John A. Furlong, Bar No. 018356
General Counsel
STATE BAR OF ARIZONA
4201 North 24th Street, Suite 200
Phoenix, Arizona 85016-6288
Telephone: (602) 252-4804
John.Furlong@staff.azbar.org

IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULES 35 AND 37, ARIZONA RULES OF CIVIL PROCEDURE	Supreme Court No. R-09-0040 **STATE BAR'S RESPONSE TO COMMENT OF ARIZONA TRIAL LAWYERS ASSOCIATION AND ARIZONA ASSOCIATION FOR JUSTICE**

The State Bar of Arizona ("State Bar") responds to the Comment to its Petition to Amend Rules 35 and 37, Arizona Rules of Civil Procedure (the "Petition") submitted by the Arizona Trial Lawyers Association ("AzTLA") and Arizona Association for Justice ("AAJ").

I. THE RATIONALE FOR THE PROPOSAL TO ALLOW VIDEO-RECORDING OF RULE 35 EXAMINATIONS AS A MATTER OF RIGHT.

Discovery in Arizona should be a truth-seeking process. The goal of the proposed rule change is to enable triers of fact and the courts to seek the truth by gaining a better understanding of claims made in litigation regarding a plaintiff's mental, physical or rehabilitation conditions by eliminating artificial impediments that block that process. Allowing video-recording of Rule 35 examinations is one means of determining the truth.

Many within the plaintiffs' bar have argued for years that Rule 35 examinations should be videotaped. Plaintiffs' attorneys have argued that audiotaping examinations (currently allowed as a matter of right) does not adequately protect the record pertaining to how an examiner's physical and other testing was performed. For instance, with physical examinations, they have argued that an audiotape will not record how far a plaintiff can move in any direction, and will not display any wince or other expression of discomfort experienced during the examination. Further, if an examiner testifies about how he or she performed certain tests or how the plaintiff reacted to those tests during the examination, plaintiffs' attorneys have argued that it is impossible without a video-recording to challenge that testimony if it is contrary to the plaintiff's recollection of the examination.

The State Bar believes that video-recording will provide objective evidence about what occurred during the examination in a way that could not be equaled. It believes that a video-recording is the best permanent and objective record of what happened at the examination and will therefore benefit both sides. *Cf. Robin v. Associated Indemnity Co.*, 297 So.2d 427 (La. 1973) (taping "would protect both the plaintiff and the physician, and might be dispositive of such doubts concerning the fairness of the examination.").

Generally, two people can recall a conversation quite differently, either because each of them misinterprets the questions posed or misunderstands the answers, or because human communicators select out information to conform to their expectations. That is one reason the courts require that depositions be recorded, transcribed, and occasionally video-recorded.[1]

[1] This is consistent with the rationale of the recent amendments to Rule 30 to allow video-recording of depositions.

Further, a video-recording offers an economical, simple, and objective record of what transpired at a Rule 35 examination, from which the trier of fact can most easily ascertain the truth concerning disputed statements. Juries should have an opportunity to see whether the examinations were fairly administered.

The State Bar believes that unreasonable and illegitimate objections to video-recording Rule 35 examinations have often been raised in the past—chiefly by attorneys representing defendants and by doctors hired by them. The most common objection is that video-recording Rule 35 examinations is disruptive and would impede and lengthen the examination. Defense medical examiners have also been known to attempt to charge extra fees for examinations that are video-recorded.[2] These objections and extra costs often appear pretextual, designed to create an advantage in litigation by precluding plaintiffs from effectively cross-examining paid physicians regarding claims they might make about what occurred at the examination.

In the past, there may have been a legitimate basis to claim that video-recording Rule 35 examinations would be disruptive, since video-recording in its infancy often required freestanding cameras, lights and microphones. Technology, however, has overcome these issues. Today's cameras and/or digital recorders are small, silent, and handheld, and do not require any additional equipment. Accordingly, the State Bar believes there is no reason to treat audio-recording and video-recording differently; video-recording can be conducted as silently and as innocuously as audio-recording.

Much like the recent amendment to Rule 30 that now allows video-recording of depositions as a matter of right, the State Bar believes that the truth

---

[2] This is the rationale of the proposed Rule's provision that would require all fees and costs, including any additional fees related to recording the examination, to be borne by the party noticing the examination. *See* proposed Rule 35(a).

would be served by allowing Rule 35 examinations to be presumptively video-recorded unless a party can show why such recording would be detrimental to the examination or unduly burdensome to the particular parties at issue.

A. Response to the AzTLA/AAJ Comment

The State Bar was surprised to learn of AzTLA's opposition to the video-recording component of the proposed Rule. Prior to the Petition's submission, AzTLA was consulted on a draft of the proposal by the State Bar's Civil Practice and Procedure Committee, the committee responsible for the preparation of this Petition (the "Committee"). The Committee also understood that AzTLA's past President was speaking for the Association in expressing support for the principle of video-recording Rule 35 examinations as a matter of right. Appendix A at 5 (Committee Minutes of June 5, 2008 ("The subcommittee, Mr. Tinsley reported, consulted with the plaintiff's and the defense bar. They found that the defense bar was not supportive of videotaping, but that the plaintiff's bar was supportive. . . .")). The Committee also received favorable comments from members of the plaintiffs' bar serving on the Committee regarding the proposal for video-recording as a matter of right.

Nor is there merit to AzTLA's current objection that video-recording would constitute an insurmountable invasion of a privacy right. This argument ignores the principle that by bringing a lawsuit, a plaintiff always puts his or her medical condition at issue in a public forum. Whatever invasion of privacy rights exist occur independently of the proposed rule change. The effect on those rights occurs with the filing of the suit.

Further, it should make no difference to privacy rights whether there is a video-recording, an audio-recording, or someone taking notes during the examination. In each case, the privacy interest will be affected. Generally,

plaintiffs are subject to a considerable number of discovery requests and deposition interrogation seeking very personal information. One who puts his or her condition at issue thus cannot reasonably expect "privacy" in such a setting; litigation is inherently public, and the trial judge always has the ability to regulate the presentation of evidence that could be unnecessarily embarrassing to the person examined. Any right to privacy is waived by making the claim, thereby putting the plaintiff's medical condition at issue. This is an intrinsic part of the truth-seeking process.

Under the proposal, to address any legitimate privacy concerns, a plaintiff need only move for a protective order requesting, for example, that the recording only be used for the lawsuit itself and not distributed or made part of the public record. Indeed, in most instances, the parties are likely to be willing to stipulate to such protection. Just as it is presumed under Rule 30 that a defendant can depose and videotape a plaintiff during a deposition, the State Bar believes it should be presumed that by making certain claims, a plaintiff is subject to a Rule 35 exam. As with depositions, a plaintiff can avail himself or herself of the right to obtain a protective order if the procedure will be unduly burdensome. The plaintiff can argue, in the particular case being litigated, that the examination should not go forward, much like a plaintiff can move for protection in certain circumstances from being deposed, such as where the plaintiff is incompetent to testify or will be unduly harassed, annoyed, or burdened by the deposition. This issue should be treated on a case-by-case basis.

II. AS WITH THE FAMILY LAW RULES, RULE 35 SHOULD BE EXTENDED TO ALLOW VOCATIONAL REHABILITATION EXAMINATIONS WHERE THE PLAINTIFF'S VOCATIONAL CONDITION IS AN ISSUE IN THE CASE.

As noted in the Petition, vocational examinations are now expressly allowed in the Family Law Rules. Arizona Rules of Family Law Procedure Rule 63, in language virtually identical to that stated in the proposed amendment to Civil Rule 35, allows for examinations by designated experts and expressly contemplates examinations of the "vocational condition" of a party. There should be no distinction between family law and tort litigation with respect to vocational examinations. In both contexts, the issue of a plaintiff's vocational abilities and limitations is often put at issue by the claims made in the lawsuit. Because this Court has already recognized the efficacy of vocational examinations in the family law context, there seems to be no reason not to extend it to tort litigation or other areas of litigation where the party has put his or her physical, mental or vocational condition at issue.

AzTLA/AAJ's position on vocational rehabilitation examination appears to be inconsistent with its position on video-recording. Its Comment, at page 5, provides a list of eight "rights." Each of those rights, however, can be protected by video-recording the examination. If the examination is video-recorded, the record will be adequately protected, and the plaintiff's lawyer can refer the trier of fact to the recording of the examination—by means similar to those listed in the Comment. The plaintiff's lawyer, for instance, can play back the recording and cross-examine the examiner, criticizing the examination, the questions asked, and the methods used. During the examination, where necessary, the plaintiff could confer with his or her representative (allowed to be present under both the current Rule and the proposed change) and/or object to certain lines of inquiry. The plaintiff could seek help from the court, as well. In the end, the video-

recording itself could be used as a tool to demonstrate whether the examination was fair or not, and as a means of impeaching the expert.

Further, if the plaintiff truly harbors objections as to the examiner's qualifications, the proposed Rule's use of the "suitably licensed or certified examiner" standard, now found in Federal Rule 35, would allow the plaintiff to file a motion to challenge the expert's suitability. As noted in the comment to the 1991 amendment of Federal Rule 35 (cited by the Pima County Bar Association in its Comment to the Petition at page 2):

> The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination.[3]

A. Case law supports vocational rehabilitation examinations under Rule 35.

The following cases involving vocational rehabilitation examinations under Federal Rule 35 will give the Court a survey of the current state of the law, and confirm that allowing vocational examinations is neither unusual nor improper.

For example, in *Cortenuto v. Emerson Electric Co.* 1991 WL 111258 (D. Pa. 1991), one district court specifically held that vocational examinations are allowed under Federal Rule 35. The plaintiff argued that such an examination was unnecessary since he was examined by his own expert and had provided that report to defendants. The plaintiff also argued that the request was impermissible

[3] While adopting the federal comment to provide the courts and practitioners additional guidance might be another means of addressing the concerns expressed by the AzTLA/AAJ Comment, the State Bar takes no position on this recommendation by the Pima County Bar Association.

because the defendants wanted the examination performed by a psychologist, rather than a physician. The court held that the named examiner was a qualified professional under Federal Rule 35 and that good cause was present to order the examination because:

> It is not sufficient that plaintiff provided defendants with a copy of his expert's report, or that he has been deposed and responded to interrogatories. Defendants stand to be prejudiced if they are refused the right to conduct their own vocational examination of plaintiff and are limited to a cross-examination of plaintiff's expert.

Similarly, in *Jefferys v. LRP Publications, Inc.* 184 F.R.D. 262 (D. Pa. 1999), the court dealt with whether Federal Rule 35 allowed the court to compel a party to submit to an examination by a vocational expert. Plaintiff argued that Rule 35 did not permit defendants' expert to interview her because the expert was not a physician or psychologist and would not be conducting a physical or mental examination. The court noted that prior to the 1991 amendment to Federal Rule 35 only physicians could perform examinations under the Rule. In 1991, however, the Rule was amended to replace "physician" with "examiner," and the advisory committee notes state that the amendment extends to other professionals who are well qualified to provide testimony about the conditions at issue in the lawsuit. The court concluded that the type of examination sought by defendants should be permitted because the 1991 amendment expanding the scope of Rule 35 was designed to overcome a plaintiff's objection to a defendant's request to conduct a vocational examination. The court also found that the defendants' expert was a "suitably licensed or certified professional" because he had an Ed.D. degree and was a diplomate of the American Board of Vocational Experts, a certified rehabilitation counselor, and a certified vocational evaluator.

Likewise, in *Douris v. County of Bucks,* 2000 WL 1358481 (D. Pa. 2000), the court addressed whether to grant a motion to compel a vocational examination under Federal Rule 35. It noted that "before an order for a vocational examination can be entered, there must be a showing that Plaintiff's qualification for employment are [sic] in controversy and that there [sic] good cause for an examination." The court held that the plaintiff placed his vocational status in controversy when he alleged that he was qualified for and could perform essential functions for the position he sought. The court also found that good cause existed because it was not sufficient to provide medical records to the opposing party in lieu of a personal examination, holding that "defendants stand to be prejudiced if they are refused the right to conduct their own vocational exam of Plaintiff."

Using similar reasoning, the court in *Fischer v. Coastal Towing Inc.,* 168 F.R.D. 199 (D. Tex. 1996) upheld the use of vocational examinations under the Rule:

> [T]o avoid prejudice, Defendant must have its expert conduct an examination of Plaintiff to rebut the reports of Plaintiff's vocational-rehabilitation expert. Otherwise, Defendant's vocational rehabilitation expert has no way to adequately scrutinize the conclusion of the Plaintiff's expert.

Similarly, in *Olcott v. LaFiandra,* 793 F. Supp. 487 (D. Vt. 1992), the court held that the language of Federal Rule 35, after the 1991 amendment, extended the rule to vocational experts. The court reasoned that good cause existed for the examination because the plaintiff had retained a vocational expert and defendant would be prejudiced if denied the opportunity to perform a similar vocational rehabilitation evaluation of the plaintiff.

Finally, in *Millius v. Tillman*, 2006 WL 1579081 (Del. Super. 2006), the court allowed a vocational specialist to conduct an examination under a state rule similar to Federal Rule 35, noting that "the advisory committee notes for the federal rule . . . state the term 'examiner' was substituted for 'physician' to broaden the scope of the rule to include other certified or licensed examiners." As a result, "[t]he Court believes the broadened language includes vocational specialists."

III. THE PROVISIONS OF RULE 26(c) PERTAINING TO PROTECTIVE ORDERS INCORPORATED IN THE PROPOSED CHANGE TO RULE 35 JUSTIFY THE ELIMINATION OF RULE 35'S "GOOD CAUSE" REQUIREMENT.

In today's practice, parties routinely agree to a Rule 35 examination without requiring a motion to be brought seeking such an examination.[4] As such, the current requirement allowing such examinations only upon court order is an anachronism which can be eliminated in favor of the usual Rule 26(c)(1) motion for protective order. The State Bar believes the current "good cause" provision of Rule 35 is redundant in light of Rule 26(c)(1), which adequately protects parties in particular cases from annoyance, embarrassment, or prejudice. In other contexts, motions for protective order are routinely brought and are typically neither costly nor time-consuming, as suggested by the Comment. The proposed Rule also has the virtue of establishing a clear procedure to be followed in noticing and objecting to an examination, and is consistent with the principles

[4] The current practice is to virtually ignore the motion upon "good cause" provision of Rule 35, in favor of sending a *notice*, usually done unilaterally, without discussion or stipulation by the parties. Where the parties do seek an order, they are forced to incur unnecessary expenses by following Rule 35(a)'s black letter law. This is time-consuming for already overburdened trial courts to consider—on issues that should be resolved either by the parties' simply giving notice or entering into a stipulation. The AzTLA Comment fails to address the reason for the change, which is to free up busy trial judges from having to conduct unnecessary hearings.

that led to the 2003 amendment to Rule 30, allowing the video-recording of depositions as a matter of right.

CONCLUSION

For all of the foregoing reasons, the State Bar requests that the Court grant the Petition to Amend Rules 35 and 37.

RESPECTFULLY SUBMITTED this 29th day of June, 2010.

John A. Furlong
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 29th day of June, 2010.

By: Kathleen Lundgren

Copies were also mailed, this
29th day of June, 2010, to:

Stanley G. Feldman, Esquire
Haralson, Miller, Pitt, Feldman
& McAnally, P.L.C.
One South Church Avenue, Suite 900
Tucson, Arizona 85701-1620

and to:

David L. Abney, Esquire
Law Offices of David L. Abney, Esq.
4025 E. Chandler Boulevard, No. 70-A8
Phoenix, Arizona 85048

By: Kathleen Lundgren

APPENDIX A

STATE BAR OF ARIZONA
CIVIL PRACTICE AND PROCEDURE COMMITTEE

Minutes of June 5, 2008 Meeting
State Bar Headquarters, Phoenix, Arizona

1. ATTENDEES

A. Members Present:

Phoenix:

Chair John W. Rogers; Members John P. Ager, Ellen M. Crowley, Gregorio M. Garcia, Richard A. Halloran, Hon. Robert C. Houser, Jr., Thomas L. Hudson, Matthew J. Kelly, Karen L. Killion, George H. King, William G. Klain, Anne C. Ronan, Barry R. Sanders, Hon. Peter B. Swann, Craig W. Soland, Lawrence G. Tinsley, Jr., and Charles W. Wirken.

By telephone:

Bridget S. Bade, Beth Capin Beckmann, Michael J. Farrell and Sarah Jezarian.

2. CALL TO ORDER

Chair John Rogers called the June 5, 2008 meeting of the 2007-08 Civil Practice and Procedure Committee to order at 4:33 P.M. A quorum was present.

3. GENERAL DISCUSSION ITEMS

A. Approval of Minutes of May 1, 2008 meeting.

1. **MOTION:** Barry Sanders moved that the minutes be approved as circulated. Bill Klain seconded the motion. The motion **PASSED** unanimously.

4. AGENDA ITEMS

A. Agenda Item A: Status of Pending Rule Change Petitions (Appendix 1)

1. Ellen Crowley reported that there were no new rule change petitions filed.

B. Agenda Item J: State Bar Convention CLE (status) (Appendix 10)

1. Bill Klain reported that the materials for the seminar were delivered to the seminar speakers, and that the Power Point presentations were being sent to John Rogers, Chair of the Committee.

2. The Chair said that he will send an email to all of the seminar speakers, copying the IT personnel at his firm, to facilitate loading all of the Power Point presentations on a single laptop computer, by the end of next week.

C. Agenda Item E: Ariz. R. Evid. 701 – 706 (opinion rules) (Appendix 5)

1. The Chair reported that he met with the Board of Governors, and that he circulated this Committee's comments on this subject to the Criminal Practice and Procedure Committee and to the Family Law Section. The Family Law Section had only one small change to the Committee's proposal, but the Criminal Practice and Procedure Committee objected to all of this Committee's proposed changes to the Evidence Rules. In light of these objections, the Chair asked whether the Committee had any reservations concerning its proposals. The Committee had no such reservations.

D. Agenda Item I: Ariz. R. Evid. 408 (offers to compromise) (***action item***) (Appendix 9)

1. Barry Sanders recalled that the subcommittee had previously recommended adopting in their entirety the changes made to Rule 408, Federal Rules of Evidence, into Rule 408, Arizona Rules of Evidence. The subcommittee did have one area of concern, specifically the portion of the federal rule that would permit the use of statements made in settlement talks with regulatory agencies in subsequent criminal prosecutions. Mr. Sanders recalled that the Committee directed the subcommittee to revisit this issue. After the subcommittee reconsidered its position, it changed that position, recommending that Arizona not adopt the portion of Federal Evidence Rule 408 relating to the use of such statements. The subcommittee then circulated a short memorandum detailing its thoughts, including a redline version of its proposed changes to Arizona Evidence Rule 408. The Chair reviewed the subcommittee's work and provided helpful edits to its proposed petition. Mr. Sanders said that if Arizona adopted the portion of Federal Evidence Rule 408 relating to the above-referenced statements, this would encourage scripted comments in settlement negotiations with regulatory agencies. He commented that the more settlement discussions that are admissible under the rules, the more likely it is that lawyers will be called as witnesses. He also noted the concern in the defense bar that authorities would initiate settlement negotiations in order to obtain useable admissions, if this portion of the rule were amended to conform with the federal counterpart. Mr. Sanders said that the subcommittee's prior draft petition referenced the desire for uniformity between the Arizona and the Federal rules of evidences as a motivating factor for the proposed amendments, but in light of the subcommittee's decision not to propose the change with respect to settlement negotiations with regulatory agencies discussed above, the subcommittee removed the reference to uniformity from its draft petition.

2. Bill Klain said that he recalled from the Committee's last discussion of this issue that there was some hesitation about doing away with the use of statements made in settlement for impeachment. He said that there was some thought given to taking an alternative position on this issue.

3. Mr. Sanders said that he remembered that the Committee had discussed the issue referenced by Mr. Klain, and that the only issue that remained to be decided was the

issue concerning the use of statements made in settlement talks with regulatory agencies in subsequent criminal prosecutions.

4. The Chair commented that *Hernandez v. State*, 203 Ariz. 196, 52 P.3d 765 (2002) creates a large exception to Rule 408, *Arizona Rules of Evidence*. He said that he wanted to bring to the Supreme Court's attention that adopting the proposal at issue would reverse the holding of *Hernandez*. The Chair asked the Committee whether any of the Members had any concerns about asking the Supreme Court to overrule *Hernandez* by way of a rule change petition.

5. Mr. Sanders noted that the *Hernandez* decision set out two interesting views concerning the use of settlement discussions, specifically the view of Justice McGregor speaking for the majority, and the dissent authored by Judge Howard. Mr. Sanders commented concerning the tension between the admission of relevant evidence, and the desire to encourage settlement, and pointed out that the Supreme Court sided with the federal interpretation of Rule 408 favoring admission for impeachment purposes, but noted that since the *Hernandez* decision was rendered, Federal Rule 408 was amended. So, Mr. Sanders noted, much of the rationale for the majority opinion in *Hernandez* is no longer valid. Judge Howard, Mr. Sanders related, argued in dissent that the majority opinion's exception to the inadmissibility of settlement discussions swallowed the otherwise exclusionary provisions of Rule 408.

6. The Chair commented that the *Hernandez* decision explained its conclusion in terms of balancing the search for truth against promoting settlement. The decision said that the rule should strike a balance between these objectives, and that it should not matter whether the evidence concerning settlement discussions is admitted directly or as impeachment evidence.

7. Mr. Sanders recalled the broad protections afforded mediation discussions in Arizona law, and asked why there were two sets of rules concerning the admissibility of settlement discussions, depending on whether they were made in a mediation process.

8. The Chair said that Rule 408 could pose a trap for the unwary, given that practitioners often invoke Rule 408 in settlement communications, believing the communications to be protected, but unaware of the exceptions to that protection created by the *Hernandez* decision.

9. Bill Klain was concerned about not allowing the use of highly probative evidence like admissions. At an automobile accident scene, for example, an admission would be very probative. But, if that admission were coupled with an offer to settle, it would not be admissible.

10. The Chair noted that if someone believes that evidence is probative and relevant, and wants to use it no matter what, then there is no point in having Rule 408 at all.

11. Thom Hudson said that he likes the petition. There will be hard cases, but he believes that the petition frames the issue well for consideration.

12. George King noted that exclusion of settlement discussions does impose a cost on the truth-seeking function of litigation, but that the cost is worth paying. He compared the cost/benefit considerations to the attorney-client privilege rule. For example, a party's call to his lawyer after an accident would be extremely probative, but that evidence is unquestionably protected by the attorney-client privilege.

13. The Chair noted the consensus to approve the proposed petition. He also noted that the Committee declined to recommend making the changes made to Rule 408, *Federal Rules of Evidence*, concerning the use of "conduct or statements made in compromise negotiations regarding the claim" that allowed the use of such conduct or statements "when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."

14. **MOTION:** Thom Hudson moved that the Committee recommend amending Rule 408, *Arizona Rules of Evidence*, as described in the petition. George King seconded the motion. The motion **PASSED**, with all but one of the Members in favor.

15. The Chair asked whether there were any comments concerning the proposed petition. He said that the subcommittee will need some editorial leeway, such as to add a redline version showing the proposed changes. Specifically, the Chair noted that there was an extra ")" on page one, line eleven, and an extra quotation mark on page two, note one. The Chair also pointed out that the Criminal Practice and Procedure Committee and the Family Law Section will need to review this proposed petition.

16. **MOTION**: Thom Hudson moved that the Committee recommend that the Board of Governors submit the proposed petition to the Supreme Court. George King seconded the motion. The motion **PASSED** unanimously.

17. Beth Beckmann asked whether the Committee believed that the attorneys practicing in juvenile law should be consulted, considering that severance and dependency matters often involve settlement discussions.

18. The Chair noted that the Board of Governors Rules Committee decides to whom to direct rules petitions for comment.

19. Ms. Beckmann commented that practitioners in juvenile law are often neglected in discussions regarding proposed rule changes.

E. Agenda Item K: Ariz. R. Civ. P. 35 (physical examinations) ***(discussion)*** (Appendix 11)

1. Larry Tinsley recalled that this issue was discussed in the Committee's meeting two months ago, an issue originally raised by Judge Schneider. Specifically, the issue is whether to allow the videotaping of physical examinations under Rule 35, *Arizona Rules of Civil Procedure*, as a matter of right. Mr. Tinsley, Judge Schneider and Judge Swann formed a subcommittee to investigate the possibility of proposing an amendment to Rule 35 to allow

videotaping as a matter of right. The subcommittee, Mr. Tinsley reported, consulted with the plaintiff's and the defense bar. They found that the defense bar was not supportive of videotaping, but that the plaintiff's bar was supportive. The subcommittee proposed some changes to Rule 35, such as eliminating the need to file a motion and obtain an order to allow an independent physical examination. Mr. Tinsley said that in practice, the motion-and-order procedure is not commonly used. Typically, he said that a party will notice an independent physical examination, and then litigate any objections to the notice. Mr. Tinsley thought that the provision in Rule 35 to obtain an order seemed unnecessary, and that would be better to use a model whereby a party serves a notice to obtain an examination, and then the recipient objects to the notice, if appropriate, and the Court rules on the objection. Mr. Tinsley said that the Chair provided edits to the subcommittee's proposed changes to the rule. Since the last time the Committee discussed the issue, the subcommittee removed from the draft proposal the language that would have allowed videotaping of the claimant from the beginning of the day of the examination. Mr. Tinsley said that the current draft proposal from the subcommittee would allow videotaping of an examination as a matter of right, unless good cause is shown to prohibit videotaping, such as where the taping would adversely affect the examination. He did not believe that videotaping would impose an undue burden on any party, but a party could raise an objection on those grounds. Mr. Tinsley recalled that Judge Swann noted that some examiners would raise their fees if the examination were videotaped, and therefore the subcommittee's proposed changes to Rule 35 would require that all such costs would be borne by the noticing party.

2. Karen Killion noted that she is a member of the defense bar, and opined that many experts would not serve as expert examiners of their examinations were videotaped. She recalled a situation where the day before a scheduled examination, the plaintiff indicated that he was going to videotape the examination, the court allowed the requested videotaping, and the expert then refused to go forward with the examination the next day.

3. Mr. Tinsley said that the defense bar did raise this issue with the subcommittee. The subcommittee, after discussion, concluded that adoption of the proposed rule would change the culture of independent examinations. He said that the subcommittee believed that physicians conducting independent examinations would likely adapt to videotaping, and that videotaping is not intrusive. With respect to last-minute notice of videotaping, Mr. Tinsley said that the proposed rule requires that a party provide such notice within five days of the original notice of examination being served.

4. Ms. Killion asked whether it would be better to notice the videotaping with the original notice of examination.

5. Mr. Tinsley said that the rule would allow noticing of videotaping to be included in the original notice.

6. The Chair said that he understood why videotaping would be advantageous, because it would avoid disputes as to what took place during an examination. But, he asked what reasons doctors would have to not want to have examinations videotaped.

7. Ms. Killion said that in the case of a neuropsychiatric examination (e.g., for a person with a traumatic brain injury), if the person knows that they are being videotaped, it might alter the results of the examination.

8. Mr. Tinsley pointed out that the example cited by Ms. Killion is covered in the proposed rule changes by the provision allowing for an exception for good cause shown.

9. Judge Swann said that he had this issue come up before him, and in that case, he ordered that the examination be audiotaped with no notice to the examined party.

10. Judge Houser said that he had the same issue come before him, and that he deals with objections to videotaping on a case-by-case basis.

11. Anne Ronan asked whether most independent physical examinations are in fact videotaped.

12. Peter Collins said that no, most examinations are not videotaped. But, he said that plaintiffs will ask to videotape to avoid intrusive questions or to make the opposing lawyer appear at the examination. Mr. Collins said that he believed that the default of allowing videotaping is the better choice.

13. Thom Hudson noted that Rule 26(c) allows a party to seek an order requiring that the examination be conducted by an individual different from the individual specified by the examining party.

14. Larry Tinsley noted that there are different provisions for objecting to an examination, including the general protective order provisions of Rule 26(c), as well as Rule 35(c), which applies specifically to examinations.

15. The Chair said that Mr. Hudson raised a good point. There is a deadline for raising objections to videotaping of an examination, but what may be missing is informing parties that if the oppose the examination, they must file a motion. The Chair suggested language to add to the proposal to require the filing of any motion concerning the examination within ten days of the service of the notice.

16. George King pointed out that a party must obtain an order before being relieved of the obligation to appear at, for example, a noticed deposition. He said that the mere filing of a motion for protective order is insufficient to avoid that obligation.

17. The Chair said that even though what Mr. King said is true, there are still problems with last-minute motions for protective orders.

18. Mr. Hudson noted that Rule 30 refers to recording depositions by "sound or sound and visual means," while Rule 35 is not technology-neutral in that respect, referring specifically to taping. He pointed out that Rule 30 does require that the means of recording be specified in the notice, and that the rule also requires that the video recording cannot be done in a

away that misrepresents what occurred. He asked whether the subcommittee considered any of these features of Rule 30 in their work on Rule 35.

19. Mr. Tinsley said that the only matter considered along those lines was whether to allow twelve hours of videotaping, and that idea was rejected. He said that the subcommittee did not consider using the technology-neutral language used in Rule 30(b).

20. Judge Swann said that he supports the suggestion of using the technology-neutral language from Rule 30(b), and noted that there could be objections to videotaping if taping in a small room provided an inaccurate representation of what occurred.

21. Bill Klain noted that the term "psychiatrists" are not in the list of allowed examiners in Rule 35.

22. Anne Ronan noted that psychiatrists are physicians, and physicians are on the list of allowed examiners in Rule 35.

23. Bill Klain noted that on page 11-8 of the materials, line 10, there was a passage that was a bit awkward regarding good cause. He suggested changing "unless the parties agree to or the court orders" to "unless the parties agree otherwise or the court orders ...."

24. Ms. Ronan asked whether the subject of an examination has standing to object to videotaping of the examination, for example, if the subject is concerned that the video will end up being posted on YouTube.

25. Judge Swann said that typically, the person being examined wants the examination to be videotaped.

26. The Chair said that he had a few comments. He said that the last section of the proposed rule concerning the situation where a party does not appear for an examination refers to Rule 37(d), but it should refer to Rule 37(b)(2)(E). Then, Rule 37(b)(2)(E) should be modified to include notices of physical examinations.

27. Rick Halloran asked whether the entirety of Rule 37(b) deals just with court orders?

28. Peter Collins suggested that sanctions for failing to appear for a noticed physical examination could be placed under Rule 37(f), with the other sanctions for failing to attend.

29. George King agreed with Mr. Collins' idea concerning Rule 37(f).

30. Thom Hudson also agreed with Mr. Collins' idea.

31. The Chair suggested adding a new subsection, subsection (4), to Rule 37(f) to provide for sanctions for a party who fails to appear for a noticed physical examination. The

Chair said that he had one other question concerning Rule 35(b). In that rule, the Chair noted that any party can file a notice for an examination, but that the rule also gives rights to the examining physician to videotape the examination. The Chair asked whether the right to videotape shouldn't in fact be a right that belongs to the parties, not a right belonging to the non-party examining physician.

32. Mr. Tinsley said that in his practice, one independent medical examining physician routinely videotapes his examinations.

33. The Chair asked whether the party noticing the examination would ordinarily take care of arranging for videotaping, if the examining physician wanted the examination videotaped.

34. Mr. Tinsley said that it could be done in that fashion.

35. The Chair asked whether third parties are given similar rights in other rules.

36. Mr. Hudson commented that it is odd for a third party to be able to serve a notice on a subject such as videotaping an examination.

37. Mr. Tinsley suggested that the examining physicians could be directed to work through the parties if they desired to have an examination videotaped.

38. The Chair noted that in product liability actions, the expert will want to examine the product that is the subject of the suit.

39. John Ager said that it is consistent with allowing a party the right to object to also give the party the right, on behalf of the examining physician, to have the examination videotaped.

40. The Chair compared the proposed changes to Rule 35 to the analogous rule in the family law setting, and noted that this rule (Rule 63, *Arizona Rules of Family Law Procedure*) does not refer to the title of the examiner (*e.g.*, psychologist or physician), but to the subjects of the examination ("mental, physical or vocational condition of a party or any other person").

41. Judge Swann said that in civil cases, vocational experts generally never meet with the subjects of their work. He said that there are very few vocational experts in the state, and that these experts generally rely solely on a review of the individual's records, as opposed to an in-person examination.

42. Mr. Tinsley noted that Rule 35 evolved to deal with mental and physical examinations.

43. Peter Collins said that vocational rehabilitation specialists will do interviews, and others will do examinations in order to determine functional capacity. He said that he has never had a problem with those types of examinations. Typically, he has noticed such examinations and they have been videotaped without objection.

44. The Chair asked whether the rule needed to be broader, to encompass non-doctor experts.

45. Karen Killion cited Rule 35, *Federal Rules of Civil Procedure*, as allowing a "suitably licensed or certified examiner" to perform examinations. She asked whether the subcommittee considered adopting the language from the federal rule as to the qualifications of the examiner.

46. Mr. Tinsley said that the subcommittee did not consider either the suggestion of the Chair or the suggestion proffered by Ms. Killion, as both suggestions were beyond the mandate of the subcommittee.

47. The Chair said that the Board of Governors Rules Committee will ask whether the Committee considered conforming Rule 35, *Arizona Rules of Civil Procedure* to its Family Law counterpart, Rule 63, *Arizona Rules of Family Law Procedure*. At this point, the Chair asked the subcommittee to consider the Committee's comments and revise its proposals accordingly.

F. Informational update regarding e-filing (not on the agenda)

1. Judge Swann related that he was involved with an appearance at the Supreme Court, with Judge Mundell, Michael Jeanes, and Vice Chief Justice Berch. The Supreme Court is considering adopting a unified electronic filing system for all courts in all counties. Judge Swann suspects that such a unified system may take a long time to implement. He recalled the Committee's support of the order in Maricopa County Superior Court making e-filing mandatory in civil cases by represented parties. Judge Swann believes that Maricopa County should proceed full speed ahead with e-filing, despite the pendency of the Supreme Court's comprehensive e-filing project. He asked the Committee Members whether the Committee would waiver in its support for the Maricopa County e-filing program.

2. The Chair noted that the views of the Committee were communicated through the appropriate channels, not directly to the Supreme Court, in light of Supreme Court's consideration of a comprehensive project.

3. Judge Swann then asked the communication regarding the Committee's continued support for the current Maricopa County e-filing program be made to the State Bar President. He said the question is whether the Committee's position regarding the Maricopa County e-filing program has changed. At least, Judge Swann asked for the Committee to have its position recorded in the minutes.

4. The Chair noted that the minutes of the Committee's meetings are available to the public. The Committee was very much in favor of the Maricopa County e-filing program. The Chair reported that Michael Jeanes, Clerk of the Superior Court, had made Maricopa County ready for electronic filing in all types of cases. The Chair said that he would be disappointed on a personal level if Maricopa County delayed its electronic filing program in order to wait for the completion of the Supreme Court's comprehensive project.

5. Judge Swann expressed his concern that without reaffirmation of the Committee's support for Maricopa County, the Supreme Court might take action to delay Maricopa County's e-filing program, while it works on creating an e-filing program for the other counties.

6. The Chair said that this will likely be a bottom-up process, considering that Michael Jeanes has been working on electronic filing since 2003.

7. Judge Swann said that the Chief Justice of the Arizona Supreme Court is committed to electronic filing.

8. **MOTION:** Judge Swann moved that the Committee submit a memorandum to the President of the Arizona State Bar indicating that the Committee continues to hold its previously-expressed opinion in support of the order authorizing electronic filing in Maricopa County, despite the potential of a state-wide electronic filing initiative. Thom Hudson seconded the motion. The motion **PASSED** unanimously.

G. Agenda Item G: Ariz. R. Civ. P. 45 (subpoena) (***discussion***) (Appendix 7)

1. Matt Kelly identified the major issues for the Committee concerning this matter. One issue is a proposed form for subpoenas. Another issue is whether there ought to be a meet-and-confer requirement as between the issuing party and the recipient of a subpoena, if there is a dispute, prior to either side seeking Court intervention to resolve the dispute. Another issue is whether a recipient can condition compliance with a subpoena on payment of fees, other than the fees allowed by statute for copying, mileage, etc. Mr. Kelly reported that the subcommittee suggested circulating its proposals for comment.

2. George King said that the language "all and singular business and excuses being laid aside" in the proposed form subpoena (at the top of page 7-20) was confusing and unnecessary. He said that the form should not list actual fees that might be allowed by statute, but that the form should only cite the statute itself, in the event the amount of the fees, or the items allowed, are amended by the Legislature. Mr. King also said that the form should indicate (on page 7-22 of the materials) that the recipient should serve copies of any objections on all parties to the action.

3. Mr. Kelly said that the party who has the subpoena issued and served is responsible for distributing any objections to the other parties.

4. Rick Halloran said that the last paragraph on page 7-20 of the materials is confusing.

5. Mr. Kelly indicated that the language of that paragraph comes from Rule 45 as it currently exists. He noted that the charge to the subcommittee was to see if Rule 45 could be improved.

6. Mr. Halloran said that the above-referenced confusing paragraph did not track the language from Rule 45.

7. Anne Ronan said that it made sense to her to use bullet points to clarify this confusing paragraph.

8. Craig Soland said that there was a typographical error on page three (page 7-21 of the materials) of the form subpoena. Specifically, he said that paragraph (v) under the line "You may object to this subpoena if" should read "the subpoena subjects you to an undue burden" (language added to the existing text is underlined).

9. The Chair said that he will circulate a Word version of the draft form subpoena to the Committee. He commented that Rule 45 is a very difficult rule to understand. He said that it makes sense to take the opportunity now to make the language of Rule 45 simple. He suggested that the subcommittee look at the language of the new federal rule (Rule 45, *Federal Rules of Civil Procedure*), which was made more simple. Also, the Chair suggested that the subcommittee compare Rule 45 to its counterpart in family law, Rule 52, *Arizona Rules of Family Law Procedure*. He said that the subcommittee should propose that both of these rules e changed and both should have the same forms. The Chair noted that the Family Law Procedure rules had headings, which he found useful. He indicated that the Committee will take up this issue in September in the 2008-09 Committee year.

10. Greg Garcia said that he was recently appointed to the Committee, and that he had just started getting notices.

11. The Chair expressed his deep appreciation to the Committee Members for their dedication and hard work over the past year.

5. ADJOURNMENT

MOTION: Chas Wirken moved to adjourn the meeting. Bill Klain seconded the motion. The motion was **PASSED** unanimously, and the meeting was adjourned at 5:57 P.M.

Submitted this 26th day of August, 2008

/s/ George H. King

George H. King, Secretary
Civil Practice & Procedure Committee