

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

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

15 (b) Report ~~of examining physician.~~

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

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

34 ~~(b) as an expert as required by Rule 26(a)(3) This subdivision applies to~~
35 ~~examinations made by agreement of the parties, unless the agreement expressly~~
36 ~~provides otherwise. This subdivision does not preclude discovery of a report of any~~
37 ~~other examiner or the taking of a deposition of an examiner in accordance with the~~
38 ~~provisions of any other rule.)~~

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

46 ~~(d) Sanctions.~~

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

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

53 Advisory Committee Notes

54 Rule 35 has been substantially revised. Few rules have generated such an
55 extensive motion practice and disputes as the previous version of Rule 35. The battles
56 typically raged over the production of reports of prior examinations by the examining
57 physician, and whether the examination could be recorded or witnessed by a third party.

58 It is also doubtful that any rule under consideration for change has been as
59 thoroughly studied as Rule 35. A subcommittee of the advisory committee has spent
60 several years collecting information from both sides of the personal-injury bar and from
61 the trial courts. While no rule amendment will please everyone, the committee is of the
62 opinion that making recording the default for medical examinations, and removing the

63 requirement for automatic production of prior reports, will best resolve the issues that
64 have bedeviled the trial courts and counsel.

65 The Committee re-emphasizes that a medical examination is not a matter of right,
66 but should only be permitted by the trial court upon a showing of good cause. Rule 35
67 has always provided, and still provides, that the proponent of an examination must
68 demonstrate good cause for the examination. And, as before, the motion and order
69 should detail the specifics of the proposed examination.

70 The committee is concerned about the rise of the so-called "professional witness" in
71 the area of medical examinations. This phenomenon is not limited to Utah. See, A
72 World of Hurt: Exams of Injured Workers Fuel Mutual Mistrust, By N. R. Kleinfeld, New
73 York Times, April 4, 2009. The committee recognizes that there is often nothing
74 "independent" about a Rule 35 examiner. Therefore, the trial court should refrain from
75 the use of the phrase "independent medical examiner," using instead the neutral
76 appellation "medical examiner," "Rule 35 examiner," or the like.

77 As noted, a major source of controversy has been requests by plaintiffs' counsel to
78 audio- or video-record examinations. The Committee has determined that the benefits
79 of recording generally outweigh the downsides in a typical case. The new rule therefore
80 provides that recording shall be permitted as a matter of course unless the person
81 moving for the examination demonstrates the recording would unduly interfere with the
82 examination. See, Boswell v. Schultz, 173 P.3d 390, 394 (OK 2007) ("A video recording
83 would be a superior method of providing an impartial record of the physical
84 examination.")

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

90 The former requirement of Rule 35(c) providing for the production of prior reports on
91 other examinees by the examiner was a source of great confusion and controversy.
92 This provision does not exist in the federal version of the rule, nor is the Committee
93 aware of any other similar state court rule. After much deliberation and discussion, it is

94 the Committee's view that this provision is better eliminated, and in the new rule there is
95 no longer an automatic requirement for the production of prior reports of other
96 examinations. Medical examiners will be treated as other expert witnesses are treated,
97 with the required disclosure under Rule 26 and the option of a report or a deposition.
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