

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13152

CAROLE A. ASHE & ANOTHER
PLAINTIFF-APPELLANTS

v.

AM PM SAFETY LLC & OTHERS
DEFENDANT-APPELLEES

On Appeal From a Judgment of the Suffolk Superior Court

BRIEF OF *AMICUS CURIAE*
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION
IN SUPPORT OF SUPERIOR COURT'S ORDER

Kyle E. Bjornlund, BBO No. 663909
kbjornlund@cetllp.com
Grant D. King, Admission Pending
gking@cetllp.com
Two Seaport Lane, 10th Floor
Boston, MA 02210
Tel: (617) 217-5500
Fax: (617) 217-5200

On the Brief:

Olivia Rayburn
Student of Northeastern University School of Law

Dated: November 17, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES3

STATEMENT OF INTEREST.....6

DECLARATION PURSUANT TO MASS. R. A. P. 17(c)56

STATEMENT OF THE ISSUE PRESENTED7

STATEMENT OF THE CASE.....7

STATEMENT OF THE FACTS7

SUMMARY OF ARGUMENT 7-8

ARGUMENT9

 I. This Court should interpret Rule 35 to include psychologists
 under the definition of “physician.”9

 II. The majority of states along with the Federal Rules of Civil
 Procedure have amended their equivalent Rule 35 to consider
 psychologists as qualified to conduct examinations under Rule
 3513

 a. The 1991 amendment to the Federal Rules of Civil
 Procedure display that psychologists are to be considered
 a competent examiner under Rule 3514

 b. Of the five other states that only include “physicians” in
 their language of Rule 35, psychologists are considered
 to be valid examiners by some courts16

CONCLUSION 18-19

MASS. R. A. P. 16(k) CERTIFICATION.....

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

CASES:

<i>Avila v. Superior Court</i> , 816 P.2d 946, 949 (Ariz. Ct. App. 1991).....	16
<i>Commonwealth v. Durham</i> , 446 Mass. 212, 221 (2006)	9
<i>Hayes v. Bette & Cring, LLC</i> , 135 A.D.3d 1058, (N.Y. App. Div. 2016)	17-18
<i>In Interest of J.A.</i> , 283 N.W.2d 83 (N.D.1979).....	15
<i>In the Interest of T.M.W.</i> , 553 So.2d 260 (Fla. 1st DCA 1989).....	15
<i>Kavanagh v. Ogden Allied Maintenance Corp.</i> , 92 N.Y.2d 952, 954 (1998).....	17-18
<i>Kelly v. Brown</i> , 529 A.2d 271 (Del.Fam.Ct. 1987).....	15
<i>Knauer v. Anderson</i> , 709 N.Y.S.2d 386 (Sup.Ct. Erie Co. 2000, Howe, J.)	17-18
<i>Massey v. Manitowoc Co.</i> , 101 F.R.D. 304 (E.D.Pa.1983).....	11-12, 15
<i>Mooney v. Osowiecky</i> , 215 A.D.2d 839 (1995).....	17
<i>Nahabedian v. Superior Court (Falkner)</i> , 257 Cal. Rptr. 254 (App. 2d Dist. 1989).....	15
<i>Ortiz v. Examworks, Inc.</i> , 470 Mass. 784, 788 (2015)	9, 13
<i>Paris v. Waterman S.S. Corp.</i> , 218 A.D.2d 561, 563–564 (1995).....	17
<i>Shaw’s Supermarket, Inc. v. Melendez</i> , 488 Mass. 338, 342 (2021)	9
<i>Stampe v. Noyes</i> , 1989 WL 1143873, at *1 (Va. Cir. Ct., Sept. 7, 1989).....	16

Thynne v. City of Omaha,
217 Neb. 654 (1984).....11-12, 15

Wills v. Red Lake Municipal Liquor Store,
350 N.W.2d 452, 454 (Minn.App.1984)..... 11

RULES:

251 Code Mass. Regs. § 3.03..... 10

Ala. R. Civ. P. 35(a)..... 11

Alaska R. Civ. P. 35(a)..... 11

Ark. R. Civ. P. 35(a)..... 11

Cal. Code Civ. P. § 2032.020 (c)(1) 11

Colo. R. Civ. P. 35(a)..... 11

Fed. R. Civ. P. 3511-16

La. C.C.P. Art. 1464 (A) 14

Mass. R. Civ. P. 358-18

N.C. Gen. Stat. § 1A-1, Rule 35(a)..... 16

Neb. Ct. R. Disc. § 6-335(a)..... 14

NY CLS CPLR § 3121 (a)..... 16

PA. R.C.P. No. 4010(a)(1) 14

S.C.R.C.P. 35 (a)..... 16

S.D. Codified Laws § 15-6-35(a)..... 16

STATUTES:

G.L. c. 90, § 34 M..... 13

G.L. c. 112, §§ 118 – 120..... 10

G.L. c. 233, § 79G10

OTHER SOURCES:

Physician, AMERICAN HERITAGE DICTIONARY (5th Ed. 2020) 9-10

Physician, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020) 9-10

STATEMENT OF INTEREST

The Massachusetts Defense Lawyers Association (“MassDLA”), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. Members of the MassDLA do not include attorneys who, for the most part, represent claimants in personal injury litigation. The purpose of the MassDLA is to improve the administration of justice, legal education and professional standards, and to promote collegiality and civility among members of the Bar.

To promote its objectives, MassDLA participates as *amicus curiae* in cases raising issues of importance to its members, their clients and the judicial system. The MassDLA believes that this is such a case and that its perspective can assist the Court in resolving the important issues raised by this appeal.

DECLARATION PURSUANT TO MASS. R. App. P. 17(c)5

Pursuant to Massachusetts Appellate Procedure Rule 17(c)5, *amicus curiae* hereby declares the following:

- a. This brief was not authored in whole or in part by any party;
- b. The preparation or submission of this brief was not funded by any party;
- c. No other person or entity, other than the *amicus curiae*, contributed money intended to fund the preparation or submission of this brief.

- d. The *amicus curiae* does not represent and has not represented one of the parties to the present appeal in another proceeding involving similar issues, nor was the *amicus curiae* a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF THE ISSUES PRESENTED

Whether the trial court erred in granting Defendant's Motion to Compel Plaintiffs to submit Plaintiff's Conservatee to a psychological exam pursuant to Mass. R. Civ. P. 35 by a psychologist given that good cause and time, place, and manner are requirements of the rule.

STATEMENT OF THE CASE

The MassDLA, as *amicus curiae*, adopts the parties' statement of the case regarding the prior proceedings.

STATEMENT OF THE FACTS

The MassDLA, as *amicus curiae*, adopts Defendant-Appellees Shawmut Woodworking & Supply Inc.'s Statement of the Facts.

SUMMARY OF THE ARGUMENT

Appellants' argument centers on the explicit ability of a trial court judge to order a Plaintiff or Plaintiff's conservatee to present to a "physician" for a physical or mental examination under Mass. Civ. R. P. 35 ("Rule 35). Central in Appellees' argument, and inherent in the Superior Court's decision, is that a Rule 35 physical or mental examination is a component of the overall discovery procedure and, therefore, should coincide with the general principals of discovery, namely, they should facilitate resolution of case issues in a speedy, fair, and transparent manner. The MassDLA is compelled to weigh in on Appellants' position because it would undermine the speedy, fair, and transparent discovery process by uniformly restricting the discovery of traumatic brain injuries to the review of medical doctors while it is evident that other clinical health-care providers offer equal if not greater insight.

To assist with this inquiry, the MassDLA's brief argues that: (1) the definition of "physician" under Rule 35 should be interpreted by this Court to include psychologists because psychologists are highly trained, engaged in health services, and thoroughly qualified to perform an examination consistent with Rule 35; and, (2) the vast majority of jurisdictions as well as the Federal Rules of Civil Procedure have been amended to affirmatively allow for psychologists to conduct

Rule 35 examinations but such amendments should not be interpreted to constrain this Court from allowing psychologists to perform examinations under Rule 35.

ARGUMENT

I. THIS COURT SHOULD INTERPRET RULE 35 TO INCLUDE PSYCHOLOGISTS UNDER THE DEFINITION OF “PHYSICIAN.”

The term “physician” is not defined in Rule 35. Mass. R. Civ. P. 35(a). To the extent a term is undefined or ambiguous, this Court looks to the terms “usual and accepted meaning, so long as those meanings are consistent with the statutory purpose.” *Shaw’s Supermarket, Inc. v. Melendez*, 488 Mass. 338, 342 (2021); *Commonwealth v. Durham*, 446 Mass. 212, 221 (2006) (holding that in interpreting Mass. R. Crim. P. 14, the Supreme Judicial Court is “the final arbiter of what the rule means and permits”). In evaluating the “usual and accepted meaning,” the Merriam-Webster Dictionary defines “physician” as “a person skilled in the art of healing.” See Physician, Merriam-Webster Dictionary (11th ed. 2020). Similarly, the American Heritage Dictionary outlines several definitions of “physician,” including “[a] person who heals or exerts a healing influence.” See Physician, American Heritage Dictionary (5th Ed. 2020). This Court, meanwhile, previously adopted the definition of “physician” as “any person who heals or exerts a healing influence.” *Ortiz v. Examworks, Inc.*, 470 Mass. 784, 788 (2015)

(holding that a physical therapist may be considered a “physician” under G.L. c. 90 § 34M).¹

Consistent with this Court’s definition of “physician” in *Ortiz*, the practice of psychology involves a “healing influence” and psychologists are “skilled in the art of healing.” See *Ortiz*, 470 Mass. at 788; Physician, Merriam-Webster Dictionary (11th ed. 2020). In Massachusetts, the practice of psychology is a board certified and regulated profession with multiple requirements needed in order to be certified as a psychologist and, thus, provide health services.² The practice of psychology encompasses a variety of “health services,” including treatment of: (a) mental and emotional disorder or disability; (b) alcoholism and substance abuse; (c) the psychological aspects of physical illness or disability; and (d) psychoeducational evaluation, therapy, and remediation and consultation. See

¹ Under G.L. c. 233, § 79G, the exception to the hearsay rule which permits medical records and reports to be admitted into evidence, the definition of “physician” explicitly includes psychologists. G.L. c. 233, § 79G; *Commonwealth v. Labroad*, 94 Mass.App.Ct. 1103 (2018) (stating that § 79G includes psychologist as a “physician” in the meaning of the rule).

² In order to be licensed by the Massachusetts Board of Registration of Psychologists, a candidate must have: “(1) Received a doctoral degree in psychology from a recognized education institution, which includes a minimum of three years of full time graduate study, (2) Spent at least two years full time in psychological employment, teaching, research or professional practice under the supervision of a licensed psychologist, and (3) Passed the psychology examination administered by the Massachusetts Board of Psychologists.” G.L. c. 112, § 119-120; 251 Code Mass. Regs. § 3.03.

G.L. c. 112, § 118.³ Each of these health services align with this Court’s consideration of a “healing influence” and it follows that the term “physician” in Rule 35 should be interpreted to include psychologist.

Other jurisdictions have confronted the ambiguity of the term “physician” by amending Rule 35 to add references to a “suitably licensed or certified examiner.” See Addendum pp. 22 - 50, Survey of Fifty States; see also Fed. R. Civ. P. 35; Ala. R. Civ. P. 35(a); Alaska R. Civ. P. 35(a); Colo. R. Civ. P. 35(a). Other states even added specific references to an examiner being a certified or licensed psychologist. Cal. Code Civ. P. § 2032.020 (c)(1); Ark. R. Civ. P. 35(a). But the amendment of Rule 35 in other jurisdictions should not foreclose this Court from considering the plain meaning of “physician” to include psychologists. Indeed, several courts addressed the definition of “physician” prior to amending Rule 35, and, similar to this Court’s holding in *Ortiz*, settled on several circumstances where non-medical doctors are considered “physicians”. See *Thynne v. City of Omaha*, 217 Neb. 654 (1984); see also *Massey v. Manitowoc Co.*, 101 F.R.D. 304 (E.D.Pa.1983); *Wills v. Red Lake Municipal Liquor Store*, 350 N.W.2d 452, 454 (Minn.App.1984) (“Allowing a vocational evaluation to be administered by a registered psychologist

³ G.L. c. 112, § 118 defines “Health service” as “the delivery of direct, preventive, assessment and therapeutic intervention services to individuals whose growth, adjustment, or functioning is actually impaired or may be at risk of impairment.”

is part of this trend for a more comprehensive involvement and reliance on other specialists to assist in evaluation by a physician.”).

Courts in two jurisdictions in particular, Nebraska and Pennsylvania, interpreted the reference to “physicians” in Rule 35 to include psychologists. *Thynne*, 217 Neb. at 654; *Massey*, 101 F.R.D. at 304. In *Thynne*, the court specifically addressed the issue presently at bar, namely, whether a psychologist should be considered as a “physician” under Rule 35. *Thynne*, 217 Neb. at 654. The Nebraska Supreme Court decided that a psychologist should be considered a physician under their equivalent Rule 35 because psychologists, “just as medically trained physicians, are skilled at and engage in the art of healing.” *Id.* at 662. Further, the court in *Thynne* wrote, “it seems to us that if the services rendered by a psychologist are of a nature as to give rise to a physician-patient privilege, it follows that a party in a lawsuit which presents a controversy as to a condition which psychologists investigate or treat ought to be able to employ the services of such practitioners.” *Id.* at 660. This same logic was used in the *Massey* decision allowing a psychologist to conduct an examination under the pre-1988 Fed. R. Civ. P. 35. *Massey*, 101 F.R.D. at 307 (“considering their required specialized training and experience, psychologists will in some instances be best qualified to administer examinations that require psychological testing . . . to require that only

a medical doctor be permitted to administer the tests because Rule 35 permits utilizing only a ‘physician,’ would not serve the ends of justice.”).

Both *Massey* and *Thynne* decisions conclude that the literal definition of a “physician” includes psychologists because a psychologist is “a person skilled in the art of healing.” See *Massey*, 101 F.R.D. at 305; *Thynne*, 217 Neb. at 661 (citing to Webster’s New Collegiate Dictionary (1974) definition of ‘physician’). This Court adopted this exact analysis in *Ortiz* to allow a physical therapist to be considered a physician under G.L. c. 90, § 34M after finding the definition to include “any person who heals or exerts a healing influence.” *Ortiz*, 470 Mass. at 788. As such, a determination by this Court that the definition of “physician” in Rule 35 includes psychologists would not be novel, but, rather, consistent with this Court’s prior holdings and the plain meaning of the word.

II. THE MAJORITY OF JURISDICTIONS AS WELL AS THE FEDERAL RULES OF CIVIL PROCEDURE AFFIRMATIVELY ALLOW FOR PSYCHOLOGISTS TO CONDUCT RULE 35 EXAMINATIONS.

A review of the Federal Rules of Civil Procedure along with the civil procedure rules of each of the fifty states demonstrates that the majority of jurisdictions permit psychologists to conduct examinations under Rule 35. See Addendum pp. 22 - 50; Fed. R. Civ. P. 35, Addendum pp. 62-64. Massachusetts remains one of only *six* states that have yet to amend their civil procedure Rule 35 to mirror the 1991 amendment to the Fed. R. Civ. P. 35. See Addendum pp. 22 - 50

(the other five states include: Connecticut, New York, North Carolina, South Carolina, and South Dakota). Further, Fed. R. Civ. P. 35, along with the Rule 35 equivalents of numerous other states, allows for a whole range of professions, including psychologists, to conduct examinations under the rule. See Addendum pp. 22 - 50. For example, vocational experts, nurses, dentists, and social workers all are able to conduct Rule 35 examinations in other jurisdictions. See generally, La. C.C.P. Art. 1464 (A) (allowing examinations by vocational rehabilitation experts); Neb. Ct. R. Disc. § 6-335(a) (allowing examinations by “persons licensed or certified under the laws to engage in a health profession”); PA. R.C.P. No. 4010(a)(1) (allowing examinations by physicians, licensed dentists, and licensed psychologists). When coupled with the general consensus that psychologists add needed insight in discovery issues, particularly in brain injury cases, it follows that the Supreme Judicial Court should join the majority of states by formally recognizing that psychologists are permitted examiners under Rule 35.⁴

⁴ The Federal Rules of Civil Procedure Advisory Committee implied in their advisory comments that physicians and clinical psychologists were in their own category while also noting that other licensed professionals should be able to provide examinations under Fed. R. Civ. P. 35. Fed. R. Civ. P. 35 1991 Amendment Advisory Comments, Addendum pp. 62-64.

A. The 1991 amendment to the Federal Rules of Civil Procedure displays that psychologists are to be considered a competent examiner under Rule 35.

In 1991, Fed. R. Civ. P. 35 was amended to read, in relevant parts, “the court . . . may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a *suitably licensed or certified examiner.*” Fed. R. Civ. P. 35 (emphasis added). This amendment occurred after the rule was revised in 1988 by Congressional enactment because Congress wished to clarify the rule in order to specifically allow psychologists to offer helpful insight on a condition at issue. See Fed. R. Civ. P. 35 Advisory Committee Notes on 1991 Amendment (“This revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.”). The amendment to the Federal Rule cleared up the ambiguity concerning what professions were considered under the previous Rule 35. *Id.*; see previous version of Fed. R. Civ. P. 35 (1987).

After the 1991 amendment to Fed. R. Civ. P. 35, many states immediately marshaled to amend their own rules to coincide with the Federal rule. See Addendum pp. 22 - 50. For some states, an amendment to their version of Rule 35 did not change much; these states had been allowing psychologists to conduct

mental examinations under their Rule 35 before the amendment was proposed to the Fed. R. Civ. P. 35. See *Thynne*, 217 Neb. at 654 (“We therefore now inscribe that clinical psychologists are physicians within rule 35 of the Nebraska Discovery Rules.”); *Massey*, 101 F.R.D. at 304; *In the Interest of T.M.W.*, 553 So.2d 260 (Fla. 1st DCA 1989); *Nahabedian v. Superior Court (Falkner)*, 257 Cal. Rptr. 254 (App. 2d Dist. 1989); *Kelly v. Brown*, 529 A.2d 271 (Del.Fam. 1987); *In Interest of J.A.*, 283 N.W.2d 83 (N.D.1979). Other state courts quickly relied on the Federal Amendment Advisory Committee Notes to clarify the ambiguities of the old rule. See *Stampe v. Noyes*, 1989 WL 1143873, at *1 (Va. Cir. Ct., Sept. 7, 1989); *Avila v. Superior Court*, 816 P.2d 946, 949 (Ariz. Ct. App. 1991). In doing so, multiple jurisdictions amended Rule 35 to allow examinations to be conducted by a “suitably licensed or certified examiner.” Fed. R. Civ. P. 35. Thus, it is apparent from these amendments that Rule 35 was not amended to constrain those who could perform an examination, instead, the rule was amended to address the ambiguity of the undefined term “physician.” See Fed. R. Civ. P. 35 Advisory Committee Notes on 1991 Amendment.

B. Courts in states that have not amended their equivalent Rule 35 to coincide with the Federal Rule consider a psychologist qualified to conduct a medical examination under their rule

Most courts in jurisdictions that have not amended their equivalent Rule 35 since the 1991 amendment of Fed. R. Civ. P. 35 have not been asked to rule on the

issue of psychologists as physicians. See generally S.D. Codified Laws § 15-6-35(a); N.C. Gen. Stat. § 1A-1, Rule 35(a); S.C.R.C.P. 35 (a). One jurisdiction that has addressed this issue is New York where the relevant code states, “any party may serve notice on another party to submit to a physical, mental or blood examination by a *designated physician*.” NY CLS CPLR § 3121 (a) (emphasis added). Multiple cases at various levels of New York courts have allowed for professions other than medical doctors to be considered as “physicians”, and thus, conduct examinations under CPLR § 3121 (a) (“New York’s Rule 35”). See *Knauer v. Anderson*, 709 N.Y.S.2d 386 [Sup.Ct. Erie Co.2000, Howe, J.]; *Kavanagh v. Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 (1998); *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, (N.Y. App. Div. 2016); *Paris v. Waterman S.S. Corp.*, 218 A.D.2d 561, 563–564 (1995).

In *Knauer*, the court allowed a neuropsychologist to conduct a mental examination under New York’s Rule 35 because the “expert was qualified” and the examination was “relevant to the issues in the case.” *Knauer*, 709 N.Y.S.2d at 388. In *Hayes*, the court ruled that a vocational rehabilitation expert may conduct an examination under New York’s Rule 35 because the Plaintiff placed his ability to work at central controversy in the case. *Hayes*, 135 A.D.3d at 1060. Further, the Court in *Hayes* overturned a prior 1995 ruling on a similar issue in *Mooney v. Osowiecky*, 215 A.D.2d 839 (1995), where the Court did not allow a vocational

expert to conduct an examination under New York’s Rule 35, by explicitly stating that the Court was no longer going to hold that standard. *Id.* at 1059 (“the ruling in that case [*Mooney v. Osoweicky*] should no longer be followed.”).

The Supreme Court Appellate Division reached the same conclusion in *Paris* where it decided that a psychologist may conduct a medical examination under New York’s Rule 35. *Paris*, 218 A.D.2d at 564. The *Paris* court reasoned that the psychologist provided useful information to the doctor on issues of diagnosis and treatment. *Id.* Considered together, these cases demonstrate that even when a state’s Rule 35 only allows for “physicians” to conduct examinations, courts still allowed non-medical doctors to perform examinations. As grounds, the court in *Kavanagh* reasoned that technical expertise in a given area facilitated discovery. *Kavanagh*, 92 N.Y.2d at 955 (“The opportunity to present a competing assessment of [Plaintiff’s] vocational abilities by an expert thus became imperative to the goal underlying our discovery rules of ‘ensur[ing] that both plaintiff[s] and defendants receive a fair trial.’”). While New York has not amended their equivalent Rule 35 to mirror Fed. R. Civ. P. 35, New York courts have grappled with the ambiguity of the term “physician” and reached a reasonable solution that facilitates discovery. Similar to the rulings in *Hayes* and *Knauer*, this court should not allow ambiguity around the term “physician” to constrain it from including psychologist under the ambit of Rule 35.

CONCLUSION

This Court should affirm the Superior Court’s ruling because a psychologist should be considered a “physician” under Mass. R. Civ. P. 35. Psychologists work in the healing arts, are well trained and credentialed, offer a vital health-care function, and are defined as “physicians” in other Massachusetts’ laws. Further, the role of psychologists in mental examinations under Rule 35 stand as a critical part of efficient and effective discovery of all pertinent facts when a person’s mental capabilities are at issue. In addition, this Court has an opportunity in this case to address the ambiguous definition of “physician” in Rule 35 and bring the overall meaning of the rule in line with the majority of other states and Fed. R. Civ. P. 35, which allow for psychologists to perform Rule 35 examinations.

Therefore, the *amicus curiae*, MassDLA respectfully requests that this Court uphold the decision of the Superior Court and allow a psychologist to conduct a Rule 35 examination.

Respectfully submitted,
**MASSACHUSETTS DEFENSE
LAWYERS ASSOCIATION**

By its attorneys,
CETRULO LLP

/s/ Kyle E. Bjornlund

Kyle E. Bjornlund

BBO No. 663909

Grant D. King

Admission Pending

CETRULO LLP

2 Seaport Lane

Boston, MA 02210

Tel: (617) 527-5500

Fax: (617) 527-5200

On the Brief:

Olivia Rayburn

Student of Northeastern University School of Law

Dated: November 17, 2021

MASS. R. A. P. 16(k) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court including, but not limited to, Mass. R. A. P. 16(a), 18, and 20. This brief has been prepared using size 14 Times New Roman font and contains less than 7,500 words as calculated by the word counter on Microsoft Word 2016 word processor.

/s/ Kyle E. Bjornlund

Kyle E. Bjornlund

BBO No.663909

kbjornlund@cetllp.com

Grant D. King

Admission Pending

gking@cetllp.com

Cetrulo LLP

Two Seaport Lane, 10th Floor

Boston, MA 02210

Tel: (617) 217-5500

Fax: (617) 217-5200

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2021, I provided service of the Massachusetts Defense Lawyers Association’s Brief of *Amicus Curiae* in the matter of Carole Ashe et al v. Shawmut Woodworking & Supply, Inc., Massachusetts Supreme Judicial Court No. SJC-13152 to all counsel of record via the Massachusetts electronic filing system, and served said document by electronic mail on the following counsel of record.

Marsha V. Kazarosian, Esq.
Kazarosian Costello LLP
546 Main Street
Haverhill, MA 01830
Telephone: (978) 372-7758
Marsha@Kazcolaw.com

Mark B. Lavoie, Esq.
McDonough, Hacking & Lavoie, LLC
27 Congress Street, Suite 404
Salem, MA 01970
Telephone: (617) 367-0808
mlavoie@mhlattys.com

/s/ Kyle E. Bjornlund
Kyle E. Bjornlund
BBO No.663909
kbjornlund@cetllp.com
Grant D. King
Admission Pending
gking@cetllp.com
Cetrulo LLP
Two Seaport Lane, 10th Floor
Boston, MA 02210
Tel: (617) 217-5500
Fax: (617) 217-5200

ADDENDUM

ADDENDUM
TABLE OF CONTENTS

Civil Procedure Rule 35 Jurisdictional Review	22-50
Massachusetts Statutes	
G.L. c. 112, § 118 (2021).....	51-53
G.L. c. 112, § 119 (2021).....	54-55
G.L. c. 112, § 120 (2021).....	56
G.L. c. 233, § 79G (2021).....	57-59
Massachusetts Rules	
251 Code Mass. Regs. § 3.03.....	60-61
Mass. R. Civ. P. 35	62
Non-Massachusetts Rules	
Fed. R. Civ. P. 35	63-65

ADDENDUM A
 MASSDLA – *AMICUS CURIAE* BRIEF
 CIVIL PROCEDURE RULE 35 JURISDICTIONAL REVIEW

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Alabama	Ala. R. Civ. P. 35(a)	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 the person in the party’s custody or legal control.	Y	
Alaska	Alaska R. Civ. P. 35(a)	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 the person in the party’s custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Arizona	Ariz. R. Civ. P. 35(a)(1)	The court where the action is pending may order a party whose physical or mental condition is in controversy to submit to a physical or mental examination by a physician or psychologist . The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.	Y	<i>Avila v. Superior Court</i> , 816 P.2d 946, 949 (Ariz. Ct. App. 1991) (vacating trial court order allowing Rule 35 examination by a vocational specialist where the defendant did not indicate that expert's qualifications met those imposed by the rule).
Arkansas	Ark. R. Civ. P. 35(a)	(a)Order for Examination. When the mental or physical condition (including the blood group) of a party, or 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 examination by a physician or a mental examination by a physician or a psychologist or to produce for the examination the person in his custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
California	Cal. Code Civ. P. § 2032.020 (c)(1)	A mental examination conducted under this chapter shall be performed only by a licensed physician , or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders.	Y	<i>Reuter v. Superior Court</i> , 3d 332, 339-40 (Cal. Ct. App. 1979) (finding that “the trial court did not abuse its discretion in ordering a party whose mental condition is in controversy to submit to testing by a psychologist who is working under the general direction of a psychiatrist” and that “the Legislature has recently recognized that psychologists are competent to make determinations in several statutory areas which previously had required the services of a physician or psychiatrist.”).

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Colorado	Colo. R. Civ. P. 35(a)	(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 the person in his or her custody or legal control.	Y	
Connecticut	Conn. Practice Book § 13-11(a)	In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, in which the mental or physical condition of a party, or of a person in the custody of or under the legal control of a party, is material to the prosecution or defense of said action, the judicial authority may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in the party's custody or legal control.	N	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Washington, D.C.	D.C. SCR-Civil Rule 35 (a) (1)	(1) In General. The court 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.	Y	<i>Adler v. Adler</i> , No. 12 DRB 1632, (D.C.Super. Dec. 11, 2012) (in discussing the identical rule 35(a) of the Superior court Rules of Procedure Governing Domestic Relations Proceedings, the court cited to <i>Leonard v. Leonard</i> , 673 So.2d 97, 99 (Fla. App. 1996): “In many cases, information obtained from <i>psychological evaluations</i> prepared for the purpose of litigation is more helpful to the court than would be information obtained from the parents' prior treatment records.” (emphasis added)).

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Delaware	Del. Super. Ct. Civ. R. 35 (a)	(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 the person in the party's custody or legal control.	Y	<i>Pitts v. Delaware Elec. Coop.</i> , No. 89c-JN-3, 1991 WL 302638 at *2 (Del.Super. Dec. 31, 1991) (“Undoubtedly, given the expanded role of psychologists in the modern health care scheme and the number of multi-disciplinary practices treating patients within a team service approach, the rules restriction is outdated.”)
Florida	Fla. R. Civ. P. 1.360 (a) (1)	(1) A party may request any other party to submit to, or to produce a person in that other party's custody or legal control for, examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Georgia	O.C.G.A. § 9-11-35(a)	(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 examination by a physician or to submit to a mental examination by a physician or a licensed psychologist or to produce for examination the person in his custody or legal control.	Y	
Hawaii	Haw. R. Civ. P. 35(a)	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.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Idaho	I.R.C.P. 35(a)(1)	(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 certified examiner, licensed physician, or a qualified mental health professional as defined in Idaho Code section 6-1901, excluding nurses. 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.	Y	
Illinois	Ill. Sup. Ct. R. 215(a)	(a) Notice; Motion; Order. In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court, upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved.	Y	<i>In re Marriage of Bates</i> , 819 N.E.2d 714 (Ill. 2004) (generally discussing psychologists allowed to conduct examinations pursuant to Ill. Sup. Ct. R. 215(a)).

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Indiana	Ind. R. Trial P. 35 (A)	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 the person in his custody or legal control.	Y	<i>Old Ind. L.L.C. v. Montano</i> , 732 N.E.2d 179, 184 n.2 (Ind. Ct. App. 2000) (“[A] licensed, trained psychologist holding a doctorate in psychology might be better able to make determinations regarding psychological issues, than a physician who did not have any specialized training or expertise in such matters”).
Iowa	Iowa R. Civ. P. 1.515	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 health care practitioner or to produce for examination the person in the party's custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Kansas	K.S.A. § 60-235 (a) (1)	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.	Y	
Kentucky	Ky. CR 35.01	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 physician, dentist or appropriate health care expert , or to produce for examination the person in his custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Louisiana	La. C.C.P. Art. 1464 (A)	When the mental or physical condition 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 an additional medical opinion regarding physical or mental examination by a physician or to produce for examination the person in his custody or legal control, except as provided by law. In addition, the court may order the party to submit to an additional medical opinion regarding an examination by a vocational rehabilitation expert or a licensed clinical psychologist who is not a physician , provided the party has given notice of intention to use such an expert.	Y	<i>Cantwell v. Garcia</i> , 522 So.2d 721, 723 (La. Ct. App. 1988) (In setting aside the denial for an order for a psychological examination under La. C.C.P. Art. 1464, the court stated that “the jurisprudence authorizes independent medical examinations by physicians. We see no reason to deny an independent psychologist's examination, for clinical psychology is a recognizable and respected branch of the medical profession”).

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Maine	Me. R. Civ. P. 35	(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.	Y	
Maryland	Md. R. 2-423	When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the legal control of the party.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Massachusetts	Mass. R. Civ. P. 35(a)	(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 physician or to produce for examination the person in his custody or legal control.	N	
Michigan	MCR 2.311 (A)	(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 or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Minnesota	Minn. R. Civ. P. 35.01	In an action in which the physical or mental condition or the blood relationship of a party, or of an agent of a party, or of a person under control of a party, is in controversy, the court in which the action is pending may order the party to submit to, or produce such agent or person for a physical, mental, or blood examination by a suitably licensed or certified examiner.	Y	<i>Wills v. Red Lake Mun. Liquor Store</i> , 350 N.W.2d 452, 455 (Ct. App. Minn. 1984) (In upholding order for plaintiff to be evaluated by a psychologist, the court noted that “[i]n this era of medical specialization, it has become increasingly necessary for examining physicians to use the services of other specialists. Allowing a vocational evaluation to be administered by a registered psychologist is part of this trend for a more comprehensive involvement and reliance on other specialists to assist in evaluation by a physician.”)

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Mississippi	M.R.C.P. Rule 35(a)	(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 the person in the party's custody or legal control.	Y	
Missouri	Mo. Sup. Ct. R. 60.01(a)(1)	(1) In an action in which the mental condition, physical condition, or blood relationship of a party, or of an agent or 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 (i) to submit to physical, mental, or blood examinations by physicians or other appropriate licensed health care providers or (ii) to produce for such examinations such party's agent or the person in such party's custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Montana	Mont. R. Civ. P. 35(a)(1)	(a) Order for 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.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Nebraska	Neb. Ct. R. Disc. § 6-335(a)	(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 one or more physicians, or other persons licensed or certified under the laws to engage in a health profession , or to produce for examination the person in his or her custody or legal control.	Y	<i>Thynne v. City of Omaha</i> , 351 N.W.2d 54, 58 (Neb. 1984) (“[W]e believe that clinical psychologists . . . are not always successful in their treatment efforts, are skilled at and engage in the art of healing. We therefore now inscribe on our heretofore clean slate that clinical psychologists are physicians within rule 35 of the Nebraska Discovery Rules.
Nevada	N.R.C.P3 5(a)(1)	(a) Order for 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 .	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
New Hampshire	N.H. Super. Ct. R. 28A	(a) Medical Examinations. In actions to recover damages for personal injuries, the defendant shall have the right to a medical examination of the plaintiff prior to trial. The defendant shall seek and obtain the medical examination of the plaintiff within the expert disclosure deadlines set forth by statute, rule, or in the structuring order issued by the court. The court may order a medical examination of the plaintiff to take place outside of the expert disclosure deadlines, including during trial, only for good cause shown.	Y	
New Jersey	N.J. Court R. 4:19	In an action in which a claim is asserted by a party for personal injuries or in which the mental or physical condition of a party is in controversy, the adverse party may require the party whose physical or mental condition is in controversy to submit to a physical or mental examination by a medical or other expert . . .	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
New Mexico	1-035 NMRA (A)	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 the person in the party's custody or legal control..	Y	
New York	NY CLS CPLR § 3121 (a)	(a) Notice of examination. After commencement of an action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician , or to produce for such examination his agent, employee or the person in his custody or under his legal control.	N	<i>Hayes v. Bette & Cring, LLC</i> , 135 A.D.3d 1058, (N.Y. App. Div. 2016) (allowing motion to compel examination under NY CLS CPLR § 3121 (a) by vocational rehabilitation expert).

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
North Carolina	N.C. Gen. Stat. § 1A-1, Rule 35(a)	(a) Order for examination. - When the mental or physical condition (including the blood group) of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending as defined by Rule 30(h) may order the party to submit to a physical or mental examination by a physician or to produce for examination his agent or the person in his custody or legal control.	N	
North Dakota	N.D.R. Civ. P. 35(a)(1)	(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.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Ohio	Ohio Civ. R. 35 (A)	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 himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control.	Y	
Oklahoma	12 Okl. St. § 3235	When the physical, including the blood group, or mental condition of a party, or a person in the custody or under the legal control of a party, is in controversy but does not meet the conditions set forth in subsection A of this section, 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 such examination the agent, employee or person in his custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Oregon	ORCP 44 (A)	(A) Order for examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control.	Y	
Pennsylvania	Pa. R.C.P. No. 4010(a) (1)-(2)	(a)(1) As used in this rule, "examiner" means a licensed physician, licensed dentist or licensed psychologist . (2)(a) When the mental or physical condition 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 an examiner or to produce for examination the person in the party's custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Rhode Island	R.I. D.C.R. 35(a)	(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of an agent 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 the person in the party's custody or legal control.	Y	
South Carolina	S.C.R.C. P. 35 (a)	(a) Order for Examination. In any case in which the amount in controversy exceeds \$100,000 actual damages, and 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 physician or to produce for examination the person in his custody or legal control.	N	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
South Dakota	S.D. Code Laws § 15-6-35(a)	In an action in which the mental or physical condition of a party or the consanguinity of a party with another person or party is in controversy, the court in which the action is pending may order such person or party to submit to a physical or mental examination or blood test by a physician .	N	
Tennessee	Tenn. R. Civ. P. 35.01	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 the person in his custody or legal control.	Y	<i>Roach v. Dixie Gas Co.</i> , 371 S.W.3d 127, 147 (Tenn. Ct. App. 2011) (psychologist categorized as “medical expert” for purposed of Rule 35 medical examination).

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Texas	Tex. R. Civ. P. 204.1(a) (1)	04.1 Motion and Order Required. (a) Motion. A party may - no later than 30 days before the end of any applicable discovery period - move for an order compelling another party to: (1) submit to a physical or mental examination by a qualified physician or a mental examination by a qualified psychologist ;	Y	
Utah	U.R.C.P. 35(a)	(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Vermont	V.R.C.P. 35(a)	(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 Presiding Judge may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Virginia	Va. Sup. Ct. R. 4:10(a)	(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, upon motion of an adverse party, may order the party to submit to a physical or mental examination by one or more health care providers, as defined in § 8.01-581.1 , employed by the moving party or to produce for examination the person in the party's custody or legal control.	Y	<i>Stampe v. Noyes</i> , 1989 WL 1143873, at *1 (Va. Cir. Ct., Sept. 7, 1989) (ordering examination by non-physician doctor of chiropractic where to construe “[r]ule 4:10 so narrowly as to prohibit examination by another doctor of chiropractic would unnecessarily conflict with the broad scope intended by Part Four and found in Rule 4:1(b)(1), stating: ‘Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action....’”).

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Washington	Wash. C.R. 35(a)(1)	(1) 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 examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control.	Y	
West Virginia	W. Va. R.C.P. 35(a)	(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 the person in the party's custody or legal control.	Y	

Jurisdiction	Rule or Statute	Relevant Provision	Psychologists may examine?	Cases
Wisconsin	Wis. Stat. § 804.10 (1)	(1) When the mental or physical condition, including the blood group or the ability to pursue a vocation, of a party is in issue, the court in which the action is pending may order the party to submit to a physical, mental or vocational examination .	Y	<i>Marriage of Kettner v. Kettner</i> , 649 N.W.2d 317, 334 (Wis. Ct. App. 2002) (Wisconsin statute “§ 804.10(1) authorizes the trial court to order the parties to undergo psychological examinations”).
Wyoming	WY R. Civ. Proc. 35(a)(1)	(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.	Y	

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XVI	PUBLIC HEALTH
Chapter 112	REGISTRATION OF CERTAIN PROFESSIONS AND OCCUPATIONS
Section 118	DEFINITIONS APPLICABLE TO SECS. 118 TO 129A

Section 118. As used in sections one hundred and eighteen to one hundred and twenty-nine A, inclusive, the following words, unless the context clearly indicates otherwise, shall have the following meanings:

"Board", the board of registration of psychologists.

"Doctoral degree in psychology", a doctoral degree from a recognized educational institution from a program in psychology as defined by the rules and regulations of the board.

"Health service", the delivery of direct, preventive, assessment and therapeutic intervention services to individuals whose growth, adjustment, or functioning is actually impaired or may be at risk of impairment.

"Health service training program", supervised experience at a site where health services in psychology are normally provided which is part of an organized integrated training program as defined by the rules and regulations of the board.

"Psychologist", an individual who by training and experience meets the requirements for licensing by the board and is duly licensed to practice psychology in the commonwealth.

"Recognized educational institution", a degree-granting college or university which is accredited by a Regional Board or Association of Institutions of higher education approved by the Council on Post Secondary Education of the United States Department of Education, or which is chartered to grant doctoral degrees by the commonwealth. Such institutional accreditation shall exist at the time that the doctoral degree is granted or within two years thereafter.

"Supervised health service experience", training at a site where health services in psychology are normally provided, with which the applicant has a formal relationship, and where the applicant is supervised at least one hour for every sixteen hours of training, at least half of which is provided by a psychologist licensed by the board who is a member of the staff of the training site. At least twenty-five per cent of the applicant's time shall be in direct client contact.

"The practice of psychology", rendering or offering to render professional service for any fee, monetary or otherwise, to individuals, groups of individuals, organizations or members of the public which includes the observation, description, evaluation, interpretation, and modification of human behavior, by the application of psychological principles, methods and procedures, for the purpose of assessing or effecting changes in symptomatic, maladaptive or undesired behavior and issues pertaining to interpersonal relationships, work and life adjustment, personal effectiveness and mental health. The practice of psychology includes, but is not limited to, psychological testing, assessment and evaluation of

intelligence, personality, abilities, attitudes, motivation, interests and aptitudes; counseling, psychotherapy, hypnosis, biofeedback training and behavior therapy; diagnosis and treatment of mental and emotional disorder or disability, alcoholism and substance abuse, and the psychological aspects of physical illness or disability; psychoeducational evaluation, therapy, remediation and consultation. Psychological services may be rendered to individuals, families, groups, and the public. For purposes of this definition, the practice of psychology does not include the teaching of psychology, the conduct of psychological research, or the provision of psychological consultation to organizations, unless such teaching research or consultation involves the delivery or supervision of the types of direct services described above, to individuals or groups of individuals.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XVI	PUBLIC HEALTH
Chapter 112	REGISTRATION OF CERTAIN PROFESSIONS AND OCCUPATIONS
Section 119	PSYCHOLOGISTS; APPLICATION FOR LICENSE; CONTENTS AND REQUIREMENTS

Section 119. Each person desiring to obtain a license as a psychologist shall make application to the board upon such form and in such manner as the board shall prescribe and shall furnish evidence satisfactory to the board that such person:

- (a) is of good moral character;
- (b) has received a doctoral degree in psychology from a recognized educational institution;
- (c) has engaged for the equivalent of at least two years full time, at least one year of which was before his receiving the doctoral degree, in psychological employment, teaching, research or professional practice under the supervision of or in collaboration with a licensed psychologist, or one clearly eligible for licensure in the opinion of the board;
- (d) conducts his professional activities in accordance with accepted standards such as the Ethical Standards of Psychologists of the American Psychological Association; and

(e) has applied to participate in the medical assistance program administered by the secretary of health and human services in accordance with chapter 118E and Title XIX of the Social Security Act and any federal demonstration or waiver relating to such medical assistance program for the limited purpose of ordering and referring services covered under the program if regulations governing such limited participation are promulgated under chapter 118E; provided, however, that a psychologist who chooses to participate in a medical assistance program as a provider of services shall be deemed to have fulfilled this requirement.

Part I	ADMINISTRATION OF THE GOVERNMENT
Title XVI	PUBLIC HEALTH
Chapter 112	REGISTRATION OF CERTAIN PROFESSIONS AND OCCUPATIONS
Section 120	PSYCHOLOGISTS; EXAMINATION OF APPLICANTS; HEALTH SERVICE PROVIDER CERTIFICATION

Section 120. Upon satisfaction of requirements specified in section one hundred and nineteen, the applicant shall pass an examination administered by the board. Examinations shall be conducted at least once a year at a time and place to be designated by the board. Examinations shall be written, oral or both as the board deems advisable. An applicant shall be held to have passed an examination upon the affirmative vote of at least five members of the board. Any person who shall have failed an examination conducted by the board may not be admitted to a subsequent examination for a period of at least six months.

Any licensed psychologist who independently provides or offers to provide to the public, health services, shall be certified as a health service provider by the board. The board shall certify as a health service provider applicants who shall demonstrate that they have at least two years full time of supervised health service experience, of which at least one year is before receiving the doctoral degree and at least one year of which is in a health service training program.

Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title II ACTIONS AND PROCEEDINGS THEREIN

Chapter 233 WITNESSES AND EVIDENCE

Section 79G MEDICAL AND HOSPITAL SERVICES; EVIDENCE

Section 79G. In any proceeding commenced in any court, commission or agency, an itemized bill and reports, including hospital medical records, relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured, or any report of any examination of said injured person, including, but not limited to hospital medical records subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization rendering such services or by the pharmacist or retailer of orthopedic appliances, shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments, the diagnosis of said physician or dentist, the prognosis of such physician or dentist, the opinion of such physician or dentist as to proximate cause of the condition so diagnosed, the opinion of such physician or dentist as to

disability or incapacity, if any, proximately resulting from the condition so diagnosed; provided, however, that written notice of the intention to offer such bill or report as such evidence, together with a copy thereof, has been given to the opposing party or parties, or to his or their attorneys, by mailing the same by certified mail, return receipt requested, not less than ten days before the introduction of same into evidence, and that an affidavit of such notice and the return receipt is filed with the clerk of the court, agency or commission forthwith after said receipt has been returned. Nothing contained in this section shall be construed to limit the right of any party to the action to summon, at his own expense, such physician, dentist, pharmacist, retailer of orthopedic appliances or agent of such hospital or health maintenance organization or the records of such hospital or health maintenance organization for the purpose of cross examination with respect to such bill, record and report or to rebut the contents thereof, or for any other purpose, nor to limit the right of any party to the action or proceeding to summon any other person to testify in respect to such bill, record or report or for any other purpose.

The words "physician" and "dentist" shall not include any person who is not licensed to practice as such under the laws of the jurisdiction within which such services were rendered, but shall include chiropodists, chiropractors, optometrists, osteopaths, physical therapists, podiatrists, psychologists and other medical personnel licensed to practice under the laws of the jurisdiction within which such services were rendered.

The word "hospital" shall mean any hospital required to keep records under section seventy of chapter one hundred and eleven, or which is in any way licensed or regulated by the laws of any other state, or by the laws and regulations of the United States of America, including hospitals of

the Veterans Administration or similar type institutions, whether incorporated or not.

The words "health maintenance organization" shall have the same meaning as defined in section one of chapter one hundred and seventy-six G.

251 CMR 3.03

3.03: Academic Requirements

A “Program in psychology” shall mean a psychology program that:

(1) is designated as a doctoral program in psychology by the Association of State and Provincial Psychology Boards or the National Register of Health Service Psychologists or is accredited by the Commission on Accreditation (CoA) of the American Psychological Association, at the time the degree is granted or within three years thereafter; and

(2) meets the following criteria:

(a) Training in psychology is doctoral training offered by a recognized educational institution.

(b) The psychology program must stand as a recognizable, coherent organizational entity within the institution.

(c) There must be clear authority and primary responsibility for the core and specialty areas of the program whether or not the program cuts across administrative lines.

(d) The program must include an organized sequence of study.

(e) There must be an identifiable psychology faculty and a psychologist responsible for the program.

(f) The program must have an identifiable body of students who are matriculated in that program for a degree.

(g) The program must include supervised practica, internship, field or laboratory training appropriate to the practice of psychology.

(h) The applicant shall complete a course of studies which encompasses a minimum of three academic years of full time graduate study, or its equivalent, of which a minimum of one academic year of full time, or its equivalent, academic graduate study in psychology must be completed in residence at the institution granting the doctoral degree. “Completed in

residence” shall be determined by the Board based on criteria which includes the following factors: frequency and duration of interactions between faculty and students; opportunities for appropriate and adequate supervision and evaluation; student access to a core psychology faculty whose primary time and employment responsibilities are to the institution; and student access to other students matriculated in the program.

(i) In addition to receiving instruction in scientific and professional ethics and standards, research design and methodology, statistics and psychometrics, and history of psychology, the core program shall require each student to demonstrate competence in each of the following substantive areas:

1. Biological Bases of Behavior: Physiological psychology, comparative psychology, neuropsychology, sensation and perception, psycho pharmacology.

2. Cognitive Affective Bases of Behavior: Learning, thinking, motivation, emotion.

3. Social Bases of Behavior: Social psychology, group processes, organizational and systems theory, issues of social/cultural diversity.

4. Individual Differences: Personality theory, human development, abnormal psychology.

5. Racial/Ethnic Bases of Behavior with a Focus on People of Color: Cross-cultural psychology, psychology and social oppression, racism and psychology.

(j) Competence in the substantive content areas listed in 251 CMR 3.03(2)(i) will typically be met by including a minimum of three graduate semester hours (five or more graduate quarter hours) in each of the five substantive content areas.

(k) All programs in psychology must include course requirements in specialty areas.

(l) The dissertation, or equivalent, must be psychological in method and content

(3) Programs that are designated as a doctoral program in psychology by the Association of State and Provincial Psychology Boards or the National Register of Health Service Psychologists, or accredited by the American Psychological Association, at the time the degree is granted or within three years thereafter, shall be presumed, in the absence of evidence to the contrary, to meet the requirements of 251 CMR 3.03(2).

(4) Applicants with a doctoral degree in psychology from a foreign institution will be required to establish equivalency to a doctoral program in psychology in the United States through a credentials evaluation, and must meet the requirements of 251 CMR 3.03(2).

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 physician or to produce for examination the person in his 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.

(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 him a copy of a detailed written report of the examining physician setting out his 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 party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his 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 he 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 him in respect of the same mental or physical condition; but he does not otherwise waive his 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 a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

Effective July 1, 1974.

Reporters' Notes (1973): Rule 35 tracks Federal Rule 35 (as amended). The general procedural framework remains identical to that under S.J.C. 3:15. No one need submit to a physical examination except upon a court order granted only "for good cause shown". If the person examined obtains from the discovering party a copy of the report of the examination (which he is entitled to do, as of right), the discovering party is entitled to any reports of any other examination (prior or subsequent) pertaining to the same condition which the person examined may have.

Rule 35. Physical and Mental Examinations

Currentness

(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) *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 examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

[Back to top](#)

(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.

CREDIT(S)

(Amended March 30, 1970, effective July 1, 1970; March 2, 1987, effective August 1, 1987; amended by [Pub.L. 100-690, Title VII, § 7047\(b\)](#), November 18, 1988, 102 Stat. 4401; amended April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Physical examination of parties before trial is authorized by statute or rule in a number of states. See *Ariz.Rev. Code Ann.* (Struckmeyer, 1928) § 4468; *Mich. Court Rules Ann.* (Searl, 1933) Rule 41, § 2; 2 *N.J.Comp.Stat.* (1910); *N.Y.C.P.A.* (1937) § 306; 1 *S.D.Comp.Laws* (1929) § 2716A; 3 *Wash.Rev.Stat.Ann.* (Remington, 1932) § 1230-1.

Mental examination of parties is authorized in Iowa. *Iowa Code* (1935) ch. 491-F1. See McCash, *The Evolution of the Doctrine of Discovery and Its Present Status in Iowa*, 20 *Ia.L.Rev.* 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon v. Manhattan Railway Co.*, 1894, 37 *N.E.* 113, 142 *N.Y.* 298, and *McGovern v. Hope*, 1899, 42 *A.* 830, 63 *N.J.L.* 76. In *Union Pacific Ry. Co. v. Botsford*, 1891, 11 *S.Ct.* 1000, 141 *U.S.* 250, 35 *L.Ed.* 734, it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co. v. Stetson*, 1900, 20 *S.Ct.* 617, 177 *U.S.* 172, 44 *L.Ed.* 721 where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, c. 651, *U.S.C., Title 28, § 2072*, formerly §§ 723b (Rules in actions at law; Supreme Court authorized to make) and 723c (Union of equity and action at law rules; power of Supreme Court).

1970 Amendment

Subdivision (a). Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination. It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control. As appears from the provisions of amended Rule 37(b)(2) and the comment under that rule, an order to “produce” the third person imposes only an obligation to use good faith efforts to produce the person.

The amendment will settle beyond doubt that a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Further, the amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule. See *Beach v. Beach*, 114 *F.2d* 479 (*D.C. Cir.* 1940). Provisions similar to the amendment have been adopted in at least 10 States: [Calif. Code Civ.Proc. § 2032](#); *Ida.R.Civ.P.* 35; *Ill. S-H Ann.* c. 110A, § 215; *Md.R.P.* 420; *Mich.Gen.Ct.R.* 311; *Minn.R.Civ.P.* 35; *Mo.Vern.Ann.R.Civ.p.* 60.01; [N.Dak.R.Civ.P. 35](#); *N.Y.C.P.L.* § 3121; [Wyo.R.Civ.P. 35](#).

The amendment makes no change in the requirements of Rule 35 that, before a court order may issue, the relevant physical or mental condition must be shown to be “in controversy” and “good cause” must be shown for the examination. Thus, the amendment has no effect on the recent decision of the Supreme Court in *Schlagenhauf v. Holder*, 379 *U.S.* 104 (1964), stressing the importance of these requirements and applying them to the facts of the case. The amendment makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules cited above appear to have been virtually unused.

Subdivision (b)(1). This subdivision is amended to correct an imbalance in Rule 35(b)(1) as heretofore written. Under that text, a party causing a Rule 35(a) examination to be made is required to furnish to the party examined, on request, a copy of the examining physician's report. If he delivers this copy, he is in turn entitled to receive from the party examined reports of all examinations of the same condition previously or later made. But the rule has not in terms entitled the examined party to receive from the party causing the Rule 35(a) examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment cures this defect. See [La.Stat.Ann., Civ.Proc. art 1495 \(1960\)](#); [Utah R.Civ.P. 35\(c\)](#).

[Back to top](#)

The amendment specifies that the written report of the examining physician includes results of all tests made, such as results of X-rays and cardiograms. It also embodies changes required by the broadening of Rule 35(a) to take in persons who are not parties.

Subdivision (b)(3). This new subdivision removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement, and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied, see 4 *Moore's Federal Practice* ¶35.06, n. 1 (2d ed. 1966); 2A *Barron & Holtzoff, Federal Practice and Procedure* § 823, n. 22 (Wright ed. 1961), and it appears best to fill the technical gap in the present rule.

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b), but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. *Sher v. De Haven*, 199 F.2d 777 (D.C. Cir. 1952), cert. denied 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)--such as Rules 34 or 26(b)(3) or (4)--discovery should not depend upon whether the person examined demands a copy of the report. Although a few cases have suggested the contrary, e.g., *Galloway v. National Dairy Products Corp.*, 24 F.R.D. 362 (E.D.Pa.1959), the better considered district court decisions hold that Rule 35(b) is not preemptive. E.g., *Leszynski v. Russ*, 29 F.R.D. 10, 12 (D.Md.1961) and cases cited. The question was recently given full consideration in *Buffington v. Wood*, 351 F.2d 292 (3d Cir. 1965), holding that Rule 35(b) is not preemptive.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

The revision authorizes the court to require physical or mental examinations conducted by any person who is suitably licensed or certified.

The rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical psychologists. This revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.

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 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. This authority is not wholly new, for under the former rule, the court retained discretion to refuse to order an examination, or to restrict an examination. 8 [WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2234 \(1986 Supp.\)](#). The revision is intended to encourage the exercise of this discretion, especially with respect to examinations by persons having narrow qualifications.

The court's responsibility to determine the suitability of the examiner's qualifications applies even to a proposed examination by a physician. If the proposed examination and testimony calls for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician. The rule does not, however, require that the license or certificate be conferred by the jurisdiction in which the examination is conducted.

2007 Amendment

The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

[Back to top](#)