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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-23-

10 **PETITION TO AMEND RULE 35**
11 **OF THE ARIZONA RULES OF**
12 **CIVIL PROCEDURE**

PETITION

13 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby petitions the Court to amend Rule 35 of the
15 Arizona Rules of Civil Procedure regarding physical and mental examinations. The
16 proposed revisions will not significantly alter the substance of the current rule, but
17 they will:

- 18 • reorganize the rule in a more concise format;
- 19 • provide for notice when the party or person to be examined seeks to
20 record the examination;
- 21 • provide for notice when the party or person to be examined seeks to
22 have a representative present at the examination;
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- 1 • clarify that a court order is necessary for an examination to proceed
2 only when there is a dispute between the parties about how the examination
3 should proceed, consistent with current practice; and
4
- 5 • help the parties more quickly and easily identify when such a dispute
6 exists.¹

7 The State Bar believes the proposed amendments will make Rule 35 more
8 user friendly. In doing so, they will streamline the process of requesting and
9 conducting physical and mental examinations permitted under Rule 35, benefitting
10 judges and practitioners alike, both of whom participated in drafting these proposed
11 changes.
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13 Appendix A is a blackline of the proposed amendments to Rule 35. Appendix
14 B is clean version.
15

16 **I. STRUCTURE OF THE CURRENT RULE.**

17 Current Rule 35 is somewhat clunky and does not directly address how the
18 majority of such examinations are noticed and conducted in actual practice. This is
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21 ¹ In 2010, the Arizona Supreme Court considered and rejected several proposed
22 amendments to Rule 35, including a change to allow the video-recording of
23 examinations as a matter of right. In 2018, the Supreme Court again considered, and
24 then adopted, a proposed amendment to allow the video-recording of examinations
25 as a matter of right. The amendments proposed here do not affect video-recording
examinations as a matter of right, nor do they propose any of the other changes the
Supreme Court considered and rejected in 2010.

1 in part the result of various amendments that have been made over the years which
2 have eroded its initial structure. The State Bar believes a reboot, which will not
3 introduce significant substantive changes, is in order.
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5 **II. THE ABILITY OF THE PARTIES TO CONDUCT**
6 **EXAMINATIONS WITHOUT A COURT ORDER WHEN THEY**
7 **AGREE SHOULD BE MORE EXPLICIT.**

8 The most troubling aspect of current Rule 35 is that the rule does not explicitly
9 authorize the parties to conduct an examination without a court order, which is how
10 the vast majority of such examinations are conducted. Instead, current Rule 35
11 begins by describing the court’s authority to order the physical or psychological
12 examination of a party or person in that party’s custody or under that party’s legal
13 control on a motion by the party requesting the examination. Rule 35(b)(1)-(2) then
14 describes how to obtain a court order “[w]hen the parties agree that an examination
15 is appropriate but do not agree on an examiner,” implying, but not explicitly stating,
16 the parties can proceed without a court order if they agree on that issue. Both rules
17 require a motion – by the party seeking the examination under current Rule 35(a)
18 and by the party objecting to the examiner under current Rule 35(b).
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21 The only other reference to examination by agreement is in current Rule
22 35(d)(6), stating “[t]his Rule 35(d) applies to examinations conducted by agreement
23 of the parties, unless the agreement states otherwise.” That would seem to leave
24 sufficient latitude for the parties to do as they wish, but the State Bar believes Rule
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1 35 can be improved if the process for noticing and conducting examinations,
2 including those by agreement, is better identified.

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4 In addition, Rule 35(b) notably fails to provide for the resolution of any
5 dispute besides one involving the identity of the examiner, and current Rule 35(a) is
6 entirely silent on the subject. Current Rule 35(b) also seems superfluous in that
7 disputes about the identity of the examiner can be resolved in the motion practice
8 provided for under current Rule 35(a).
9

10 There are many aspects of a physical or mental examination about which
11 parties may agree or disagree. Where there is agreement on all issues, it should be
12 clear that no motion or court order is required to proceed with a Rule 35 examination.
13 Where there is disagreement, proposed Rule 35 provides a better mechanism to
14 identify and resolve them.
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16 **III. STRUCTURE OF PROPOSED RULE 35.**

17 **A. Proposed Rule 35(a) - Request for an Examination.**

18
19 Proposed Rule 35(a) begins at a natural starting point, simply recognizing
20 what is implied, but never very well or directly stated in the current rule. A party
21 may request a physical or mental examination of another party or a person in that
22 party's custody or legal control. Current Rule 35(a) puts the cart before the horse
23 by addressing what appears to be the requirement of court orders before a dispute is
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1 even identified. Proposed Rule 35 provides for court orders only after identifying
2 the existence of any objections which might give rise to a need for them.

3
4 **B. Proposed Rule 35(b) - Presence of a Representative at an
5 Examination.**

6 Like current Rule 35(c)(1), proposed Rule 35(b) permits the party or person
7 to be examined to have a representative present at an examination, which should be
8 restricted only if the presence of the representative may adversely affect the
9 examination.

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11 **C. Proposed Rule 35(c) - Recording an Examination.**

12 Like current Rule 35(c)(2), proposed Rule 35(c) permits the party or person
13 to be examined to audio-record or video-record the examination, which should only
14 be restricted if the recording may adversely affect the examination.

15 However, proposed Rule 35(c) permits any party to make such a request,
16 including the party who has custody or legal control of the person to be examined.²
17 This change recognizes a party may have an interest in recording an examination
18 even if it did not request the examination be performed. While this change would
19 permit multiple recordings of a single examination, those situations should be rare
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² The right of a party who has custody or legal control of the person to be
examined to request a recording is implied, but not explicit in the current rule.

1 and concerns that about disruption to the examination can be resolved as set forth in
2 proposed Rule 35(e) when they arise.

3
4 Along these lines, proposed Rule 35(c) also eliminates language found in
5 current Rule 35(c)(2) permitting a court to limit recording to the least restrictive
6 means possible “on a showing” that a proposed recording may adversely affect an
7 examination’s outcome. This was done because the procedures for objecting to
8 everything under Rule 35 have been consolidated in proposed Rule 35(e) and a
9 court’s authority to restrict an examination is made explicit in Rule 35(f). That
10 authority requires not just “a showing,” as suggested by Rule 35(c)(2), but “a
11 showing of good cause,” as set forth in proposed Rule 35(f), as well as various
12 sections of current Rule 35.
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15 **D. Proposed Rule 35(d) – Notice.**

16 Once the rights of the parties have been established under proposed Rule
17 35(a)-(c), proposed Rule 35(d) governs the notice required to establish those rights,
18 thus setting the stage for any objections that may be presented by motion under
19 proposed Rule 35(e).
20

21 First, proposed Rule 35(d)(1)(A)-(C) requires the requesting party to identify
22 the person to be examined; to state the time, place, manner, conditions, and scope of
23 the examination; and to identify the person or persons who will perform the
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1 examination. This is similar to what is required of the court under current Rule 35(a)
2 or the requesting party under current Rule 35(b).

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4 Proposed Rule 35(d)(1)(D) also requires the requesting party to provide notice
5 of an intent to record an examination, stating the method of recording and the identity
6 of the recorder. This is not required under the current rule, which and can lead to
7 confusion or surprise at the examination, resulting in delay and unnecessary expense.

8
9 Next, once the party requesting the examination has provided the notice
10 required by proposed Rule 35(d)(1), proposed Rule 35(d)(2) requires the party or
11 person to be examined to provide notice of an intent to have a representative present,
12 including the name of the representative and the representative's relationship to the
13 party. Current Rule 35 does not require the party or person to be examined to provide
14 notice of an intent to have a representative present, again, potentially leading to the
15 same problems that can result from a lack of notice of an intent to record an
16 examination.
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19 Finally, proposed Rule 35(d)(3) requires any other party (besides the
20 requesting party) or the person to be examined to provide notice of an intent to record
21 the examination, again, preventing the problems that can arise from lack of notice.
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23 **E. Proposed Rule 35(e) - Objections.**

24 Once the parties and person to be examined have provided the notice required
25 by proposed Rule 35(d), the parties will be in a position to raise any objections they

1 might have about the examination. Proposed Rule 35(e) permits a party to raise
2 these objections by motion under Rule 26(c), subject to the expedited discovery
3 resolution procedures provided for by Rule 26(d). This recognizes existent current
4 discovery dispute procedures and clarifies that court involvement is only required
5 when the parties actually have a dispute, rather than in every case.
6

7 **F. Proposed Rule 35(f) - Orders.**

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9 Proposed Rule 35(f) maintains the “good cause” requirement for a court to
10 order a Rule 35 examination currently found in Rule 35(a)(2)(A), but also clarifies
11 the requirement of “good cause” in connection with any Rule 35 order, including
12 orders related to the nature and extent of the examination and those who may attend
13 and record it.
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15 **G. Proposed Rule 35(g) - Failure to Appear for an Examination.**

16 Proposed Rule 35(g) preserves the remedy provided for by current Rule
17 35(b)(3) when a person fails to appear for an examination and no party has filed an
18 objection to the examination. It also corrects the reference to the source for sanctions
19 which the court may impose from Rule 37(f) to Rule 37(b)(2)(B), which specifically
20 addresses failures to appear for Rule 35 examinations.
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1 **H. Proposed Rule 35(h) - Examiner’s Reports and Materials; Waiver of**
2 **Privilege; Scope.**

3 Proposed Rule 35(h)(1), regarding an examiner’s reports, streamlines current
4 Rule 35(d)(1)-(3) without making substantive changes.

5 Proposed Rule 35(h)(2), regarding the waiver of privilege, mirrors current
6 Rule 35(d)(4).
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8 Proposed Rule 35(h)(3), regarding the scope of Rule 35, mirrors current Rule
9 35(d)(6).
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11 Current Rule 35(d)(5) provides remedies when a “report of examination” is
12 not delivered when requested. This subsection has been eliminated for many
13 reasons. One, current Rule 35(d)(5) does not distinguish whether the “report” is of
14 the examination performed under Rule 35 or of an earlier examination requested
15 under current Rule 35(d)(2)(B) and proposed Rule 35(h)(1)(C). Two, it fails to
16 recognize the procedures for resolving disputes required by Rule 26(d). Three, it
17 contains language stating the court must act “on terms that are just,” which is
18 presumed with any judicial action. Four, it suggests a remedy - exclusion of the
19 examiner’s testimony - which a court is already free to impose under Rule 26(c).
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21 Finally, the issue of failure to deliver any report is so uncommon that it does not
22 warrant special attention in this rule.
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1 **CONCLUSION**

2 The State Bar of Arizona believes the proposed amendments to Rule 35 will
3 substantially improve the structure of the rule, improve notice, and reduce conflict
4 between parties. The State Bar respectfully requests Rule 35 be amended as set forth
5 above.
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7
8 RESPECTFULLY SUBMITTED this 9th day of January 2023.

9 */s/ Lisa M. Panahi*

10 _____
11 Lisa M. Panahi
12 General Counsel
13

14 Electronic copy filed with the
15 Clerk of the Supreme Court of Arizona
16 this 9th day of January 2023.

17 by: P Seguin
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APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline.)

Rule 35. Physical and Mental Examinations

~~(a)~~ (a) Right to Request a Physical or Mental Examination on Order.

~~(1) Generally. The court where the action is pending may order.~~ A party whose may request that a physician or psychologist perform a physical or mental examination of another party, or a person who is in another party's custody or under its legal control, when that party or person's physical or mental condition is in controversy to submit to a physical or mental examination by a physician or psychologist. The court has.

(b) Attendance of Representative. The party or person to be examined may have a representative present during the examination, unless the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control presence of the representative may adversely affect the examination's outcome.

~~(2) Motion and Notice; Contents of the Order. An order under Rule 35(a)(1):~~

~~(A) may be entered only on motion for good cause and on notice to all parties and the person to be examined;~~

~~(B) must~~ (c) Recording. Any party may audio-record or video-record an examination, unless the recording may adversely affect the examination's outcome. The person recording the examination may be a different person from the representative described in Rule 35(b). A copy of a recording of an examination must be provided to any party upon request.

(d) Notice.

(1) By a Party Requesting an Examination. A party requesting an examination must serve a written notice on all other parties no fewer than 30 days before the examination. The notice must specify:

(A) the identity of the person to be examined;

(B) the time, place, manner, conditions, and scope of the examination; and

(C) must specify the identity of the person or persons who will perform the examination; and

~~(b) Examination on Notice; Motion Objecting to Examiner; Failure to Appear.~~

~~(1) Notice. When (D) if the parties agree that examination is to be recorded, the method of recording and the identity of the person who will make the recording.~~

~~(2) By the Party or Person to Be Examined Wanting to Have a Representative Present at an Examination is appropriate but do not agree on the examiner. The party seeking the or person to be examined wanting to have a representative present at an examination must serve a written notice on all other parties no fewer than 15 days before the examination stating name of the representative and the representative's relationship to the party or person to be examined.~~

~~(3) By a Party (Other than the Requesting Party) or the Person To Be Examined Wanting to Record an Examination. Any party (other than the requesting party) or the person to be examined, wanting to record an examination, must serve written notice on all other parties no fewer than 15 days before the examination stating the method of recording and the identity of the person or entity who will make the recording.~~

(e) Objections. Subject to Rule 26(d), any party or the person to be examined may object to the examination itself; the time, place, manner, conditions, and scope of the examination; the person who will perform the examination; the presence of a representative; or the method of recording by filing a motion with the court where the action is pending under Rule 26(c).

(f) Orders. Upon a showing of good cause, the court where the action is pending may order the examination to proceed by giving reasonable and not fewer than 30 days written notice to all other parties. The notice must:

~~(A) identify the party or person to be examined;~~

~~(B) specify the time, place, and scope of the examination; and~~

~~(C) identify the examiner(s).~~

~~(2) Motion Objecting to Examiner. After being served with a proper notice as specified in the notice provided under Rule 35(b)(1), a party who objects to the examiner(s) identified in the notice may file a motion in the court where the action is pending. For good cause, the court may order that d), or that the examination be conducted by an examiner, in a physician manner, or psychologist under conditions other than the ones specified in the such notice.~~

~~(3)(g) Failure to Appear.~~ Unless ~~the~~ a party has filed a ~~motion~~ objection under Rule ~~26(e), 35(e),~~ if the party ~~must appear—~~ or produce the person in the party's custody or legal control ~~for the noticed examination.~~ If the party to be examined fails to ~~do so~~ attend an examination as noticed or ordered, the court where the action is pending may, ~~on motion,~~ make such orders concerning the failure as are just, including those under Rule ~~37(f)(2)(B).~~

~~(c) Attendance of Representative; Recording.~~

~~(1) Attendance of Representative.~~ Unless his or her presence may adversely affect the examination's outcome, the person to be examined has the right to have a representative present during the examination.

~~(2) Recording.~~

~~(A) Audio or Video Recording.~~ The person to be examined or the party requesting the examination may audio record or video record any examination. On a showing that such recording may adversely affect the examination's outcome, the court may limit the recording, using the least restrictive means possible.

~~(B) Copy of Recording.~~ A copy of a recording made of an examination must be provided to any party upon request.

~~(d) Examiner's Report; Other Like~~ (h) Examiner's Reports of Same Condition and Materials; Waiver of Privilege; Scope.

~~(1) Contents.~~ The examiner's (1) *Examiners Report and Materials.* If requested by the party or person to be examined, within 20 days of the examination:

~~(A) the examiner must prepare, and the party requesting the examination must produce, a written report must be in writing and set~~ which sets out in detail the examiner's ~~examiner's~~ findings, including diagnoses, conclusions, and the results of any tests: of the person examined;

~~(2) Request by the Party or Person Examined.~~ The party who is examined— or who produces the person examined— may request the examiner's report, like reports of the same condition, and written or recorded notes from the examination. If such a request is made, the party who moved for or noticed the examination must, within 20 days of the examination or request— whichever is later— deliver to the requestor copies of:

~~(A) the examiner's report;~~

~~(B)~~(B) the party requesting the examination must produce any written or recorded materials prepared by the examiner of the person examined in connection with the examination; and

(C) the party requesting the examination must produce like reports of all earlier examinations ~~of~~involving the same condition; and.

~~(C) all written or recorded notes made by the examiner and the person examined at the time of the examination, and must provide access to the original written or recorded notes for purposes of comparing them with the copies.~~

~~(3) *Request by the Examining Party.* After delivering the materials required by Rule 35(d)(2), the party who moved for or noticed the examination is entitled, on its request, to receive from the party who was examined—or who produced the person examined—like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.~~

~~(4)(2) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party or person examined waives any privilege ~~it~~they may have—in that action or any other action involving the same controversy—concerning testimony by any other person who has examined or who later examines the same condition.~~

~~(5) *Failure to Deliver a Report as Ordered.* On motion, the court may order—on terms that are just—that a party deliver a report of an examination. If the report is not delivered as ordered, the court may exclude the examiner's testimony at trial.~~

~~(6)(3) *Scope.* This Rule 35(dh) applies to examinations conducted by agreement of the parties, unless the agreement states otherwise. ~~This rule~~It does not preclude a party from obtaining an examiner's report, or deposing an examiner, under other rules.~~

APPENDIX B

Rule 35. Physical and Mental Examinations

(a) Right to Request a Physical or Mental Examination. A party may request that a physician or psychologist perform a physical or mental examination of another party, or a person who is in another party's custody or under its legal control, when that party or person's physical or mental condition is in controversy.

(b) Attendance of Representative. The party or person to be examined may have a representative present during the examination, unless the presence of the representative may adversely affect the examination's outcome.

(c) Recording. Any party may audio-record or video-record an examination, unless the recording may adversely affect the examination's outcome. The person recording the examination may be a different person from the representative described in Rule 35(b). A copy of a recording of an examination must be provided to any party upon request.

(d) Notice.

(1) By a Party Requesting an Examination. A party requesting an examination must serve a written notice on all other parties no fewer than 30 days before the examination. The notice must specify:

(A) the identity of the person to be examined;

(B) the time, place, manner, conditions, and scope of the examination;

(C) the identity of the person or persons who will perform the examination; and

(D) if the examination is to be recorded, the method of recording and the identity of the person who will make the recording.

(2) By the Party or Person to Be Examined Wanting to Have a Representative Present at an Examination. The party or person to be examined wanting to have a representative present at an examination must serve a written notice on all other parties no fewer than 15 days before the examination stating name of the representative and the representative's relationship to the party or person to be examined.

(3) *By a Party (Other than the Requesting Party) or the Person To Be Examined Wanting to Record an Examination.* Any party (other than the requesting party) or the person to be examined, wanting to record an examination, must serve written notice on all other parties no fewer than 15 days before the examination stating the method of recording and the identity of the person or entity who will make the recording.

(e) Objections. Subject to Rule 26(d), any party or the person to be examined may object to the examination itself; the time, place, manner, conditions, and scope of the examination; the person who will perform the examination; the presence of a representative; or the method of recording by filing a motion with the court where the action is pending under Rule 26(c).

(f) Orders. Upon a showing of good cause, the court where the action is pending may order the examination to proceed as specified in the notice provided under Rule 35(d), or that the examination be conducted by an examiner, in a manner, or under conditions other than as specified in such notice.

(g) Failure to Appear. Unless a party has filed an objection under Rule 35(e), if the party or person to be examined fails to attend an examination as noticed or ordered, the court where the action is pending may make such orders concerning the failure as are just, including those under Rule 37(b)(2)(B).

(h) Examiner's Reports and Materials; Waiver of Privilege; Scope.

(1) *Examiners Report and Materials.* If requested by the party or person to be examined, within 20 days of the examination:

(A) the examiner must prepare, and the party requesting the examination must produce, a written report which sets out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests of the person examined;

(B) the party requesting the examination must produce any written or recorded materials prepared by the examiner of the person examined in connection with the examination; and

(C) the party requesting the examination must produce like reports of all earlier examinations involving the same condition.

(2) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party or person examined waives any privilege they

may have in that action or any other action involving the same controversy concerning testimony by any other person who has examined or who later examines the same condition.

(3) *Scope.* This Rule 35(h) applies to examinations conducted by agreement of the parties, unless the agreement states otherwise. It does not preclude a party from obtaining an examiner's report, or deposing an examiner, under other rules.