

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

At the Supreme Judicial Court holden at Boston within and
for said Commonwealth on the seventh day of June, in the year of
two thousand and twenty-three:

present,

<u>KIMBERLY S. BUDD</u>)	Chief Justice
)	
<u>FRANK M. GAZIANO</u>)	
)	
<u>DAVID A. LOWY</u>)	Justices
)	
<u>ELSPETH B. CYPHER</u>)	
)	
<u>SCOTT L. KAFKER</u>)	
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<u>DALILA ARGAEZ WENDLANDT</u>)	
)	
<u>SERGE GEORGES, JR.</u>)	

ORDERED: That the Massachusetts Rules of Civil Procedure
adopted by order dated July 13, 1973, as amended, to take effect
on July 1, 1974, are hereby amended as follows:

Rule 35

By deleting Rule 35 and inserting in
lieu thereof the attached Rule 35.

The amendment accomplished by this order shall take effect on September 1, 2023.

ORDERED:

<u>KIMBERLY S. BUDD</u>)	Chief Justice
)	
<u>FRANK M. GAZIANO</u>)	
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<u>DAVID A. LOWY</u>)	Justices
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<u>ELSPETH B. CYPHER</u>)	
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<u>SCOTT L. KAFKER</u>)	
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<u>DALILA ARGAEZ WENDLANDT</u>)	
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<u>SERGE GEORGES, JR.</u>)	

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 suitably licensed or certified examiner or to produce for examination a 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 Examiner.

(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 requesting party a copy of a detailed written report and findings of the examiner, 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 party is unable to obtain the report and so establishes. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and may exclude from trial the testimony of an examiner who fails or refuses to make a report.

(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 available 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; but the party does not otherwise waive any right to object at the trial to the introduction into evidence of the report or any part thereof.

(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 an examiner's report or the taking of a deposition of an examiner in accordance with the provisions of any other rule.

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

Reporter's Notes--2023

This amendment responded to the Supreme Judicial Court opinion in *Ashe v. Shawmut Woodworking & Supply, Inc.*, 489 Mass. 529 (2022). In *Ashe*, the court requested the Standing Advisory Committee on the Rules of Civil Procedure “to consider whether an amendment or other guidance to rule 35 is in order consistent with this opinion” (footnote 9).

At issue in *Ashe* was whether a Superior Court order to submit to a physical examination by a neuropsychologist satisfied the language of Rule 35, which provided that a court may order a party to submit to a mental or physical examination by a *physician* upon a showing of good cause. The court held that a neuropsychologist was a “physician” within the meaning of Rule 35, and upheld the order to submit to a physical examination.

The amendment to Rule 35 replaced the word “physician” with the words “suitably licensed or certified examiner.” This amendment is consistent with a 1991 amendment to Rule 35 of the Federal Rules of Civil Procedure adding similar language to the federal rule. The 1991 Notes of the Advisory Committee on the Federal Rules of Civil Procedure are instructive in interpreting the 2023 amendment to the Massachusetts rule:

The requirement that the examiner be *suitably* licensed or certified is a new requirement. The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subject 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....The revision is intended to encourage the exercise of ...discretion, especially with respect to examinations by persons having narrow qualifications.

The title of Rule 35(b) has been revised to reflect the change in the rule.

In addition, stylistic changes have been made to Rule 35 to eliminate references to masculine pronouns. No substantive changes were intended.