AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

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Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
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RE: Proposed Amendment to Rule 35: Physical and Mental Examinations

Dear Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this suggestion to amend Rule 35 regarding compulsory medical examinations ("CMEs")[1] after hearing extensive complaints about discrepancies in the application of the rule by the courts, especially when compared to similar state rules. Rule 35 has not been amended since 2007, when the Advisory Committee on Civil Rules ("Advisory Committee") completed its general restyling of the Federal Rules of Civil Procedure. The last substantive change to the rule was made by amendment in 1991. It seems timely to review Rule 35 and issues in its application that have arisen in the decades since it was last amended. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, civil rights cases, consumer cases, class actions, and other civil actions, and regularly represent clients who are subjected to improper questioning and abuse during CMEs.

I. A Medical Exam Under Rule 35 Differs from a Patient Seeking Medical Care

Under Rule 35, a court may order a party whose mental or physical condition is in controversy to undergo a physical or mental examination by a licensed or certified examiner chosen by the party to the litigation. This medical examination has been referred to by many different names, including an independent medical examination ("IME") and a defense medical examination ("DME"). But these terms are inapt and imprecise. For instance, using the term "independent" is inaccurate, as the medical examiner is retained by the requesting party and is not truly providing an independent opinion.[2] While these examinations disproportionately affect

[1] Courts in Clay County, Florida, refer to the medical examinations as "compulsory medical examinations" or "CMEs" because the physician or healthcare provider was not chosen by the court" and thus, cannot be referred to as "independent" to the jury. CLAY COUNTY CLERK OF COURT, GUIDELINES FOR COUNSEL REGARDING COMPULSORY MEDICAL EXAMINATIONS (CME) CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360(A)(1)(A) & IF ORDERED (B), AS WELL AS 1.360(B) AND 1.390(B) & (C) (Nov. 2, 2020).

[2] The independent nature of the medical evaluation is especially questionable when insurers hire the evaluators. Shanil Ebrahim et al., *Ethics and Legalities Associated with Independent Medical Evaluations*, 186(4) CAN. MED. ASS'N J. 248 (Mar. 4, 2014); Robert F. Spencer, Letter to the Editor, *Are Independent Medical Examiners Truly Independent?*, PAIN PHYSICIAN J., 2010, at 92 ("When physicians receive a substantial portion of their income from

plaintiffs bringing personal injury claims, they can be ordered for any party; thus, DME is too narrow a term.[3] AAJ believes that compulsory medical examination or "CME" accurately captures the nature of these examinations, which are outside the scope of a standard doctor-patient relationship and are not voluntary.

II. Federal Courts Have Applied the Rule Narrowly, Resulting in Unfair and Traumatizing Treatment of Injured Plaintiffs

Unlike many state court rules, there is no requirement in Rule 35 that a plaintiff be accompanied to a medical examination by a representative[4] or that the examination be recorded[5]. Frequently, this results in an examination well beyond the scope authorized in the court's order under Rule 35(a)(2)(B). If the plaintiff, who is subjected to the examination, questions the medical professional performing the examination, they are often met with disparagement, belittling, and worse. In some instances, the plaintiff may be afraid to question the authority of the medical professional or may not have the confidence, language skills, or fortitude to do so. For plaintiffs who suffer from a variety of serious injuries, including traumatic brain injuries, post-traumatic stress disorders, or psychological disorders, these hostile interactions can inflict additional harm. Inappropriate, aggressive medical examination questions are designed to confuse and even trap plaintiffs, who just want the examination to stop but are unable to interrupt the relentless nature of certain medical professionals.

Importantly, the medical examination is not performed by a neutral third party, but by an examiner engaged by an adverse party—completely different from medical treatment sought by the plaintiff. There is considerable risk that the exam could become a de facto deposition, where privileged and irrelevant subjects may be discussed and reported without any knowledge of plaintiff's counsel. Additionally, some medical professionals repeatedly are engaged by defense interests, such as insurance companies, to perform CMEs. Whereas an individual plaintiff is only undergoing the examination due to a court order, the medical professional has an existing relationship with opposing counsel.[6]

If the plaintiff attorney brings the matter of the improper medical exam to limit evidence outside the scope of the order, it is often not well-received and properly limited by the court. Even worse, juries are often more inclined to believe a well-spoken and well-dressed medical

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performing IMEs (or if their hourly rate for IMEs is significantly greater than their hourly rate for patient care), they will not be independent.").

[3] *Schlagenhauf v. Holder*, 379 U.S. 104, 113 (1964) ("Rule 35, on its face, applies to all 'parties,' which, under any normal reading, would include a defendant.").

[4] *See* Samuel D. Hodge, Jr., Melissa Thomas, & Connor Lacy, *A Guide to the Independent Medical Examination*, 25(2) ALB. L.J. SCI & TECH 339, 358 (2015) ("The federal courts have been largely uniform in rejecting the right for an attorney to be present at an IME.").

[5] *Id.* at 366 ("The federal district courts generally hold that recording devices will not be allowed unless good cause for its use is shown.").

[6] Dorothy Sims, Chris Dove, & Richard Frederick, *Transparency in Forensic Exams*, 24 NEV. L.J. 531, 537 (2024) ("Because the expert is paid by the defendant, the expert can expect future business or referrals if her testimony is successful at defeating the claim or suppressing the settlement value of the claim in the event the jury goes with the defense expert's opinion.").

professional—even one who denies wrongdoing on the stand—than a plaintiff from a lower socioeconomic background who may have difficulty articulating the harm caused by a barrage of questioning. This is especially true when the plaintiff is already suffering from underlying physical or mental injury let alone understanding the medical terminology used by the medical professional.

III. Two Proposed Rule Changes Would Solve the Problem

AAJ proposes two changes to the rules that would address these troubling issues. The first change would allow for a representative of the party being examined to be present at the medical examination. Not only does the presence of representative prevent disparagement of the plaintiff, but it would also ensure that the plaintiff's attorney can properly assess whether the medical examination was properly given and reported.[7] Second, AAJ recommends adding an option in the rule to record the examination. The changes would ensure that any inconsistencies on what transpired at the examination can be reviewed and resolved by the court while maintaining any privacy concerns of the person being examined.

A. Add an optional representative for the party being examined

The presence of the representative would be discretionary to ensure that the party undergoing the medical exam is comfortable with the presence of an additional person during the medical examination. The proposed text (attached) would make clear that the representative may not disrupt the examination. If the medical examination is conducted properly, there should be no disruption whatsoever. However, if the CME results in disparagement or beratement of the party being examined, the representative can assist in stopping the harassment. The accompanying Committee Note could provide examples of individuals who are considered appropriate representatives, including the counsel of record and other persons designated by the counsel of record. Importantly, the parent or guardian of a minor child should *not* be considered the designated representative under this amendment, as that individual may also need to attend a medical examination with the child to provide care and comfort.[8]

B. Add a recording option

The second change would permit the party being examined—or that party's representative—to record the examination. Again, the recording is a discretionary option, but may be especially helpful for the plaintiff who does not wish for a representative to be present during a psychological examination. A recording ensures accountability and impartiality in the medical examination and deters a medical professional from conducting an exam where the plaintiff is manipulated, exposed to severe distress or psychological exploitation, or treated in an

[7] *Id.* at 540 ("When courts deny an injured party's request to videorecord their examination by a defense medical or psychological expert, the court deprives the injured party of a meaningful way of determining whether the expert properly administered the test and then correctly reported the results.").

[8] *See, e.g.*, Fla. R. Civ. P. 1.360(a)(1)(C) (providing that "[a]ny minor required to submit to examination pursuant to this rule shall have the right to be accompanied by a parent or guardian at all times during the examination, except upon a showing that the presence of a parent or guardian is likely to have a material, negative impact on the minor's examination").

unprofessional manner. Recordings could be audio only or video, depending on the type of examination with the option of allowing the party to select the type of recording.

Studies of recorded CMEs reveal a number of disturbing behaviors by medical professionals, even by those who knew they were being recorded. These documented failures include: (1) tests that were never administered by a trained professional; (2) misrepresentation of tests, including falsely claiming that tests were performed; (3) complete abandonment of standardized procedures; and (4) changing or improperly influencing test answers.[9] A recording can document whether the medical examination was properly conducted and whether the reported results comport with the examination and even help determine whether the medical professional was competent to perform the exam.[10]

C. Privacy concerns are adequately addressed with the proposal

Privacy concerns are not a valid reason to oppose this suggestion. While AAJ strongly supports privacy protections for plaintiffs, the recording would be optional for the party undergoing the examination and is designed to ensure transparency. The privacy interest belongs to the person undergoing the examination, not the medical professional conducting the examination.[11]

Some arguments against video recording (and a representative attending the examination) ignore the realities of modern litigation as well as expectations regarding video recordings. At numerous stages in a case, including depositions, hearings, and trial, parties are questioned and recorded with multiple people present.[12] People are aware that mobile phones and cameras are capturing their movements and are aware that their images are frequently captured on camera. Precluding a party from recording the exam affords the medical professional more protection than if they simply walked across the street and were video recorded by CCTV cameras or other people.[13]

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[9] The article details a litany of problems with medical exams, including medical examinations that were not actually conducted, a medical examination conducted by a secretary instead of a licensed medical professional, stating that the results of the medical examination were normal when the video recording indicated otherwise, altering the answers provided by the examinee, conducting the examination next to a construction site, and providing prompts to the plaintiff to answer the question. *See* Sims et al., *supra* note 6, at 549–55.

[10] A recent article regarding examinations performed in Washington state documented problems with the medical examinations, including over-reliance on doctors well-past retirement age: "In a recording of Lorick's [injured truck driver's] most recent exam in September 2024, the examiner appears to urinate on himself. The doctor, in his late 80s, is shown standing over Lorick during the exam. As the doctor turns to the camera, a dark spot on his pants can be seen where there was not a spot before. The doctor then quickly exits the room, returning shortly afterward to finish the exam. 'He seemed to be so mentally out-of-it that he didn't even notice it was a concern,' said David Lauman, a lawyer at the firm representing Lorick." Lizz Giordano, *Retired Docs Earn Millions Examining Injured Washington Workers*, Cascade PBS, Aug, 22, 2025.

[11] Hodge, Jr., et al., *supra* note 4, at 364 ("The privacy interest at an independent medical examination is that of the patient's and not the doctor's privacy right. Therefore, it is the patient's decision to waive their privacy right and allow the exam to be videotaped.").

[12] Sims et al., *supra* note 6, at 581.

[13] *Id.*

IV. State Courts Rules Provide Successful Examples

Many state courts have updated their rules and provide a template for modernizing Rule 35.[14] One state to consider is California, which authorizes both an "observer" and the recording of the proceeding:

> (a) The attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination.
>
> (b) The observer under subdivision (a) may monitor the examination, but shall not participate in or disrupt it.[15]

The California rule also affirmatively permits a motion for a protective order if either the medical examiner or the observer become abusive.[16]

Washington state has a similar rule which provides for both an observer and an opportunity to make an audiotape recording of the examination with a videotape recording available by consent of the parties or order of court:

> Unless otherwise ordered by the court, the party being examined or that party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner. A videotape recording of the examination may be made on agreement of the parties or by order of the court. [17]

More updated state rules permit video recordings as the optimal method to record medical examinations. Some states may specify that, "The plaintiff also has the right to designate an additional person to be present and video record the examination."[18] These rules provide greater flexibility for who accompanies the party to the medical examination. Arizona's rule similarly specifies that the person recording the examination may be a different person than the representative attending on behalf of the person to be examined.[19] Finally, while Florida's rule[20] is similar to the federal rule, extensive local rules provide for both representatives to

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[14] *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 3235); Ariz. R. Civ. P. 35(b)–(c); Idaho R. Civ. P. 35(a)(3); 735 ILL. COMP. STAT. ANN. 5/2-10039(d); and Pa. R. Civ. P. 4010(a)(4)–(5).

[15] Cal. Civ. Proc. Code § 2032.510.

[16] While this language might serve as a deterrent, it is not needed at the federal level where Rule 26 would already permit a party to seek a protective order.

[17] Wash. Super. Ct. Civ. R. 35.

[18] 735 ILL. COMP. STAT. ANN. 5/2-10039(d).

[19] Ariz. R. Civ. P. 35(b)–(c) (requiring 30 days' notice of the examination, including whether, how, and by whom it will be recorded).

[20] Fla. R. Civ. P. 1.360.

examinations and recordings to be made by the party undergoing examination.[21] These rules provide additional protections to the party undergoing examination, such as prohibiting questions from the medical examiner to the party being examined regarding fault and prohibiting the defense attorney from recording the examination.[22] While this section is not a comprehensive review of state rules, it may provide the Advisory Committee with some helpful guidance on the success of some states in addressing the problems caused by traumatizing CMEs.

V. Conclusion

AAJ urges the Advisory Committee to revise Rule 35 to protect parties from abusive and traumatizing treatment when undergoing court-ordered medical examinations through two simple, discretionary changes: (1) providing for a representative to attend with the party, and (2) allowing for a recording of the examination that would protect the party from traumatic or inappropriate treatment while ensuring flexibility when it may be needed. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,

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President
American Association for Justice

[21] *See* SEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA, GUIDELINES REGARDING COMPULSORY MEDICAL EXAMINATIONS CONDUCTED PURSUANT TO FLA. R. CIV. P. 1.360(A)(1)(A) AND 1.360(B) (April 2017), ("One of Plaintiff's counsel, or a representative thereof, a videographer, a court reporter, an interpreter, if necessary, and, if a minor, a parent or guardian may attend the compulsory medical examination. No other persons may attend without specific order of the Court.").

[22] Order Compelling 1.360 Examination, Hon. Paul L. Huey, 13th Judicial Circuit, Hillsborough Cnty. Fla. (last visited Dec. 17, 2025) (requiring "all parties involved" to observe enumerated conditions, such as "2. …. Questions pertaining to fault, when the Plaintiff hired his/her attorney, who referred the Plaintiff to any doctor, and what the Plaintiff to his attorney or any investigators are NOT permitted" and "6. Neither Defendant's attorney nor any of Defendant's representatives may attend, or observe, record or video the exam.").

ATTACHMENT

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Representative at Examination.* The party being examined may have a representative present at the examination, who may observe but not disrupt the examination.

(3) *Recording of Examination.* Unless otherwise ordered by the court, the party being examined or that party's representative may record the examination by video or alternative means, which shall be made in an unobtrusive manner.

(4)(~~2~~) *Motion and Notice; Contents of the Order.* The order:

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

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) *Request by the Party or Person Examined.* The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued 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) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

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

(6) *Scope.* This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.