

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

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

13 (b) Report. The party requesting the examination shall disclose a detailed written
14 report of the examiner, setting out the examiner's findings, including results of all tests
15 made, diagnoses and conclusions. If the party requesting the examination wishes to call
16 the examiner as a witness, the party shall disclose the examiner as an expert as
17 required by Rule 26(a)(3).

18 (c) Sanctions. If a party or a person in the custody or under the legal control of a
19 party fails to obey an order entered under paragraph (a), the court on motion may take
20 any action authorized by Rule 37(e), except that the failure cannot be treated as
21 contempt of court.

22 Advisory Committee Notes

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

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

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

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

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

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

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

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

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