

## MASSACHUSETTS RULES OF CIVIL PROCEDURE

### RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

#### DRAFT 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.