

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a licensed physician or a mental examination by a licensed psychologist, or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requestor a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the person against whom the order is made shows that it is unobtainable. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of the deposition of the examiner in accordance with the provision of any other rule.

Advisory Committee's Notes
1993

Rule 35(a) is amended to permit the court to order a mental examination by a “licensed . . . psychologist.” The change, which is in accord with a 1988 Congressional revision of Federal Rule 35(a), reflects the increasing incidence of claims involving mental or emotional condition in civil litigation and the corresponding need for increased resort to psychologists. In Maine, licensed psychologists are those practitioners defined in 32 M.R.S.A. § 3811(2) and qualified and licensed as provided in 32 M.R.S.A. §§ 3831(2), 3832-36. A psychologist from another state satisfies the rule if qualified and licensed under similar provisions of that state’s law.

The amendment also expressly requires that examining physicians be “licensed.” The rule thus requires licensure pursuant to 32 M.R.S.A. §§ 3270, 3271-3276, for physicians or 32 M.R.S.A. §§ 2571-2573 for osteopathic physicians, or similar provisions in another state.

The amendment does not extend as far as the December 1991 amendment of the federal rule to include any “suitably licensed or certified examiner,” because of the extreme range and variety in licensing provisions and standards.

Rules 35(b)(1) and (3) are amended for conformity with the amendment of Rule 35(a) by using the term “examiner” to refer to either a licensed physician or a licensed psychologist. *Cf.* Rule 35(b)(2).

Advisory Committee's Note
October 1, 1970

Rule 35(a) is amended to permit an order against a party for the examination of a person in his custody or under his legal control. Thus, a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. It is also made clear that examination may be obtained where the blood group of the person to be examined is in controversy.

In contrast with the elimination from Rule 34 of any requirement of a showing of "good cause" and of any requirement for a prior court order, for the purpose of obtaining production of documents or things, Rule 35 preserves those requirements in the sensitive area of physical and mental examinations. In

addition, it must be shown that the relevant physical or mental condition is "in controversy".

Rule 35(b)(1) is amended to correct a previously existing imbalance. The amended rule will entitle, as the existing rule does not, the examined party to receive from the party causing the physical or mental examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment also requires that the written report of the examining physician include the results of all tests made, such as results of x-rays and cardiograms.

Rule 35 (b)(3) expressly declares two points of existing practice: (1) The provisions of Rule 35(b) come into play even if the physical or mental examination is by consent. *See* Field, McKusick and Wroth § 35.4. (2) The existence or non-existence of the right to get a report under Rule 35(b) does not affect the discovery of such reports under the provisions of other rules--such as Rule 34 or 26(b)(3) or 26(b)(4).

Advisory Committee's Note
November 1, 1969

The present amendment is identical to F.R. 35(b) (2). When the rules were promulgated, there was no physician-patient privilege recognized in Maine. Accordingly, at that time there was no occasion to adopt a rule like F.R. 35(b) (2), which deals with waiver of any privilege the examined party may have if he requests and obtains a report of an examination under Rule 35. 1968 Laws, c. 544, § 82 created a privilege for communications between a person and a psychologist or psychological examiner. 32 M.R.S.A. § 3815. 1969 Laws, c. 378 created a physician-patient privilege. 32 M.R.S.A. § 3153. The psychologist privilege is by its terms unlimited, but the physician's privilege does not exist "when the physical or mental condition of the patient is at issue in such action" (the very same circumstance when an examination under Rule 35(a) is obtainable) or "when a court in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice." *Ibid.* Although the 1969 physician-patient privilege is too limited to appear to require adoption of Rule 35(b) (2), the Committee believes the existence of the broader psychologist-patient privilege makes it advisable to provide for a waiver where the examined party asks for and gets a copy of the examination report.

Adoption of the amendment is not designed to foreclose further judicial development of the doctrine of waiver. There is authority for the proposition that

bringing an action in which the existence of a physical ailment is an essential element is a waiver of the privilege for all communications concerning that ailment, a position vigorously espoused by Wigmore. *Wigmore on Evidence* § 2389 (3d ed. 1940). Other authorities hold that testimony by the plaintiff about the ailment is such a waiver, and still others that calling any physician to testify about it is a waiver as to all communications with all doctors. A sufficient reason for this amendment is that a defendant whose physical or mental condition is in controversy may be examined under Rule 35, and he could not be said to waive anything by being sued. Therefore, the adoption of the amendment warrants no inference as to what else may constitute a waiver, but the matter is left open for decision in the ordinary processes of adversary litigation.

It is to be noted that the examination that may be ordered under Rule 35(a) can be conducted only by a physician. However, the waiver which under Rule 35(b)(2) results from the examining party's requesting and obtaining a copy of the physician's report applies to "the testimony of every other *person* who has examined or may thereafter examine him in respect of the same mental or physical condition." (Emphasis added) Thus, the waiver extends to a psychologist, even though an examination by the psychologist could not be ordered under Rule 35. Such is the policy of F.R. 35(b) (2) and it seems to the Committee to be proper policy in Maine to the extent there is a privilege in this area.

Reporter's Notes December 1, 1959

This rule is substantially the same as Federal Rule 35. There is no provision for physical or mental examination by court order in Maine, but examinations are permitted by consent as a matter of course in most personal injury cases.

Even if the examination is had without resort to the rule, it is intended that the examined party be able to obtain upon request a copy of the examining doctor's report in accordance with Rule 35(b). To construe the rule otherwise would mitigate against the sensible practice of examination by consent. If the report is thus furnished to a plaintiff, the defendant may in turn demand a like report from the plaintiff of any examination, previously or thereafter made, of the same physical or mental condition.