

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

2 (a) **Order for examination.** When the mental or physical condition or
3 attribute(including the blood group) of a party or of a person in the custody or under the
4 legal control of a party is in controversy, the court in which the action is pending may
5 order the party or person to submit to a physical or mental examination by a suitably
6 licensed or certified examiner or to produce for examination the person in the party's
7 custody or legal control, unless the party is unable to produce the person for
8 examination. The order may be made only on motion for good cause shown. All papers
9 related to the motion and upon notice of any hearing shall be served on a nonparty to
10 the person to be examined. The order and to all parties and shall specify the time,
11 place, manner, conditions, and scope of the examination and the person or persons by
12 whom the examination is to be made. The person being examined may record the
13 examination by audio or video means unless the party requesting the examination
14 shows that the recording would unduly interfere with the examination.

15 (b) **Report.** The party requesting of examining physician.

16 **(b)(1)** If requested by a party against whom an order is made under Rule 35(a) or
17 the person examined, the party causing the examination to be made shall
18 disclosed deliver to the person examined and/or the other party a copy of a detailed
19 written report of the examiner, setting out the examiner's findings, including results of all
20 tests made, diagnoses diagnosis and conclusions. If the party requesting, together with
21 like reports of all earlier examinations of the same condition. After delivery the party
22 causing the examination wishes to call the shall be entitled upon request to receive from
23 the party against whom the order is made a like report of any examination, previously or
24 thereafter made, of the same condition, unless, in the case of a report of examination of
25 a person not a party, the party shows that the report cannot be obtained. The court on
26 motion may order delivery of a report on such terms as are just. If an examiner as a
27 witness, the party shall disclose fails or refuses to make a report, the court on motion
28 may take any action authorized by Rule 37(b)(2).

29 **(b)(2)** By requesting and obtaining a report of the examination so ordered or by
30 taking the deposition of the examiner as an expert as required by Rule 26(a), the party
31 examined waives any privilege the party may have in that action or any other involving

32 ~~the same controversy, regarding the testimony of every other person who has examined~~
33 ~~or may thereafter examine the party in respect of the same mental or physical condition.~~

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

38 ~~(c) Sanctions. (c) Right of party examined to other medical reports. At the time of~~
39 ~~making an order to submit to an examination under Subdivision (a), the court shall,~~
40 ~~upon motion of the party to be examined, order the party seeking such examination to~~
41 ~~furnish to the party to be examined a report of any examination previously made or~~
42 ~~medical treatment previously given by any examiner employed directly or indirectly by~~
43 ~~the party seeking the order for a physical or mental examination, or at whose instance~~
44 ~~or request such medical examination or treatment has previously been conducted.~~

45 ~~(d) Sanctions.~~

46 ~~(d)(1) If a party or a person in the custody or under the legal control of a party fails to~~
47 ~~obey an order entered under paragraphSubdivision (a), the court on motion may take~~
48 ~~any action authorized by Rule 37(~~eb~~)(2), except that the failure cannot be treated as~~
49 ~~contempt of court.~~

50 ~~(d)(2) If a party fails to obey an order entered under Subdivision (c), the court on~~
51 ~~motion may take any action authorized by Rule 37(b)(2).~~

52 **Advisory Committee Notes**

53 Rule 35 has been substantially revised. A medical examination is not a matter of
54 right, but should only be permitted by the trial court upon a showing of good cause. Rule
55 35 has always provided, and still provides, that the proponent of an examination must
56 demonstrate good cause for the examination. And, as before, the motion and order
57 should detail the specifics of the proposed examination.

58 The parties and the trial court should refrain from the use of the phrase "independent
59 medical examiner," using instead the neutral appellation "medical examiner," "Rule 35
60 examiner," or the like.

61 The Committee has determined that the benefits of recording generally outweigh the
62 downsides in a typical case. The amended rule therefore provides that recording shall

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63 be permitted as a matter of course unless the person moving for the examination
64 demonstrates the recording would unduly interfere with the examination.

65 Nothing in the rule requires that the recording be conducted by a professional, and it
66 is not the intent of the committee that this extra cost should be necessary. The
67 committee also recognizes that recording may require the presence of a third party to
68 manage the recording equipment, but this must be done without interference and as
69 unobtrusively as possible.

70 The former requirement of Rule 35(c) providing for the production of prior reports on
71 other examinees by the examiner was a source of great confusion and controversy. It is
72 the Committee's view that this provision is better eliminated, and in the amended rule
73 there is no longer an automatic requirement for the production of prior reports of other
74 examinations. Medical examiners will be treated as other expert witnesses are treated,
75 with the required disclosure under Rule 26 and the option of a report or a deposition.

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