records, concerning the physical, mental, or blood condition of such party as to which privilege has been waived.

Disclosures pursuant to this rule shall include the conclusions of such treating or examining medical expert.

Depositions of treating or examining medical experts shall not be taken except upon order of the court for good cause shown upon motion and notice to the parties and upon such terms as the court may provide.

When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties. It shall specify the time and place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The order may regulate the filing and distribution of a report of findings and conclusions and the testimony at trial by the examiner, the payment of expenses, and any other relevant matters.

**HISTORY:** (Amended July 23, 1997. )

# MISSISSIPPI

*M.R.C.P. Rule 35*

MISSISSIPPI COURT RULES ANNOTATED  
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MISSISSIPPI RULES OF CIVIL PROCEDURE  
CHAPTER V. DEPOSITIONS AND DISCOVERY

M.R.C.P. Rule 35  
(2008)

Review Court Orders which may amend this Rule

Rule 35. Physical and mental examinations of persons.

(a) Order for examination.. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. A party or person may not be required to travel an unreasonable distance for an examination. The party requesting the examination shall pay the examiner and shall advance all necessary expenses to be incurred by the party or person in complying with the order.

(b)(1) Report of examiner. If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

(c) Limited applicability to actions under Title 93 of the Mississippi Code of 1972.. This rule does not apply to actions under Title 93 of the Mississippi Code of 1972, except in the discretion of the Chancery Judge.

**HISTORY:** Adopted effective January 16, 2003

# MISSOURI

MISSOURI RULES OF COURT

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH JULY 1, 2007 \*\*\*

SUPREME COURT RULES  
RULES OF CIVIL PROCEDURE  
PART I. RULES GOVERNING CIVIL PROCEDURE IN THE CIRCUIT COURTS  
RULE 60. PHYSICAL AND **MENTAL EXAMINATION** OF PERSONS

Mo. Sup. Ct. R. 60.01 (2007)

Review Court Orders which may amend this Rule

60.01. Examination and Report

**(a) Order for Examination.**

(1) In an action in which the mental condition, physical condition, or blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party (i) to submit to physical, mental, or blood examinations by physicians or other appropriate licensed health care providers or (ii) to produce for such examinations such party's agent or the person in such party's custody or legal control.

(2) In any action in which the vocational ability of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party (i) to submit to evaluation by vocational rehabilitation professionals or (ii) to produce for such evaluation such party's agent or the person in such party's custody or legal control.

(3) Any order under this Rule 60.01(a) may be made only on motion for good cause shown, upon notice to the person against whom the order is sought and to all other parties. Such order shall specify the time, place, manner, conditions, scope of, and identity of each person conducting the examination or evaluation. The court may, as a condition of its order, require the party requesting the order to reimburse the person who is the subject of the order for that person's reasonable round trip expenses in traveling more than sixty miles from the place of residence to the place of examination or evaluation.

**(b) Report of Findings.**

(1) If requested by the party against whom an order is made under Rule 60.01(a) or the person who is the subject of the order, the party obtaining the order shall deliver to the requesting person or party a copy of a detailed written report of the examiner or evaluator setting out the findings, including results of all tests made, diagnosis, and conclusions, together with like reports of all earlier examinations or evaluations of the same condition. After delivery, the party obtaining the order shall be entitled upon request to receive from the party against whom the order is made a like report of any examination or evaluation, previously or thereafter made, of the same condition, unless, in the case of a report of examination or evaluation of a person not a party, the party shows an inability to obtain it. The court on motion shall make an order against a party requiring delivery of a report on such terms as are just; if an examiner or evaluator fails or refuses to make a report, the court may exclude the examiner's or evaluator's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination or evaluation so ordered or by taking the deposition of the examiner or evaluator, the person examined or evaluated waives any privilege the person may have in that action, or any other involving the same controversy, regarding the testimony of every other person who has examined or evaluated or may thereafter examine or evaluate the person in respect of the same mental condition, physical condition, vocational ability, or blood relationship.

(3) This Rule 60.01(b) applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise, and does not preclude discovery of a report of or the taking of a deposition of the examiner or evaluator in accordance with the provisions of any other rule.

# MONTANA

\*\*\* THIS DOCUMENT IS CURRENT THROUGH THE 2007 REGULAR AND SPECIAL SESSIONS  
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\*\*\* ANNOTATIONS CURRENT THROUGH OCTOBER 23, 2007 \*\*\*

TITLE 25 CIVIL PROCEDURE  
CHAPTER 20 RULES OF CIVIL PROCEDURE  
PART V DEPOSITIONS AND DISCOVERY

**Go to the Montana Code Archive Directory**

Mont. Code Anno., Ch. 20, Rule 35(a) (2007)

Rule 35(a) Order for examination.

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or **mental examination** by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Rule 35(b) Report of examiner.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) Waiver of privilege. Either by (1) requesting and obtaining a report of the examination ordered as provided herein, or by taking the deposition of the examiner, or by (2) commencing an action or asserting a defense which places in issue the mental or physical condition of a party to the action, the party examined or a party to the action waives any privilege the party may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, prescribed, consulted, or examined or may thereafter treat, consult, prescribe or examine, such party in respect to the same mental or physical condition; but such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion seasonably made, and upon notice and for good cause shown, the court in which the action is pending, may make an order prohibiting the introduction in evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

# NEBRASKA

*Neb. Ct. R., Discovery R. 35*

NEBRASKA RULES OF COURT ANNOTATED  
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\*\*\* CURRENT THROUGH THE 2007 FIRST SESSION, SUPREME COURT AMENDMENTS AS OF  
JULY 15, 2007 AND THE NOVEMBER 2007 GENERAL ELECTION. \*\*\* ANNOTATIONS  
CURRENT THROUGH JULY 15, 2007. \*\*\*

NEBRASKA DISCOVERY RULES FOR ALL CIVIL CASES

Neb. Ct. R., Discovery R. 35 (2007)

Rule 35. Physical and **mental examination** of persons

(a) Order for examination. -- When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or **mental examination** by one or more physicians, or other persons licensed or certified under the laws to engage in a health profession, or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him or her a copy of a detailed written report of the examining physician setting out his or her findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he or she is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report, the court may exclude his or her testimony if offered at the trial.

(2) (Not used).

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

# NEVADA

NEVADA COURT RULES ANNOTATED  
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\*\*\* CURRENT THROUGH UPDATES RECEIVED BY SEPTEMBER 10, 2007 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JUNE 1, 2007 \*\*\*

RULES OF CIVIL PROCEDURE FOR THE NEVADA DISTRICT COURTS  
V. DEPOSITIONS AND DISCOVERY

Nev. R.C.P. 35 (2007)

Review court orders which may amend this Rule.

RULE 35. Physical and **mental examination** of persons

(a) Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or **mental examination** by a suitably licensed or certified examiner to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examiner.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

**HISTORY:** (Amended eff. 9-27-71; Amended eff. 1-1-05)

# NEW HAMPSHIRE

NEW HAMPSHIRE COURT RULES  
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\*\*\* RULES CURRENT THROUGH SUPREME COURT ORDER DATED FEBRUARY 20, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH CASES DECIDED DECEMBER 31, 2007 \*\*\*

RULES OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE  
GENERAL PROVISIONS GOVERNING DISCOVERY

N.H. Super. Ct. R. 35 (2008)

**35.**

**a. Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical or **mental examinations**; and requests for admission. Unless the Court orders otherwise, or unless otherwise provided in these rules, the frequency of use of these methods is not limited.

**b. Scope of Discovery.** Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follows:

**(1) In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

When a party withholds materials or information otherwise discoverable under this rule by claiming that the same is privileged, the party shall promptly and expressly notify the opposing party of the privilege claim and, without revealing the contents or substance of the materials or information at issue, shall describe its general character with sufficient specificity as to enable other parties to assess the applicability of the privilege claim. Failure to comply with this requirement shall be deemed a waiver of any and all privileges.

**(2) Trial Preparation: Materials.** Subject to the provisions of subdivision b(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision b(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its

subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 59 apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

**(3) Trial Preparations: 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) (i)** A party may through interrogatories require any other party to identify each person, whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. **(ii)** Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision b(3)(c) of this rule, concerning fees and expenses as the Court may deem appropriate.

**(b)** A party may discover facts known or opinions held by an expert, who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

**(c)** Unless manifest injustice would result, **(i)** the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions b(3)(a) and b(3)(b) of this rule, and **(ii)** with respect to discovery obtained under subdivision b(3)(a)(ii) of this rule, the Court may require, and with respect to discovery obtained under subdivision b(3)(b), the Court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

**c. Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Court; (6) that a deposition after being sealed be opened only by order of the Court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

If the motion for a protective order is denied in whole or in part, the Court may, on such terms and conditions as are just, order that any party or person provide or permit

discovery. The provisions of Rule 59 apply to the award of expenses incurred in relation to the motion.

**d. Sequence and Timing of Discovery.** Unless the Court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

**e. Supplementation of Responses.** A party, who has responded to a request for discovery with a response that was complete when made, is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of persons having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (a) he knows that the response was incorrect when made, or (b) he knows that the response, though correct when made, is no longer true.

(3) A duty to supplement responses may be imposed by order of the Court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

**f. Disclosure of Expert Witnesses.** Within thirty (30) days of a request by the opposing party, or in accordance with an order of the Court following a discovery conference, a party shall be required to supply a Disclosure of Expert Witness(es) as defined under Rule 702 of the Rules of Evidence, which document shall

(1) identify each person, including any party, whom the party expects to call as an expert witness at trial,

(2) provide a brief summary of the expert's education and experience relevant to his area of expertise,

(3) state the subject matter on which the expert is expected to testify, and

(4) state a summary of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party shall attach to the disclosure a copy of any expert report relating to such expert.

**g. Discovery abuse; sanctions.**

(1) The court may impose appropriate sanctions against a party or counsel for engaging in discovery abuse. Upon a finding that discovery abuse has occurred, the court should normally impose sanctions unless the offending party or counsel can demonstrate substantial justification for the conduct at issue or other circumstances that would make the imposition of sanctions unfair. Discovery abuse includes, but is not limited to, the following:

(a) employing a discovery method in a manner or to an extent that causes unwarranted

annoyance, embarrassment, or undue burden or expense;

(b) employing discovery methods otherwise available which result in legal expense disproportionate to the matters at issue;

(c) making, without substantial good faith justification, an unmeritorious objection to discovery;

(d) responding to discovery in a manner which the responding party knew or should have known was misleading or evasive;

(e) producing documents or other materials in a disorganized manner or in a manner other than the form in which they are regularly kept;

(f) failing to confer with an opposing party or attorney in a good faith effort to resolve informally a dispute concerning discovery.

(2) The sanctions which may be imposed for discovery abuse include, but are not limited to, the following:

(a) a monetary sanction in an amount equal to the unnecessary expenses incurred, including reasonable attorney's fees, as the result of the abusive conduct;

(b) an issue sanction that orders that designated facts be taken as established by the party who has been adversely affected by the abuse;

(c) an evidence sanction that prohibits the offending party from introducing certain matters into evidence;

(d) a terminating sanction that strikes all or part of the claims or defenses, enters full or partial judgment in favor of the plaintiff or defendant, or stays the proceeding until ordered discovery has been provided.

**HISTORY:** --Amended September 1, 1987; amended January 18, 2007, eff. March 1, 2007.

# NEW JERSEY

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NJ R SUPER TAX SURR CTS  
CIV R. 4:19  
R. 4:19

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NEW JERSEY STATUTES ANNOTATED  
NEW JERSEY RULES OF COURT  
PART IV. RULES GOVERNING CIVIL PRACTICE IN THE SUPERIOR COURT, TAX COURT AND SUR-  
ROGATE'S COURTS  
CHAPTER III. PRETRIAL DISCOVERY; PRETRIAL CONFERENCE PROCEDURE  
RULE 4:19. **PHYSICAL AND MENTAL EXAMINATION OF PERSONS**  
→ 4:19. [Physical and Mental Examination of Persons]

In an action in which a claim is asserted by a party for personal injuries or in which the mental or physical condition of a party is in controversy, the adverse party may require the party whose physical or mental condition is in controversy to submit to a physical or mental examination by a medical or other expert by serving upon that party a notice stating with specificity when, where, and by whom the examination will be conducted and advising, to the extent practicable, as to the nature of the examination and any proposed tests. The time for the examination stated in the notice shall not be scheduled to take place prior to 45 days following the service of the notice, and a party who receives such notice and who seeks a protective order shall file a motion therefor, returnable within said 45-day period. The court may, on motion pursuant to R. 4:23-5, either compel the discovery or dismiss the pleading of a party who fails to submit to the examination, to timely move for a protective order, or to reschedule the date of and submit to the examination within a reasonable time following the originally scheduled date. A court order shall, however, be required for a reexamination by the adverse party's expert if the examined party does not consent thereto. This rule shall be applicable to all actions, whenever commenced, in which a physical or mental examination has not yet been conducted.

Current with amendments received through December 21, 2007

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# NEW MEXICO

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NM R DIST CT RCP Rule 1-035  
NMRA, Rule 1-035

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WEST'S NEW MEXICO RULES ANNOTATED  
STATE COURT RULES  
RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS  
ARTICLE 5. DEPOSITIONS AND DISCOVERY

→ **RULE 1-035. PHYSICAL AND MENTAL EXAMINATION OF PERSONS**

**A. Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

**B. Report of Examining Physician.**

(1) If requested by the party against whom an order is made under Paragraph A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This paragraph applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This paragraph does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

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NEW YORK

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McKinney's CPLR § 3121

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C

Effective:[See Text Amendments]

McKinney's Consolidated Laws of New York Annotated Currentness

Civil Practice Law and Rules (Refs &amp; Annos)

Chapter Eight. Of the Consolidated Laws

Article 31. Disclosure (Refs &amp; Annos)

→ § 3121. Physical or mental examination

**(a) Notice of examination.** After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination.

**(b) Copy of report.** A copy of a detailed written report of the examining physician setting out his findings and conclusions shall be delivered by the party seeking the examination to any party requesting to exchange therefor a copy of each report in his control of an examination made with respect to the mental or physical condition in controversy.

CREDIT(S)

(L.1962, c. 308; amended L.1984, c. 294, § 8.)

Current through L. 2008, chapters 1 to 6 and 9 to 17.

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# NORTH CAROLINA

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Rules Civ.Proc., G.S. § 1A-1, Rule 35

C

WEST'S NORTH CAROLINA GENERAL STATUTES ANNOTATED  
 CHAPTER 1A. RULES OF CIVIL PROCEDURE  
 ARTICLE 5. DEPOSITIONS AND DISCOVERY

→ **Rule 35. Physical and mental examination of persons**

(a) Order for examination.--When the mental or physical condition (including the blood group) of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending as defined by Rule 30(h) may order the party to submit to a physical or mental examination by a physician or to produce for examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.--

- (1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.
- (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.
- (3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

Current through S.L. 2007-552 (End) of the 2007 Regular and Extra Sessions.

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# NORTH DAKOTA

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NORTH DAKOTA CENTURY CODE COURT RULES ANNOTATED  
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\*\*\* Rule amendments current through June 29, 2007 \*\*\*  
\*\*\* Annotations current through 2007 ND Lexis 169 \*\*\*

North Dakota Rules of Civil Procedure  
V. DEPOSITIONS AND DISCOVERY.

*N.D.R. Civ. P. Rule 35 (2007)*

Review Court Orders which may amend this Rule.

**Rule 35. Physical and mental examination of persons.**

**(a) Order for examination.**

If the mental or physical condition (including the blood group) of a party, or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**(b) Report of examiner.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requestor a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination is entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

**NOTES:**

**EXPLANATORY NOTE**

This rule is identical to *Rule 35, FRCivP*, except for style changes.

Rule 35 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

## N.D.R. Civ. P. Rule 35

Rule 35 was amended, effective March 1, 1994, to track the 1991 federal amendment, by authorizing the court to require a physical or mental examination conducted by any person who is suitably licensed or certified such as a dentist, occupational therapist or clinical psychologist. The requirement that the examiner be "suitably licensed or certified" authorizes the court to assess the credentials of the examiner to assure that no person is subject to a court ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination.

Sources: Joint Procedure Committee Minutes of October 29-30, 1992, page 10; April 20, 1989, page 2; December 3, 1987, page 11; November 29-30, 1979, page 7; *Rule 35, FRCivP*.

Cross Reference: Rules 26 (General Provisions Governing Discovery), and 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P.; Rules 503 (Physician and Psychotherapist-Patient Privilege) and 706 (Court Appointed Experts), N.D.R.Ev.

Discretion of Court. Mental Examination. Pretrial Discovery Orders Nonappealable.

#### Discretion of Court.

This rule vests a wide discretion in the trial court in determining whether to require an examination. *Stroschein v. Stroschein*, 390 N.W.2d 547 (N.D. 1986); *Guskjolen v. Guskjolen*, 391 N.W.2d 639 (N.D. 1986).

#### Mental Examination.

Where plaintiff's complaint alleged mental as well as physical suffering, fact that her answers to defendant's interrogatories did not describe severe psychiatric or mental difficulties did not thereby deprive defendant of right to move for mental examination. *Bohn v. Eichhorst*, 181 N.W.2d 771 (N.D. 1970).

Trial court did not err in ordering a plaintiff in a wrongful termination case to undergo a mental examination even though the plaintiff never placed her mental condition "in controversy;" it was within the trial court's discretion to determine whether the defendant had adequately demonstrated the plaintiff's mental condition was "in controversy" and to decide whether to order the examination. *Gepner v. Fujicolor Processing, Inc.*, 2001 ND 207, 637 N.W.2d 681 (2001).

#### Pretrial Discovery Orders Nonappealable.

Pretrial orders by trial court relating to physical examination and taking of X-rays are not appealable. *Budge v. Anderson*, 146 N.W.2d 169 (N.D. 1966).

#### Collateral References.

23 *Am. Jur. 2d, Depositions and Discovery*, § 168 et seq.

27 C.J.S. *Discovery*, §§ 110-112.

Attorney or physician or a court reporter present during physical or mental examination by a court-appointed expert, 7 A.L.R.3d 881.

Timeliness of application for compulsory physical examination of injured party in personal injury action, 9 A.L.R.3d 1146.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery, 21 A.L.R.3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Assertion of privilege in pretrial discovery proceedings as precluding waiver of privilege at trial, 36 A.L.R.3d 1367.

Waiver of privilege as regards one physician as a waiver as to other physicians, 44 A.L.R.3d 24.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

OHIO

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OHIO RULES OF COURT SERVICE  
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\*\*\* RULES CURRENT THROUGH FEBRUARY 25, 2008 \*\*\*  
 \*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

Ohio Rules Of Civil Procedure  
 Title V Discovery

*Ohio Civ. R. 35* (2008)

Review Court Orders which may amend this Rule.

### **Rule 35. Physical and mental examination of persons**

#### **(A) Order for examination.**

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

#### **(B) Examiner's report.**

(1) If requested by the party against whom an order is made under Rule 35(A) or the person examined, the party causing the examination to be made shall deliver to such party or person a copy of the detailed written report submitted by the examiner to the party causing the examination to be made. The report shall set out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party to require delivery of a report on such terms as are just. If an examiner fails or refuses to make a report, the court on motion may order, at the expense of the party causing the examination, the taking of the deposition of the examiner if his testimony is to be offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision 35(B), applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

#### **NOTES:**

##### **Staff Notes**

Rule 35 concerns physical and mental examinations and is based on proposed Federal Rule 35. The rule deals with physical and mental examinations of parties and persons "... in the custody or under the legal control of... part[ies]."

While based on the proposed Federal Rule, Rule 35 is not the exact Federal Rule. Rule 35 deletes the word "physician" and inserts "examiner." While it is obvious that most medical examinations are and must be made by a physician, there are examinations or portions of examinations which are made by experts who are not physicians. Rule 35 therefore

# OKLAHOMA

**C**

## OKLAHOMA STATUTES ANNOTATED

## TITLE 12. CIVIL PROCEDURE

## CHAPTER 41. DISCOVERY CODE

## → § 3235. Physical and Mental Examination of Persons

A. SCOPE WHEN ELEMENT OF CLAIM OR DEFENSE. When the physical, including the blood group, or mental condition of a party or of a person in custody or under the legal control of a party, is in controversy in any proceeding in which the person relies upon that condition as an element of his claim or defense, an adverse party may take a physical or mental examination of such person.

B. PROCEDURE WHEN ELEMENT OF CLAIM OR DEFENSE. The party desiring to take the physical or mental examination of another party or of a person in custody or control of another party within the scope of subsection A of this section shall serve his request upon the person to be examined and all other parties. The request shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

No request shall be served until thirty (30) days after service of summons and petition upon the defendant. The request shall set a time for the examination not less than five (5) days after service of the notice.

If the party or person in custody or control of the party who is to be examined objects to the physical or mental examination then he shall file a motion objecting to the examination and setting out the reasons why his mental or physical condition is not in controversy or such person may apply for a protective order under the provisions of subsection C of Section 3226 of this title. The burden of proof is upon the person objecting to the examination or requesting a protective order. The court may set the conditions for examination or refuse to permit such examination if the mental or physical condition is not in controversy. If the party or the person in custody or control of the party refuses to obey the court order to submit to a physical or mental examination the court may impose those sanctions provided for in paragraph 4 of subsection A and paragraph 2 of subsection B of Section 3237 of this title.

If the motion is granted to prohibit the examination, the court may impose those sanctions provided for in paragraph 4 of subsection A of Section 3237 of this title upon the party requesting the examination.

C. ORDER FOR EXAMINATION. When the physical, including the blood group, or mental condition of a party, or a person in the custody or under the legal control of a party, is in controversy but does not meet the conditions set forth in subsection A of this section, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for such examination the agent, employee or person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties. The order shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

D. REPRESENTATIVE MAY BE PRESENT. A representative of the person to be examined may be present at the examination.

## E. REPORT OF EXAMINER.

1. If requested by the party or the person examined under this section, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examiner setting out his findings, including results of all tests made, diagnoses and conclusions, together with the like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled upon request to receive from the party or person against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may enter an order against a party requiring delivery of a report on such terms as are just. If an examiner fails or refuses to make a report the court may exclude his testimony if offered at the trial.

2. If the physician or psychotherapist-patient privilege has not already been waived as provided in the Oklahoma Evidence Code [FN1] requesting and obtaining a report of the examination made or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same physical or mental condition.

3. This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other section of the Oklahoma Discovery Code. [FN2]

[FN1] Title 12, § 2101 et seq.

[FN2] Title 12, § 3224 et seq.

Current through Chapter 368 (End) of the First Regular  
Session of the 51st Legislature (2007).

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# OREGON

**C**

WEST'S OREGON REVISED STATUTES ANNOTATED  
 TITLE 1. COURTS OF RECORD; COURT OFFICERS; JURIES  
 OREGON RULES OF CIVIL PROCEDURE

→ **ORCP 44. Physical and mental examination** of persons; reports of examinations

**A Order for examination.** When the mental or **physical** condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a **physical or mental examination** by a physician or a **mental examination** by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**B Report of examining physician or psychologist.** If requested by the party against whom an order is made under section A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

**C Reports of examinations; claims for damages for injuries.** In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

**D Report; effect of failure to comply.**

**D(1) Preparation of written report.** If an obligation to furnish a report arises under sections B or C of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.

**D(2) Failure to comply or make report or request report.** If a party fails to comply with sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

**E Access to individually identifiable health information.** Any party against whom a civil action is filed for

OR Rules Civ. Proc., ORCP 44

compensation or damages for injuries may obtain copies of individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

The statutes are current through the end of the 2007 Regular Session of the 74th Oregon Legislative Assembly. Revisions to Acts made by the Oregon Revisors were unavailable at time of publication.

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# PENNSYLVANIA

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Pa.R.C.P. No. 4010

**C**

PURDON'S PENNSYLVANIA STATUTES AND CONSOLIDATED STATUTES

**PENNSYLVANIA RULES OF CIVIL PROCEDURE**

DEPOSITIONS AND DISCOVERY

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY FOR INSPECTION AND OTHER ACTIVITIES

ENTRY UPON PROPERTY FOR INSPECTION AND OTHER ACTIVITIES

→ **Rule 4010. Physical and Mental Examination of Persons**

(a)(1) As used in this rule, "examiner" means a licensed physician, licensed dentist or licensed psychologist.

(2) When the mental or physical condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by an examiner or to produce for examination the person in the party's custody or legal control.

*Note:* The examination may include blood or genetic testing.

(3) The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(4)(i) The person to be examined shall have the right to have counsel or other representative present during the examination. The examiner's oral interrogation of the person to be examined shall be limited to matters specifically relevant to the scope of the examination.

*Note:* Ordinarily, the facts giving rise to liability are not germane to an examination and the information which the examiner seeks should be limited to facts of liability germane to the issue of damages.

(ii) Subdivision (a)(4)(i) shall not apply to actions for custody, partial custody and visitation of minor children.

(5)(i) The party who is being examined or who is producing for examination a person in the party's custody or legal control may have made upon reasonable notice and at the party's expense a stenographic or audio recording of the examination. Upon request and payment of reasonable cost, the party who caused the recording to be made shall provide each other party with a copy of the recording.

(ii) Subdivision (a)(5)(i) shall not apply to actions for custody, partial custody and visitation of minor children.

(b)(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party or person a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made

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Pa.R.C.P. No. 4010

a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court shall exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) Subdivision (b) applies to an examination made by agreement of the parties, unless the agreement expressly provides otherwise. It does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

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# PUERTO RICO

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Page 1

LAWS OF PUERTO RICO ANNOTATED  
TITLE THIRTY-TWO(A). APPENDIX  
PUERTO RICO COURT RULES ANNOTATED  
III. Rules of Civil Procedure for the General Court of Justice, 1979  
V. PRETRIAL PROCEEDINGS  
Rule 32. **Physical and mental examination of persons**

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Current with amendments received through December 2005

Rule 32.1. Order for examination

In a suit in which the mental or physical condition of a party, including the blood group or genetic structure, is in dispute, the court in which the suit is pending may order said party to submit to a physical or mental examination by a physician. The order may only be issued through a motion upon notice to the party to be examined, and to all the other parties, and shall specify the date, time, place, manner, conditions and scope of the examination and the physician or physicians that shall perform it.-- Amended on Jan. 4, 2000, No. 11, § 1, eff. 30 days after Jan. 4, 2000.

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# RHODE ISLAND



WEST'S GENERAL LAWS OF RHODE ISLAND ANNOTATED  
RHODE ISLAND STATE COURT RULES  
SUPERIOR COURT RULES OF CIVIL PROCEDURE  
V. DEPOSITIONS AND DISCOVERY

→ **Rule 35. Physical and Mental Examination of Persons**

**(a) Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**(b) Report of Examiner.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion and notice may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make such a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so offered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

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# SOUTH DAKOTA

South Dakota Codified Laws Currentness

Title 15. Civil Procedure

Chapter 15-6. Rules of Procedure in Circuit Courts (Refs & Annos)

IV. Discovery

15-6-35--Physical and Mental Examinations and Blood Tests of Persons

**→15-6-35(a). Order for examination**

In an action in which the mental or physical condition of a party or the consanguinity of a party with another person or party is in controversy, the court in which the action is pending may order such person or party to submit to a physical or mental examination or blood test by a physician. The order may be made only on motion for good cause shown and upon notice to the person or party to be examined and to all other persons or parties involved and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**Source:** SDC 1939 & Supp 1960, § 36.0602; SD RCP, Rule 35 (a), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

LIBRARY REFERENCES

Damages ⇐206.

Pretrial Procedure ⇐451 to 457.

Westlaw Key Number Searches: 115k206; 307Ak451 to 307Ak457.

C.J.S. Damages §§ 328 to 340.

C.J.S. Discovery §§ 69, 110 to 112.

RESEARCH REFERENCES

ALR Library

Attorney or physician or a court reporter, present during physical or mental examination by a court-appointed expert, 7 A.L.R.3d 881.

Blood-grouping tests, 163 A.L.R. 939; 46 A.L.R.2d 1000; 43 A.L.R.4th 579.

Constitutional rights, requiring submission to physical examination or test as violation of, 164 A.L.R. 967; 25 A.L.R.2d 1407.

Custody of child, right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 A.L.R.3d 268.

Designation of physician to examine plaintiff in personal injury action, right of defendant, 33 A.L.R.3d 1012.

Dismissal of action for plaintiff's failure or refusal to obey court order, 4 A.L.R.2d 348; 56 A.L.R.3d 1109; 27 A.L.R.4th 61; 32 A.L.R.4th 212; 3 A.L.R.5th 237.

Distance or location of place of examination, court's power to order physical examination of personal injury plaintiff as affected by, 71 A.L.R.2d 973.

Nature, extent, and conduct of physical examination of party to action or proceeding to recover for personal injury or disability, 135 A.L.R. 883.

Power to require physical examination of injured person in action by his parent or spouse to recover for his injury, 62 A.L.R.2d 1291.

Power to require plaintiff to submit to physical examination, 51 A.L.R. 183; 108 A.L.R. 142.

Proximate cause, physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 A.L.R.2d 1001.

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party, 84 A.L.R.4th 558.

Timeliness of application for compulsory physical examination of injured party in personal injury action, 9 A.L.R.3d 1146.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

#### Encyclopedias

23 Am. Jur.2d, Depositions and Discovery, §§ 282-306.

#### NOTES OF DECISIONS

Discretion of court 1

Good cause 2

Second examination 3

##### 1. Discretion of court

Decisions on whether to order medical examination are within broad discretion of trial court. SDCL 15-6-35(a). Stormo v. Strong, 1991, 469 N.W.2d 816. Damages ¶206(1)

Statute granting court discretion to order physical or mental examination does not give defendants the right to compel personal injury plaintiff to submit to additional medical examinations until they secure expert who will agree with their theory of the case, and number of examinations ordered by trial court is to be held to a minimum. SDCL 15-6-35(a). Stormo v. Strong, 1991, 469 N.W.2d 816. Damages ¶206(3)

##### 2. Good cause

Requirement that "good cause" be established to obtain physical or mental examination of party indicates that moving party must establish greater showing of necessity than to obtain other forms of discovery. SDCL 15-6-35(a). Stormo v. Strong, 1991, 469 N.W.2d 816. Damages ¶206(2)

##### 3. Second examination

Trial court could refuse to order second physical examination of automobile accident victim by physician of defendants' choice; defendants had been provided with copies of all requested medical records and reports regarding victim's condition, victim had submitted to other requested examinations such as functional capacity assessment, and defendants were not deprived of any medical testimony on their behalf but instead chose not to present testimony of their medical experts because it did not support their theory.



SDCL 15-6- 35(a). Stormo v. Strong, 1991, 469 N.W.2d 816. Damages ~~to~~ 206(3)

S D C L § 15-6-35(a), SD ST § 15-6-35(a)

Current through the 2007 Regular Session and Supreme Court Rule 07-07

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South Dakota Codified Laws Currentness

Title 15. Civil Procedure

Chapter 15-6. Rules of Procedure in Circuit Courts (Refs & Annos)

Div. Discovery

15-6-35--Physical and Mental Examinatons and Blood Tests of Persons

**15-6-35(b). Report of examining physician**

- (1) If requested by the party against whom an order is made under § 15-6-35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.
- (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.
- (3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

**Source:** SDC 1939 & Supp 1960, §§ 36.0603, 36.0604; SD RCP, Rule 35 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; Supreme Court Rule 76-3, § 9.

**LIBRARY REFERENCES**

Damages ¶206.

Pretrial Procedure ¶455.

Westlaw Key Number Searches: 115k20; 307Ak455.

C.J.S. Damages §§ 328 to 340.

C.J.S. Discovery § 112.

**RESEARCH REFERENCES**

**ALR Library**

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 A.L.R.2d 536.

Copy of physician's report of pretrial examination where there is no specific statute or rule providing therefor, right to, 70 A.L.R.2d 384.

Federal Rule of Civil Procedure 35 (b) (1, 2) and similar state statutes and rules pertaining to reports of physician's examination, 36 A.L.R.2d 946.

X-ray report made by physician taking or interpreting x-ray pictures, admissibility of, 6 A.L.R.2d 406.

Encyclopedias

23 Am. Jur.2d, Depositions and Discovery, §§ 307-313.

S D C L § 15-6-35(b), SD ST § 15-6-35(b)

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# TENNESSEE

TENNESSEE

## RULE 35

## PHYSICAL AND MENTAL EXAMINATION OF PERSONS

**35.01. Order for Examination.** — When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. [As amended July 1, 1979.]

**35.02. Report of Examining Physician.** — (1) If requested by the party against whom an order is made under Rule 35.01 or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the suitably licensed or certified examiner setting out findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party cannot obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a suitably licensed or certified examiner fails or refuses to make a report the court may exclude testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine that party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of a suitably licensed or certified examiner or the taking of a deposition of the suitably licensed or certified examiner in accordance with the provisions of any other rule. [As amended July 1, 1979, and by order entered December 20, 1993, effective July 1, 1994.]

**Advisory Commission Comments.** This Rule permits a court to order the physical or mental examination of a party upon motion of another party when the condition is in controversy. A provision is made to permit the examined party to obtain a



copy of the report; obtaining such a copy acts as a waiver of any privilege with respect to other examinations of the same party for the same condition.

**Advisory Commission Comments [1994].** The amendment expands the group of professionals who can conduct examinations. Whether an examiner authorized under this rule may give testimony at a trial or proceeding is governed by the Tennessee Rules of Evidence.

TEXAS



Vernon's Texas Rules Annotated Currentness  
Texas Rules of Civil Procedure  
 Part II. Rules of Practice in District and County Courts  
 Section 9. Evidence and Discovery (Refs & Annos)  
 B. Discovery  
 ➔ Rule 204. Physical and Mental Examination (Refs & Annos)  
204.1. Motion and Order Required

(a) *Motion.* A party may--no later than 30 days before the end of any applicable discovery period--move for an order compelling another party to:

(1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist; or

(2) produce for such examination a person in the other party's custody, conservatorship or legal control.

(b) *Service.* The motion and notice of hearing must be served on the person to be examined and all parties.

(c) *Requirements for Obtaining Order.* The court may issue an order for examination only for good cause shown and only in the following circumstances:

(1) when the mental or physical condition (including the blood group) of a party, or of a person in the custody, conservatorship or under the legal control of a party, is in controversy; or

(2) except as provided in Rule 204.4, an examination by a psychologist may be ordered when the party responding to the motion has designated a psychologist as a testifying expert or has disclosed a psychologist's records for possible use at trial.

(d) *Requirements of Order.* The order must be in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

204.2. Report of Examining Physician or Psychologist

(a) *Right to Report.* Upon request of the person ordered to be examined, the party causing the examination to be made must deliver to the person a copy of a detailed written report of the examining physician or psychologist setting out the findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery of the report, upon request of the party causing the examination, the party against whom the order is made must produce a like report of any examination made before or after the ordered examination of the same condition, unless the person examined is not a party and the party shows that the party is unable to obtain it. The court on motion may limit delivery of a report on such terms as are just. If a physician or psychologist fails or refuses to make a report the court may exclude the testimony if offered at the trial.

(b) *Agreements; Relationship to Other Rules.* This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance

with the provisions of any other rule.

204.3. Effect of No Examination

If no examination is sought either by agreement or under this subdivision, the party whose physical or mental condition is in controversy must not comment to the court or jury concerning the party's willingness to submit to an examination, or on the right or failure of any other party to seek an examination.

204.4. Cases Arising Under Titles II or V, Family Code

In cases arising under Family Code Titles II or V, the court may--on its own initiative or on motion of a party--appoint:

(a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert;

(b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.

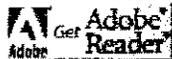
204.5. Definition

For the purpose of this rule, a psychologist is a person licensed or certified by a state or the District of Columbia as a psychologist.

Current with amendments received through February 1, 2008

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UTAH

## Rule 35

UTAH

**Rule 35. Physical and mental examination of persons.**

(a) Order for examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control, unless the party is unable to produce the person for examination. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.

(b)(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the person examined and/or the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just. If an examiner fails or refuses to make a report, the court on motion may take any action authorized by Rule 37(b)(2).

(b)(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(b)(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.

(c) Right of party examined to other medical reports. At the time of making an order to submit to an examination under Subdivision (a), the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted.

(d) Sanctions.

(d)(1) If a party or a person in the custody or under the legal control of a party fails to obey an order entered under Subdivision (a), the court on motion may take any action authorized by Rule 37(b)(2), except that the failure cannot be treated as contempt of court.

(d)(2) If a party fails to obey an order entered under Subdivision (c), the court on motion may take any action authorized by Rule 37(b)(2).

Advisory Committee Notes

# VERMONT

Vermont Rules of Civil Procedure, Rule 35

West's Vermont Statutes Annotated Currentness

West's Vermont Court Rules

Rules of Civil Procedure

V. Depositions and Discovery

**➤RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS**

**(a) Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Presiding Judge may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**(b) Report of Examiner.**

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requestor a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The Presiding Judge on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect to the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

[Amended effective March 1, 1995.]

Reporter's Notes--1994 Amendment

Rule 35 is amended for conformity with a 1991 amendment of Federal Rule 35 extending the rule to include physical or mental examinations by any person who is "suitably licensed or certified" to conduct the examination sought. The Advisory Committee's Note to the 1991 federal amendment points out that the requirement of suitable license or certification is intended to authorize the court "to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination." The federal Advisory Committee further notes that the suitability requirement applies even to an examination by a physician and that the rule does not "require that the license or certificate be conferred by the jurisdiction in which the examination is conducted."

#### Reporter's Notes--1975 Amendment

Rule 35(b) is amended by the addition of a new paragraph (2) adopting verbatim Federal Rule 35(b)(2). See also Maine Rule 35(b)(2). The change will be incorporated by reference in D.C.C.R. 35.

No provision for waiver of the physician-patient privilege was deemed necessary when the rules were originally promulgated because Vermont law did not recognize the privilege. See Reporter's Notes to Rule 35 as originally promulgated. This situation was changed by Act No. 190 of 1973, effective July 1, 1974, which added 12 V.S.A. § 1612(a), providing that in the absence of waiver by the patient or by law, "a person authorized to practice medicine or dentistry, or a registered professional or licensed practical nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

The amended rule provides that if a party who has been examined by an opponent obtains a copy of the report or takes the deposition of the examiner, the party waives the physician-patient privilege as to the condition in question in its entirety--both in future actions and with regard to other examinations. Note that the provision applies only to a party. There is no waiver if the report of an examination of a nonparty is obtained by either the person examined or the opposing party. See Wright and Miller, Federal Practice and Procedure § 2237, n. 16 (1970). Note also that the amended rule applies to "mental," as well as physical, condition. There is presently no psychologist- or psychotherapist-patient privilege in Vermont law, and thus nothing to waive as to examinations by such practitioners. The evidence of "a person authorized to practice medicine" as a mental condition, however, is privileged under the statute and subject to the waiver.

The amendment is not intended to foreclose further judicial development of the doctrine of waiver under the new privilege statute. In some jurisdictions, it is held that testimony as to the condition in issue by the patient, calling one of several examining doctors, or commencement of an action putting the condition in issue constitutes a waiver. See McCormick on Evidence § 103 (Cleary et al., eds., 1972). Rule 35(b)(2) would be necessary, however, even if the last of these doctrines were adopted, since the doctrine would not apply to a defendant. See Advisory Committee's Note to 1969 Amendment of Maine Rule 35, 1 Field, McKusick and Wroth, Maine Civil Practice 525-526 (2d ed. 1970).

## Reporter's Notes

This rule carries forward the provisions of 12 V.S.A. §§ 1263-1264 (now superseded), with changes taken from the 1970 federal amendments.

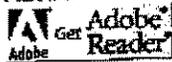
The Vermont statute was virtually identical to former Federal Rule 35, with the differences that the statute expressly required that the party to be examined have refused to submit voluntarily and expressly provided that the examination was to be at the expense of the applicant. Since these provisions both reflect the practice under the federal rule as it stands, they have been omitted in the interests of uniformity but will still be Vermont practice. See 8 Wright & Miller, Federal Practice and Procedure § 2234 (1970). The former statute has been followed in another respect, however. Federal Rule 35(b)(2), providing that by requesting a report of his examination the examined party waives any privilege regarding other examinations, was omitted from the statute and has been omitted from the rule, because Vermont does not recognize the physician-patient privilege. Cf. R.I. Rule 35; Advisory Committee's Note to 1969 Amendment of Maine Rule 35, 1 Field, Mckusick & Wroth, Maine Civil Practice 525-526 (1970).

A major change based on the 1970 federal amendments is the extension of Rule 35(a) to permit examination of "a person in the custody or under the legal control of a party" when such person's condition is in controversy. This change makes clear that a parent or guardian suing to recover for injuries to a minor may be required to produce the minor for examination. In line with what was already the federal practice, the rule now also expressly permits determination of blood group. See Beach v. Beach, 114 F.2d 479 (D.C.Cir.1940).

Rule 35(b)(1) has been changed to require delivery to the examined party not only of a report of an examination held under the rule but of all earlier examinations to which he may have access. It is also made clear that the report includes such items as test results.

Rule 35(b)(2) is taken from Federal Rule 35(b)(3), which was added by the 1970 amendments. It makes clear that Rule 35(b) applies to examinations made by agreement and that other discovery devices may be used to obtain medical reports or testimony.

Rules Civ. Proc., Rule 35, VT R RCP Rule 35  
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# VIRGINIA



## VIRGINIA

### RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

#### (b) Report of Examiner.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or other qualified expert setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if the physician or other qualified expert fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

[Effective July 1, 1960; amended effective July 1, 1978; April 6, 1998.]

# WASHINGTON

Part IV Rules for Superior Court

^Superior Court Civil Rules (Cr)

^5. Depositions and Discovery (Rules 26-37)

**➔RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS**

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(2) *Representative at Examination.* The party being examined may have a representative present at the examination, who may observe but not interfere with or obstruct the examination.

(3) *Recording of Examination.* Unless otherwise ordered by the court, the party being examined or that party's representative may make an audiotape recording of the examination which shall be made in an unobtrusive manner. A videotape recording of the examination may be made on agreement of the parties or by order of the court.

**(b) Report of Examining Physician or Psychologist.** The party causing the examination to be made shall deliver to the party or person examined a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. The report shall be delivered within 45 days of the examination and in no event less than 30 days prior to trial. These deadlines may be altered by agreement of the parties or by order of the court. If a physician or psychologist fails or refuses to make a report in compliance herewith the court shall exclude the examiner's testimony if offered at the trial, unless good cause for noncompliance is shown.

**(c) Examination by Agreement.** Subsections (a) (2) and (3) and (b) apply to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

CREDIT(S)

[Amended effective July 1, 1972; September 17, 1993; September 1, 2001.]

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### 1. In general

The State is not entitled to a mental examination pursuant to the civil discovery rule of an individual for whom the State seeks commitment as a sexually violent predator; the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under the sexually violent predator statute, which expressly provides for postcommitment evaluation, but it makes no mention of evaluations during pretrial discovery. In re Detention of Williams (2002) 147 Wash.2d 476, 55 P.3d 597, reconsideration denied. Mental Health ~~461~~

Privacy interests that may be implicated by a compelled mental examination under civil rule of discovery are truncated by the substantial public safety interest involved when trying to evaluate the recidivism tendencies of a known sex offender in a commitment proceeding under sexually violent predator statute. In re Detention of Williams (2001) 106 Wash.App. 85, 22 P.3d 283, review granted 144 Wash.2d 1016, 32 P.3d 284, affirmed in part, reversed in part 147 Wash.2d 476, 55 P.3d 597, reconsideration denied. Mental Health ~~461~~

Neither CR 35, which permits appropriate examination of a party or person in custody of a party, nor RCW 26.09.250, which generally permits the custodial parent to determine the upbringing of a child, operate to prevent a noncustodial parent from obtaining a psychological examination of a child. McDaniel v. McDaniel (1975) 14 Wash.App. 194, 539 P.2d 699.

While a party who is ordered to submit to a psychiatric examination under the provisions of CR 35 may be accompanied at such examination by his attorney, he is not entitled to have his spouse or other family members present. Tietjen v. Department of Labor & Industries (1975) 13 Wash.App. 86, 534 P.2d 151.

Trial court can no longer be compelled by claim of privilege to decide any case involving mental or physical condition of any party to action after hearing only part of evidence material to that issue, as means is now available to court to have access to all material facts relating to mental or physical condition of any party in any case where such condition is in controversy. Randa v. Bear (1957) 50 Wash.2d 415, 312 P.2d 640.

Statute does not apply in proceeding to appoint guardian for incompetent. State v. Superior Court (1942) 15 Wash.2d 407, 131 P.2d 144.

It is not error to refuse an untimely request for X-rays of plaintiff's injured spine, requiring her removal to a hospital and adding to her discomfort, where she was brought

to court on a stretcher evidently in great distress, mentally and physically. Shanahan v. International Stage Co. (1931) 164 Wash. 609, 3 P.2d 1092.

## 2. Sexually violent predator proceedings

Supreme Court would decline to consider sexual violent predator's (SVP) claim that the trial court committed reversible error when it ordered his mental examination pursuant to civil rule governing physical and mental examinations of persons; SVP failed to meet his burden on appeal because he failed to establish that the trial court actually ordered him to submit to the examination, and the record contained only a copy of the State's motion and SVP's response. In re Detention of Halgren (2006) 156 Wash.2d 795, 132 P.3d 714. Mental Health ¶467

Detainee in commitment proceeding under sexually violent predator (SVP) statute was not required to submit to mental examination under court rule providing for court-ordered mental examinations in general civil proceedings when mental condition of party is at issue, and therefore, sanctions against detainee for refusing to submit to examination were improper; SVP statute provided for special proceedings inconsistent with general civil rules, and included separate process for ordering mental examinations. In re Detention of Meints (2004) 123 Wash.App. 99, 96 P.3d 1004. Mental Health ¶461

## 3. Good cause

Good cause will exist for an additional mental examination, under civil rule, of an individual for whom state seeks commitment under sexually violent predator statute when state can show that the statutorily mandated examination is insufficient. In re Detention of Williams (2001) 106 Wash.App. 85, 22 P.3d 283, review granted 144 Wash.2d 1016, 32 P.3d 284, affirmed in part, reversed in part 147 Wash.2d 476, 55 P.3d 597, reconsideration denied. Mental Health ¶461

Good cause existed, as necessary under civil discovery rule, to allow state's expert to conduct a personal evaluation of detainee in commitment proceeding under sexually violent predator statute, where expert testified that a personal interview was standard and professional practice and was critical to ensuring an accurate diagnosis, and examinations on which trial court made probable cause finding were not current and were conducted only to determine whether to refer detainee for commitment. In re Detention of Williams (2001) 106 Wash.App. 85, 22 P.3d 283, review granted 144 Wash.2d 1016, 32 P.3d 284, affirmed in part, reversed in part 147 Wash.2d 476, 55 P.3d 597, reconsideration denied. Mental Health ¶461

State is not automatically entitled, in commitment proceeding under sexually violent predator statute, to repeated psychological evaluations whenever it wishes, but must make an affirmative, fact-based showing of good cause in each case pursuant to applicable civil rule of discovery. In re Detention of Williams (2001) 106 Wash.App. 85, 22 P.3d 283, review granted 144 Wash.2d 1016, 32 P.3d 284, affirmed in part, reversed in part 147 Wash.2d 476, 55 P.3d 597, reconsideration denied. Mental Health ¶461

Requirement under sexually violent predator statute that a mental examination be conducted upon a determination of probable cause supersedes the general "good cause" showing required under civil rule for ordering a mental examination. Detention of Broer v. State (1998) 93 Wash.App. 852, 957 P.2d 281, amended on denial of reconsideration, for superseding opinion, see. Mental Health ¶461

## 4. Discretion of court

Supreme Court's decision in *In re Detention of Williams*, which held that a trial court is

precluded from ordering a CR 35 mental exam in a sexually violent predator (SVP) proceedings, applied retroactively in appeal from SVP commitment, trial of which predated publication of that decision; although decision set forth new rule of law, retroactive application would further purposes of SVP provisions and court rule. In re Audett (2006) 158 Wash.2d 712, 147 P.3d 982. Mental Health ¶433(2)

The State is not entitled to a court-ordered CR 35 mental examination in a sexually violent predator (SVP) proceeding; given the express provisions for various mental examinations occurring both prior to and after trial, additional mental examinations prior to trial that are not provided for in the SVP statutory scheme are inconsistent with that scheme, and thus precluded. In re Audett (2006) 158 Wash.2d 712, 147 P.3d 982. Mental Health ¶461

Trial court acted within its discretion, in personal injury protection (PIP) insured's action against third-party tortfeasor to recover for injuries sustained in automobile accident, in denying tortfeasor's motion for continuance on the first morning of trial, even though tortfeasor claimed that she was surprised by court's decision to grant insured's motion to exclude PIP examiner's testimony on afternoon before trial and that such ruling left her without a medical expert; tortfeasor had had nearly three years to obtain independent medical examination, and trial had already been continued eight times. Harris v. Drake (2003) 116 Wash.App. 261, 65 P.3d 350, review granted, cross review denied 150 Wash.2d 1025, 82 P.3d 242, affirmed 152 Wash.2d 480, 99 P.3d 872. Pretrial Procedure ¶717.1

CR 35(a) does not authorize trial court to require parents of minor party to submit to physical or mental examination under theory that parents are "real parties in interest", although not named party; trial court does not have jurisdiction to order such examination of nonparty. T.R. v. Cora Priest's Day Care Center (1993) 69 Wash.App. 106, 847 P.2d 33.

Whether a party seeking a court-ordered mental or physical examination under CR 35(a) meets the requirement that he affirmatively show "good cause" therefor and that the mental or physical condition of the person to be examined is "in controversy" is a matter within the trial court's discretion. Such a showing may be made through the pleadings alone. Green, In re (1976) 14 Wash.App. 939, 546 P.2d 1230.

In determining whether a court abused its discretion in ordering a physical or mental examination during a trial, consideration must be given to the effect of delay caused thereby and whether good cause was shown for requesting the examination at that time. Tietjen v. Department of Labor & Industries (1975) 13 Wash.App. 86, 534 P.2d 151. Damages ¶206(4)

Trial court is to exercise its discretion in deciding whether to grant or deny motion for mental examination. Beagle v. Beagle (1961) 57 Wash.2d 753, 359 P.2d 808.

In action to modify divorce decree and obtain custody of minor children, trial court did not err in denying motion to compel mother of children to submit to mental examination pursuant to this rule, where there was nothing in record to indicate that court abused its discretion. Beagle v. Beagle (1961) 57 Wash.2d 753, 359 P.2d 808.

It is not abuse of discretion to refuse to order physical examination of plaintiff in personal injury case when plaintiff is in distant state, her deposition is before court, and granting of order would require continuance of trial and possibly its ultimate dismissal. Finn v. Bremerton (1922) 118 Wash. 381, 203 P. 971.

Where action is instituted to recover damages for personal injuries, it is within discretion



and disinterested physicians to make examination, and to refuse to appoint one who was present as witness for plaintiff. Faasch v. Karney (1927) 145 Wash. 390, 260 P. 255.

It was not error to refuse application for appointment of physician of defendant's own selection to examine X-ray plate, where disinterested physician was appointed. Hansen v. Sandvik (1924) 128 Wash. 60, 222 P. 205.

It is not error to refuse to appoint physician selected by defendant to make physical examination of plaintiff, in action for malpractice, where disinterested physician was selected as appointed by court. Just v. Littlefield (1915) 87 Wash. 299, 151 P. 780.

### 8. Report of findings

Doctor's testimony about defendant's mental examination was admissible in civil commitment proceeding to have defendant judged a sexually violent predator (SVP), as court rules at that time entitled state to the examination. In re Detention of Smith (2003) 117 Wash.App. 611, 72 P.3d 186, Mental Health ¶460(2)

Defendant in civil commitment action was not prejudiced by counsel's alleged ineffective assistance in failing to suppress doctor's testimony regarding defendant's mental state following examination, as doctor's opinion was same before and after examination and examination merely reinforced doctor's opinion. In re Detention of Smith (2003) 117 Wash.App. 611, 72 P.3d 186, Mental Health ¶463

When a party retains a physician to examine the opposing party, provides the opposing party with a copy of the physician's report as required by CR 35(b), and decides not to call the physician as a witness at trial, CR 26(b)(4)(B) precludes the opposing party from deposing the physician to preserve his testimony for trial absent exceptional circumstances involving the impracticality of obtaining expert assistance by other means. Mothershead v. Adams (1982) 32 Wash.App. 325, 647 P.2d 525.

It was not abuse of discretion to permit physician to testify as to results of medical examination of plaintiff, where there was no intention on part of plaintiff to violate subd (b)(1), and testimony of physician was not surprise to plaintiff as to any new issues in case. Davis v. Sill (1960) 55 Wash.2d 477, 348 P.2d 215.

Admission of testimony of physician regarding results of medical examination of plaintiff was within court's discretion, where no report of results of examination had been supplied to defendants as provided for in subd (b)(1), where request for exchange of medical reports is made. Davis v. Sill (1960) 55 Wash.2d 477, 348 P.2d 215.

Where plaintiff voluntarily submits to physical examination by physician, requested by defense, physician may be called by plaintiff to testify as to examination and, without payment of special fee, may be required to state his expert opinion as to nature and extent of injury as disclosed by his examination. State ex rel. Bergs v. Superior Court (1929) 154 Wash. 144, 281 P. 335.

Person who voluntarily submitted to examination by doctor at instance of adverse party may call doctor as witness and interrogate him relative to examination. Osborn v. Seattle (1927) 142 Wash. 25, 252 P. 164.

### 9. Waiver of privilege

Instrument signed by superior court judge for apparent purpose of facilitating gathering of medical information from doctors and hospitals for use in defending lawsuit, wherein each paragraph of instrument began with words "Ordered that" and contained statement

of law or fact relating to waiver of doctor-patient privilege, constituted improper method of stating court's opinion as to status of privilege involved and was set aside by supreme court. Kime v. Niemann (1964) 64 Wash.2d 394, 391 P.2d 955.

#### 10. Review

Defendant failed to preserve his objection, for purposes of appeal of sexually violent predator (SVP) commitment, to admission of evidence derived from improperly court-ordered CR 35 mental exam in SVP proceeding; although defendant initially objected to proposed mental exam, he not only failed to object to derivative exam results and testimony of State's expert, but also relied on testimony of State's expert as basis for his moving to exclude testimony of psychologist who completed mental exam that was properly required under SVP provision. In re Audett (2006) 158 Wash.2d 712, 147 P.3d 982. Mental Health ☞467

State's notice for discretionary review was filed within the time allowable under applicable rule, and thus, State timely appealed denial of its renewed motion to conduct mental health examination of individual alleged to be a sexually violent predator (SVP) when it sought interlocutory review of the decision denying that motion, despite different time limitation in rule governing motions for reconsideration, which would only apply after entry of judgment. In re Detention of Williams (2002) 147 Wash.2d 476, 55 P.3d 597, reconsideration denied. Mental Health ☞467

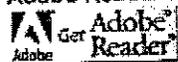
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# WEST VIRGINIA

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(b) *Report of examiner.* — (1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or other qualified expert setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if the physician or other qualified expert fails or refuses to make a report the court may exclude his the examiner's testimony if offered at the trial.

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WISCONSIN



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JUDICIAL COUNCIL COMMITTEE'S NOTE--1974

1994 Main Volume

This section is based on Federal Rule 35 and s. 269.57(2) through (4). Section 269.57 is by its terms restricted to physical examinations of defendants; this section permits physical or mental examination of any party. Section 269.57 permits examination only in actions for personal injuries; this section permits examination whenever mental or physical condition is actually in issue. See Schlagenhauf v. Holder, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152 (1965). This statute contains no counterpart to the provision of s. 269.57(2)(a) 1 granting to the examinee the once-exercisable right to reject an examining physician. If cause exists to object to an examiner, a protective order may be obtained under s. 804.01(3).

Sub. (2) contains a number of changes from s. 269.57(2). First, the papers subject to discovery are not limited to hospital records, but include "hospital, medical, and other records concerning the injuries claimed and the treatment thereof". Second, the party seeking discovery is given the right not only to inspect, but also to copy such papers. Third, the right to inspect and copy may be made subject to such terms as may be just. Fourth, a party may inspect X-rays taken in the diagnosis of the party's injuries.

Sub. (3)(a) is derived from s. 269.57(3). It reduces from 15 days to 10 days the period after receipt of reports of court-ordered examination with which such reports must be delivered to the adverse party.

Sub. (3)(b) is substantially identical to Federal Rule 35(b)(3).

Sub. (4) is based on s. 269.57(4). The present provisions make the custodian of the records liable to the person examined for the cost of obtaining copies and for attorney's fees not in excess of \$50. Sub. (4) on the other hand makes the custodian liable to the party seeking discovery for the reasonable and necessary costs of enforcing his right to discover.

# WYOMING

Wyoming

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discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule. [amended October 21, 1970, effective February 11, 1971]