

TO:

Rule 28 Distribution

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ATTACHMENT A¹

RULES OF CIVIL PROCEDURE

Rule 35. Physical and Mental Examinations

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

~~(1) Generally. The court where the action is pending may order a party whose~~ 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 to submit to a physical or mental examination by a physician or psychologist. The court has 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.

(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 the recording of an examination must be provided to any party upon request.

(d) Notice.

~~(21) Motion and Notice; Contents of the Order. By a Party Requesting an Examination. An order under Rule 35(a)(1):~~ 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) may be entered only on motion for good cause and on notice to all parties and~~ the identity of the person to be examined;

~~(B) must specify 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

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

¹ Additions to the text of the rule are shown by underscoring and deletions are shown by ~~strike through~~.

(2) By the Party or the Person to Be Examined Wanting to Have a Representative Present at an Examination. If the party or the person to be examined wants to have a representative present at an examination, they must serve a written notice on all other parties no fewer than 15 days before the examination stating the 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. If a party (other than the requesting party) or the person to be examined wants to record an examination, they 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 that will make the recording.

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

~~(1) Notice.~~ When the parties agree that an examination is appropriate but do not agree on the examiner, the party seeking the examination may 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 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 the examination be conducted by a physician or psychologist other than the one specified in the notice.

(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.

~~(3)(g) Failure to Appear.~~ **Failure to Appear.** Unless the a party or the person to be examined has filed a motion an objection under Rule ~~26(e)~~ 35(e), if the party or person to be examined must appear or produce the person in the party's custody or legal control for the noticed examination. If the party 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).~~

~~(e) 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.~~

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

~~(1) *Contents. Request by the Party or Person Examined.* The examiner's report must be in writing and 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 that 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~~

~~(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) the party requesting the examination must produce like reports of all earlier examinations of the person examined 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 producing the materials required by Rule 35(d)(2)(h)(1)(C), the party who moved for or noticed requesting 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 person examined involving the same condition. But those reports do not need ~~not~~ to be delivered produced by the party with custody or control of the person examined if the party shows that it could not obtain them.

(43) *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.~~

(64) *Scope.* This Rule 35(~~4h~~) 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.

ATTACHMENT B
(Clean Version of Rule as Amended)

RULES OF CIVIL PROCEDURE

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 or entity that will make the recording.

(2) *By a Party or the Person to Be Examined Wanting to Have a Representative Present at an Examination.* If a party or the person to be examined wants to have a representative present at an examination, they must serve a written notice on all other parties no fewer than 15 days before the examination stating the 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.* If a party (other than the requesting party) or the person to be examined wants to record an examination, they 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 that 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 or the person to be examined 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 Report and Materials; Waiver of Privilege; Scope.

(1) *Request by the Party or Person Examined.* 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 that 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 of the person examined involving the same condition.

(2) *Request by the Examining Party.* After producing the materials required by Rule 35(h)(1)(C), the party requesting 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 person examined involving the same condition. But those reports do not need to be produced by the party with custody or control of the person examined if the party shows that it could not obtain them.

(3) *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.

(4) *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.