

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

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

11 **(b) Report.** The party requesting the examination ~~shall~~must disclose a detailed written report of the
 12 examiner, within 28 days after the examination, setting out the examiner's findings, including results of all
 13 tests performed~~made~~, diagnoses, and other matters that would routinely be included in an examination
 14 record generated ~~report~~ by a medical professional. ~~conclusions~~. If the party requesting the examination
 15 wishes to call the examiner as an expert witness, the party ~~shall~~must disclose the examiner as an expert
 16 in the time and manner as required by Rule ~~26(a)(3)~~ 26(a)(4).

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

20 **Advisory Committee Notes**

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

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

27 The ~~C~~committee has determined that the benefits of recording generally outweigh the downsides in a
 28 typical case. The amended rule therefore provides that recording shall be permitted as a matter of course
 29 unless the person moving for the examination demonstrates the recording would unduly interfere with the
 30 examination.

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

35 The former requirement of Rule 35(c) providing for the production of prior reports on other examinees
 36 by the examiner was a source of great confusion and controversy. It is the ~~C~~committee's view that this
 37 provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the

38 | production of prior reports of other examinations. ~~Medical examiners will be treated as other expert~~
39 | ~~witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a~~
40 | ~~deposition.~~

41 | A report must be provided for all examinations under this rule. The Rule 35 report is expected to
42 | include the same type of content and observations that would be included in a medical record generated
43 | by a competent medical professional following an examination of a patient, but need not otherwise
44 | include the matters required to be included in a Rule 26(a)(4) expert report. If the examiner is going to be
45 | called as an expert witness at trial, then the designation and disclosures under Rule 26(a)(4) also are
46 | required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the
47 | expert's report or deposition under Rule 26(a)(4)(C). Nothing in these rules would preclude a party who
48 | furnishes a report under Rule 35 from also including within it the expert disclosures required under Rule
49 | 26(a)(4), in order to avoid the potential need to generate a separate Rule 26 (a)(4) report later if the
50 | opposing party elects a report rather than a deposition. But submitting such a combined report will not
51 | limit the opposing party's ability to elect a deposition if the Rule 35 examiner is designated as an expert.

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