THE PRESENCE OF THIRD PARTIES AT RULE 35 EXAMINATIONS

William Scott Wyatt and Richard A. Bales***

---

* Judicial clerk for the Honorable Sidney Fitzwater, United States District Court for the Northern District of Texas. B.A., University of Oklahoma, 1995; J.D., Southern Methodist University, 1998. Upon completing the clerkship, Mr. Wyatt will work for the Dallas office of Vinson & Elkins, L.L.P. Mr. Wyatt wishes to thank his parents, Dr. Will G. and Lou Ann Wyatt, for their continuous love and support and his wife, Susan, for always being his inspiration.

** Assistant Professor, Northern Kentucky University, Salmon P. Chase College of Law.

INTRODUCTION

Physical and mental injuries play a critical role in an increasing number of lawsuits. Plaintiffs have sought recovery for these injuries in a variety of cases, under causes of action ranging from negligence to employment discrimination[1] to intentional infliction of emotional distress. These injuries are difficult to quantify or even to verify. There are few methods or tools to determine if a plaintiff is suffering mental distress or pain and the extent of that suffering. Unlike a suit for breach of contract, a court cannot examine a document to determine the liabilities and the amounts. To counter this proof difficulty, the Federal Rules of Civil Procedure[2] and parallel state court rules[3] allow, under certain circumstances, the defendant's physician to conduct a mental or physical examination of the plaintiff. These examinations are considered the best available method for a defendant to determine, and to gather evidence concerning, the plaintiff's mental or physical condition.[4]

These examinations, however, are also a source of concern for many plaintiffs. A plaintiff who has suffered a severe mental injury understandably will not want to submit to an examination that "renews the unspeakable woe" of the causative events.[5] By doing so, the plaintiff may suffer more mental harm by reliving the unpleasant experience. Also, a plaintiff may be concerned about submitting to an examination conducted by an expert who is paid by the opposing party. These concerns may prompt the plaintiff to request that the court allow third parties[6] to be present during the examination. Defendants normally reply that this would interfere with their experts' ability to conduct an adequate examination. The Federal Rules of Civil Procedure offer no guidance regarding under what circumstances, if any, courts should permit third parties to be present during a Rule 35 examination by an opposing party's expert. Not surprisingly, the judicial decisions on point are not entirely consistent, and fail to provide a coherent set of principles for informing future cases.

---

1. For discussions of the use of Rule 35 examinations in employment cases, see Richard A. Bales & Priscilla Ray, M.D., *The Availability of Rule 35 Mental Examinations in Employment Discrimination Cases*, 16 REV. LITIG. 1 (1997); Kent D. Streseman, Note, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268 (1995).

2. FED. R. CIV. P. 35.

3. For a discussion of how many state courts interpret the state equivalents to Rule 35, see *infra* Part III.F and accompanying notes.

4. DAVID HITTNER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL, 5TH CIRCUIT EDITION 11:834 (1996), *available in* WESTLAW, TXFCIVP Ch. 11-J.

5. VIRGIL, AENEID, bk. II, l. 3 (Allen Mandelbaum trans., Univ. of California Press (1981)) ("Infandum, regina, jubes renovare dolorem") ("O Queen—too terrible for tongues the pain you ask me to renew") (recounting the destruction of the city of Troy).

6. The term "third party" refers to a person other than the examining physician or the examined party. This includes the examined party's attorney, another physician, a close friend or relative of the examined party, or a court reporter. See *infra* Part II.C-F and accompanying notes for a discussion of court rulings on the presence of third parties during Rule 35 examinations.

This article provides a comprehensive analysis of whether and when a court should permit third parties to be present during Rule 35 examinations. Part I provides background material on when and how one party may obtain a Rule 35 examination of another party. Part II discusses and evaluates the reasons that litigants have proffered for allowing third parties to be present during the examination. Part II then categorizes the cases according to the particular type of third party whose presence is requested, including family members, physicians, and lawyers. Part II also evaluates whether the presence of that particular type of third party is likely to be helpful or harmful to the discovery process. Part III examines and analyzes the various policy considerations that litigants have offered, and courts have adopted, for or against the presence of third parties. Finally, Part IV returns to the categorization of cases by type of third party, and proposes specific factors for the courts to use when faced with these issues.

I. RULE 35

A. *The Rule*

Federal Rule of Civil Procedure 35 provides a structured procedure for conducting mental or physical examinations. It states that:

> 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. 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.[7]

B. *Obtaining a Mental or Physical Examination*

The most common way for a party to conduct a Rule 35 mental or physical examination is to obtain a court order.[8] To do so, the requesting party, usually the defendant,[9] must prove two prerequisites.[10] First, the party must show that the relevant physical or mental condition is "in controversy."[11] A

---

7. FED. R. CIV. P. 35(a).

8. The parties may also stipulate to an examination. FED. R. CIV. P. 35 (1970 amendment commentary). See also *infra* note 19 and text accompanying notes 75-78 for a discussion of stipulations.

9. *See* Hirschheimer v. Associated Minerals & Minerals Corp., No. 94 CIV.6155, 1995 WL 736901, at *2 (S.D.N.Y. Dec. 12, 1995) (acknowledging defendant as usual party to invoke Rule 35 examination).

10. *In re* Certain Asbestos Cases, 113 F.R.D. 612, 614 (N.D. Tex. 1986) (stating that burden of proof is on the party requesting examination).

11. FED. R. CIV. P. 35 (1970 amendment comment); *see also* Schlagenhauf v. Holder, 379 U.S. 104, 115, 118-19 (1964) (requiring affirmative showing by movant that each condition to be

condition is in controversy when the party to be examined, usually the plaintiff, has alleged or pled the existence of a mental or physical condition that allegedly was caused by, or resulted from, the defendant's conduct.[12] A defendant may not place a condition in controversy merely by asserting unsubstantiated allegations about the condition.[13] The purpose of this narrow definition is to ensure that the defendant does not overplead conditions in controversy and thereby subject another party to extraneous mental or physical examinations.[14]

Second, the defendant must show that "good cause" exists for conducting the examination.[15] The defendant must assert specific facts that justify the discovery.[16] A defendant may satisfy this burden by demonstrating the defendant's need for the information to be obtained from such an examination and the defendant's inability to obtain this information from other sources.[17] For example, in a products liability action against an asbestos manufacturer, the defendant made an adequate showing by demonstrating that an autopsy of an asbestos victim by a qualified pathologist was the most medically reasonable method of determining the exact cause of death.[18]

In addition to the in controversy and good cause requirements, Rule 35 also prescribes certain minimal procedures that the parties must follow with regard to Rule 35 examinations.[19] The examination may be conducted by a suitably licensed or certified expert requested by the defendant,[20] or the court may appoint its own expert examiner, if the plaintiff makes a valid objection to the defendant's choice in an examiner and the parties cannot agree

---

examined is in controversy); Bales & Ray, *supra* note 1, at 3-5 (stating court must decide if moving party makes sufficient showing that condition to be examined is in controversy).

12. *See, e.g.*, Anson v. Fickel, 110 F.R.D. 184, 186 (N.D. Ind. 1986) (holding mental condition sufficiently in controversy when plaintiff sought compensation for emotional damages and was confined to psychiatric ward after accident).

13. *See Schlagenhauf*, 379 U.S. at 118-21 (holding that defendant, in response to cross-claim, may not obtain Rule 35 examination merely by asserting that co-defendant was unfit to operate motor vehicle).

14. *See id.* (holding that basis must exist before requiring Rule 35 examinations).

15. FED. R. CIV. P. 35 (1970 amendment comment).

16. *See Schlagenhauf*, 379 U.S. at 121 (holding that only allegations of impaired vision were specific enough to warrant court ordered examination); *In re* Certain Asbestos Cases, 113 F.R.D. 612, 614 (N.D. Tex. 1986) (requiring physician's affidavit demonstrating that condition is in controversy and autopsy is most reasonable method for determining decedent's condition at death).

17. *Schlagenhauf*, 379 U.S. at 118-19.

18. *In re Certain Asbestos Cases*, 113 F.R.D. at 614.

19. *See* FED. R. CIV. P. 35(a) (stating court's order must "specify time, place, manner, conditions, and scope of examination"). An examination under a stipulation is slightly different. The parties may stipulate to almost any procedure, including the setting for the examination, the methodology used in the examination, and the presence of certain individuals at the examination. FED. R. CIV. P. 35 (1970 amendment commentary). The parties, however, must follow the procedures set forth in Rule 35 to the extent that those proceedings are not contradicted by the stipulation. *Id.*

20. FED. R. CIV. P. 35(a).

to an examining physician.[21] After completing a court ordered or stipulated examination, the examinee is entitled to receive a copy of the examination report upon request.[22]

II. Court Rulings on the Presence of Third Parties

A. Introduction

Other than the examining physician and the party to be examined, Rule 35 does not expressly mention who or what may be present at a mental or physical examination.[23] In fact, Rule 35 mental or physical examinations are the only discovery devices under the Federal Rules of Civil Procedure that a party may conduct outside of the presence of the examined party's counsel.[24] There is, however, no language in Rule 35 that specifically or impliedly bars a third party from attending the examination. Courts have interpreted Rule 35 as giving a trial court discretion to allow the presence of a third party,[25] subject to the general principle that the court should "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[26]

An examined party who requests the presence of a third party or device, such as a tape recorder, at a mental or physical examination faces an uphill battle. Neither the Federal Rules of Civil Procedure nor the United States Supreme Court have enunciated a clear standard for the district courts to use when ruling on such a request. District courts usually have required the plaintiff to make a showing of good cause for the presence of a third party,[27] meaning that the examined party must prove that "special circumstances are present which call for a protective order tailored to the specific problems presented."[28] As this standard implies, the presumption generally seems to

---

21. Duncan v. Upjohn Co., 155 F.R.D. 23, 27 (D. Conn. 1994); The Italia, 27 F. Supp. 785, 786 (E.D.N.Y. 1939).

22. Fed. R. Civ. P. 35(b)(1).

23. Fed. R. Civ. P. 35(a).

24. *See* Fed. R. Civ. P. 26(f) (requiring attorneys of record to be present at meeting of parties prior to scheduling conference); Acosta v. Tenneco Oil Co., 913 F.2d 205, 210 (5th Cir. 1990) (reversing lower court decision requiring plaintiff to submit to Rule 35 examination outside presence of counsel when Rule 35 requirements were not met).

25. *See, e.g.*, Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D. Ind. 1989) (holding court has discretion to deny attorney presence at court ordered examination).

26. Fed. R. Civ. P. 26(c); *see also* Tirado v. Erosâ, 158 F.R.D. 294, 295 (S.D.N.Y. 1994) (viewing presence of plaintiff's attorney and stenographer as unnecessary intrusion affecting results of examination); Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969) (viewing presence of plaintiff's attorney at examination as unfavorably adversarial).

27. *Wheat*, 125 F.R.D. at 480; Cline v. Firestone Tire & Rubber Co., 118 F.R.D. 588, 589 (S.D. W.Va. 1988); Brandenberg v. El Al Israel Airlines, 79 F.R.D. 543, 546 (S.D.N.Y. 1978); Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 598 (D. Md. 1960).

28. *Tirado*, 158 F.R.D. at 299.

be against permitting third parties to be present at Rule 35 mental or physical examinations.[29]

B. Reasons to Request the Presence of a Third Party

Before discussing the court rulings on the presence of third parties and devices at Rule 35 mental and physical examinations, a brief consideration of the reasons for such requests will clarify why disputes occur. These reasons also indicate which policy arguments are relevant to the consideration. Generally, there are three reasons why an examinee may request the presence of a third party or device at a Rule 35 examination: fear that the examiner will turn the examination into a *de facto* deposition, the need for emotional support during an examination concerning intimate facts, and the potential for the examiner to use harmful examination techniques.

1. *De Facto* Depositions

The first reason for requesting the presence of a third party or device at a Rule 35 mental or physical examination is the fear that the examination will turn into a *de facto* deposition. Several courts have recognized the danger that a Rule 35 examination may easily become such a deposition.[30] Many examinees and their attorneys fear that the examining physician, especially a psychiatrist who is retained and paid by the opposing party, will ask questions seeking answers that will undermine the examinee's case.[31] Under pressure by an expert in the field, fearing a court order for refusing to cooperate, or just intimidated by the examining physician, the examinee may answer questions that harm the merits of his case, without fully considering the correct answer to give or objecting to the impropriety of the question. For example, a psychiatrist who examines the examinee's mental condition may probe into the reasons for the examinee's mental distress and ask questions regarding other parts of the examinee's life that may cast doubts on the truthfulness of the pleadings. The defendant then could use these statements as an admission by the plaintiff that the defendant was not the cause, or at least not the sole cause, of the plaintiff's mental distress.[32]

To prevent this danger, the examinee may request the presence of a third party, usually an attorney, to ensure that the examination does not turn into a deposition. The attorney will be able to object to questions concerning impermissible subject matters and may help the examinee answer a question in

---

29. *See Cline*, 118 F.R.D. at 589 (stating psychological examination especially condemns presence of plaintiff's attorney).

30. *See* Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 14 (E.D.N.Y. 1989) (noting that, in reality, an examination is adversarial in nature); Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636 (D. Wis. 1984) (stating plaintiff is entitled to counsel during psychiatric interview); *Dziwanoski*, 26 F.R.D. at 597. *But see Wheat*, 125 F.R.D. at 480 (stating it is highly unlikely that examining physician would ask any questions beyond background questions necessary for treatment).

31. *Wheat*, 125 F.R.D. at 480.

32. *Dziwanoski*, 26 F.R.D. at 597-98.

a way that does not undermine the lawsuit. A lawyer's presence would be especially useful when the examinee is a lay person without the legal training that would allow him to adequately assess the propriety of certain questions during the examination.[33]

2. Sensitive Subject Matter

The second reason for requesting the presence of a third party or device at a Rule 35 mental or physical examination is that the examination may probe into highly intimate, sensitive, or private matters. Questions about these subjects are especially likely to occur during psychiatric examinations in sexual harassment cases and physical examinations in sexual assault cases, because such questions are the most effective way to obtain the necessary information from the plaintiff. Due to their highly personal nature, the questions asked in the examination may raise serious concerns regarding the examinee's privacy rights or freedom from unnecessary embarrassment.[34] The presence of a third party, especially a close relative or trusted friend, might prevent or decrease the harmful effects of probing into these matters by providing moral support and comfort to the examinee during an intensive examination. If the examinee's attorney is present, she can prevent the physician from asking a line of questions that impermissibly intrudes into the examinee's private life.

3. Harmful Methodology

The third reason for requesting the presence of a third party or device at a Rule 35 mental or physical examination is that the physician may employ improper, unconventional, or harmful examination methods. Using an unconventional method or a method that is rejected by the scientific community may cause unnecessary stress or emotional harm to the examinee, or lead the examining physician to the wrong conclusion. Most examinees do not have the specialized training and knowledge to realize that the method is improper or harmful. Also, some of the techniques may cause subtle adverse effects so that the examinee does not even realize that any harm is occurring. This lack of knowledge may prevent the examinee from informing his attorneys of the examination's problems. Moreover, any discussion with the attorney would occur only after the harm has occurred. Plaintiffs, therefore, often request the presence of their own experts who are able to analyze and evaluate the propriety of the examining physician's techniques and questions.[35] If the examinee's expert believes there is a problem, he may object to the technique

33. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2236 (1994).

34. *See* Sanden v. Mayo Clinic, 495 F.2d 221, 225 (8th Cir. 1974) (stating plaintiff failed to argue that presence of her own physician was necessary to protect her privacy interests and prevent unnecessary embarrassment); Klein v. Yellow Cab Co., 7 F.R.D. 169, 170 (D.C. Ohio 1944) (stating plaintiff argued that physical examination would be too painful because exam would involve genitalia).

35. WRIGHT ET AL., *supra* note 33, § 2236.

or suggest alternative methods when appropriate. The examinees, therefore, believe that the presence will allow the defendant to obtain all of the necessary information about the examinee's injuries without causing impermissible harm to the examinee or his case.

C. Attorneys

Although Rule 35 is silent on the issue of whether an examinee's attorney may be present during an examination, the federal courts consistently have held that the plaintiff does not have an absolute right to have his attorney present at the examination.[36] Following this principle, the overwhelming majority of courts that have considered the issue have denied the examinee's request to have his attorney present during the examination.[37] These decisions are based on the belief that the attorney's presence would adversely affect the case and the examination, such as by introducing an adversarial aspect into the examination, or by making the attorney a potential witness in the case.[38] After considering the benefits and detriments of the presence of an attorney, courts believe that the negative consequences to the case and the examination outweigh any potential benefits.

Courts have recognized two exceptions to this general rule of denying the attorney's presence. The first is when the opposing party does not object to the presence of the examinee's attorney.[39] This exception, however, is unlikely to occur in most cases handled by experienced trial attorneys, and there is no set rule concerning the timeliness of the objection.

The second exception occurs when the examinee makes a showing of good cause for the attorney's presence.[40] To date, only one court has permitted the presence of an examinee's attorney over opposing counsel's objec-

---

36. *E.g.*, Tirado v. Erosâ, 158 F.R.D. 294, 295 (S.D.N.Y. 1994) (relying on omission of right to attorney's presence in Rule 35).

37. Hirschheimer v. Associated Minerals & Minerals Corp., No. 94 CIV.6155, 1995 WL 736901, at *3 (S.D.N.Y. Dec. 12, 1995); *Tirado*, 158 F.R.D. at 296; Tomlin v. Holececk, 150 F.R.D. 628, 631 (D. Minn. 1993); Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D. Ind. 1989); Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 13-14 (E.D.N.Y. 1989); Cline v. Firestone Tire & Rubber Co., 118 F.R.D. 588, 589 (S.D. W.Va. 1988); McDaniel v. Toledo, Peoria & W. R. Co., 97 F.R.D. 525, 526 (C.D. Ill. 1983); Neumerski v. Califano, 513 F. Supp. 1011, 1016-17 (E.D. Pa. 1981); Brandenberg v. El Al Israel Airlines, 79 F.R.D. 543, 546 (S.D.N.Y. 1978); Swift v. Swift, 64 F.R.D. 440, 443 (E.D.N.Y. 1974); Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969); *Dziwanoski*, 26 F.R.D. at 598. *But see* Vreeland v. Ethan Allen, Inc., 151 F.R.D. 551, 551-52 (S.D.N.Y. 1993) (finding no abuse of discretion in permitting attorney to be present); Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636 (E.D. Wis. 1984) (permitting presence of doctor or attorney at psychological examination of plaintiff); Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 299 (E.D. Pa. 1983) (permitting plaintiff's psychiatrist to be present at examination of plaintiff solely as observer).

38. *E.g.*, *Dziwanoski*, 26 F.R.D. at 598 (warning that if an attorney who attends a Rule 35 examination later desires her observations to be the basis of a cross-examination or contradiction of the physician, the attorney will effectively make herself a witness, thereby subjecting her to disqualification).

39. *Warrick*, 46 F.R.D. at 427; *Dziwanoski*, 26 F.R.D. at 598 n.2.

40. *Cline*, 118 F.R.D. at 589; *Brandenberg*, 79 F.R.D. at 546.

tion. In *Zabkowicz v. West Bend Co.*,[41] the employment discrimination plaintiffs argued that the examiner's status as defendant's expert would make it possible for the examiner to conduct an adversarial *de facto* deposition.[42] The court agreed, concluding that "the plaintiffs' interest in protecting themselves from unsupervised interrogation by an agent of their opponent outweighs the defendants' interest in making the most effective use of their expert."[43] Every other court to consider the issue, however, has required the plaintiff to show more than "broad allegations of harm unsubstantiated by specific examples,"[44] and has refused to permit the attorney's presence.[45]

D. Physicians

Courts have split on the issue of whether the examinee's doctor may be present during a Rule 35 mental or physical examination conducted by the opposing party's expert. Several courts have allowed physicians to attend the examination.[46] These courts have viewed the examinee's physician as a lesser threat to the process of the examination than the examinee's attorney. These courts reason that, while the attorney's presence may inhibit the examining doctor's permissible questioning of the examinee or intimidate the examining doctor, the presence of a physician has a higher probability to increase the professionalism of the examination by assuring that the examining physician follows accepted and scientifically valid methods of examination.[47] One court has indicated that joint examinations conducted by both

---

41. 585 F. Supp. 635 (E.D. Wis. 1984).

42. *Id.* at 636.

43. *Id.*

44. Hirschheimer v. Associated Minerals & Minerals Corp., No. 94 CIV.6155, 1995 WL 736901, at *3 (S.D.N.Y. Dec. 12 1995) (quoting Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 223 (S.D.N.Y. 1994)).

45. See *supra* note 37 and accompanying text for a discussion of cases in which courts did not permit an attorney to be present at Rule 35 examinations.

46. *See, e.g.*, Tirado v. Erosâ, 158 F.R.D. 294, 300 n.14 (S.D.N.Y. 1994) (permitting presence of nurse during psychological examination); *In re* Certain Asbestos Cases, 113 F.R.D. 612, 615 (N.D. Tex. 1986) (permitting presence of pathologist during autopsy); Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 299 (E.D. Pa. 1983) (permitting presence of psychologist solely as observer); Brandenberg v. El Al Israel Airlines, 79 F.R.D. 543, 546 (S.D.N.Y. 1978) (permitting presence of physician at physical examination); Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969) (permitting presence of physician at physical examination); Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 598 (D. Md. 1960) (permitting presence of physician at physical examination); Klein v. Yellow Cab. Co., 7 F.R.D. 169, 170 (D.C. Ohio 1944) (permitting presence of physician at physical examination).

47. *Dziwanoski*, 26 F.R.D. at 598. It often is difficult to tell from the judicial opinions whether the court is most concerned with the accuracy of the examining expert's conclusion—that is, the attending expert will be able to alert the examining expert to possible mistakes, or suggest alternative approaches that might lead to more a more accurate conclusion—or with the nature of the examination itself—that is, the presence of the attending expert will deter the examining expert from turning the examination into a deposition, or conducting the examination in an unnecessarily hostile manner. The latter would appear to be a legitimate concern, and would justify a court permitting the examinee's expert to attend the examination as a silent observer. The former, however, appears problematic for two reasons. First, the examinee has

parties' doctors is the preferred approach to Rule 35 examinations.[48] In most cases where the court grants the examinee's request to have a physician present, however, the court requires the examinee's doctor to behave as an impartial observer, rather than an adversary, to prevent any disruption during the examination.[49]

Several courts have denied examinees' requests to have their own physician present at a Rule 35 mental or physical examination.[50] These courts give two reasons for the refusal: the doctor's presence may be an unnecessary burden on the examining physician,[51] and the presence may prevent the examinee from focusing on the examination.[52] These factors, the courts reason, will decrease the effectiveness of the examination. Some of the courts adopting this view, however, have indicated that they would recognize exceptions under appropriate circumstances. Two courts, for example, have stated that the presence of the examinee's doctor would be appropriate if the examinee could show that the examining doctor proposes to use unorthodox or potentially harmful techniques in conducting the examination.[53] To date, however, no court has permitted an examinee's doctor to attend a Rule 35 examination on this ground.

E. Moral Supporters

Examinees have requested that the court allow people other than attorneys or physicians to be present at Rule 35 mental or physical examinations. These third party observers typically have included friends, spouses, children,

---

no interest in the accuracy of the opposing party's expert; if the opposing expert makes a mistake or fails to follow a proper line of inquiry, this can be used at trial to undermine the persuasiveness of the examining expert's conclusion. Second, this gives an unfair advantage to the examinee with regard to trial preparation: her expert has the benefit of having attended the opposing party's expert's examination, whereas the opposing party's expert presumably does not have the benefit of having attended the examinee's expert's examination. See *infra* notes 89-92 and accompanying text for a discussion of the possible effects of the presence of attorneys at Rule 35 examinations. This is less of a concern where the presence of the examinee's expert is justified on the grounds of deterring a hostile examination, because there is little likelihood that the examinee's expert will examine her client in a hostile manner.

48. *Dziwanoski*, 26 F.R.D. at 598.

49. *In re Certain Asbestos Cases*, 113 F.R.D. at 615; *Lowe*, 101 F.R.D. at 299.

50. Duncan v. Upjohn Co., 155 F.R.D. 23, 27 (D. Conn. 1994); Galieti v. State Farm Mut. Auto. Ins. Co., 154 F.R.D. 262, 265 (D. Colo. 1994); *see also* Sanden v. Mayo Clinic, 495 F.2d 221, 225 (8th Cir. 1974) (requiring examinee's own physician to examine the examinee after the examination and examinee's attorney to conduct extensive medical questioning of variety of doctors at trial).

51. *See Sanden*, 495 F.2d at 225 (stating that presence of examinee's physician was unnecessary because examinee was registered nurse and could evaluate medical appropriateness of examination techniques).

52. *Galieti*, 154 F.R.D. at 265. *See also infra* text accompanying notes 87-90.

53. *Duncan*, 155 F.R.D. at 27; *Galieti*, 154 F.R.D. at 265. Such an exception corresponds to the majority rule's rationale that the presence of another physician may ensure professional and safe examinations. See also *supra* text accompanying note 40 for a discussion of the court's accepted exception when the opposing party does not object to the presence of the examinee's attorney.

or parents.[54] Generally, courts have denied the requests to have these people present at the examination, and have concluded that their presence would constitute an unnecessary distraction and thereby decrease the scientific value of the examination.[55]

The one exception is when the examinee makes a showing of good cause.[56] The necessary showing for this exception is similar to that required for the presence of a physician.[57] One way that the examinee may satisfy this requirement is by proving that the examining physician will use unorthodox or potentially harmful examination methods and that the third party is necessary to deter the usage of such methods.[58] Additionally, the examinee may satisfy this good cause requirement by proving that the examination would be highly traumatic for the examinee or would probe extremely sensitive or private matters. Under these circumstances, a court might permit a third party, such as a spouse or a parent, to be present to provide moral support and comfort during the examination. Although several courts have suggested that good cause would overcome the presumption against permitting the presence of moral supporters in Rule 35 examinations,[59] it does not appear that any court has permitted moral supporters to attend on this ground.

---

54. *See, e.g.*, Shirsat v. Mut. Pharm. Co., 169 F.R.D. 68, 70 (E.D. Pa. 1996) (discussing third party observers, court reporters, and recording devices); Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609-10 (C.D. Cal. 1995) (discussing third party observers); Galieti v. State Farm Mut. Auto. Ins. Co., 154 F.R.D. 262, 265 (D. Colo. 1994) (discussing third party observers); Tomlin v. Holececk, 150 F.R.D. 628, 631-32 (D. Minn. 1993) (discussing tape recorders). In one particularly interesting case, the defendant requested the court's permission to allow his presence at the examination. Deluca v. Gateways Inn, Inc., 166 F.R.D. 266, 267-68 (D. Mass. 1996). The court correctly denied this request, noting that the defendant's presence could easily and unnecessarily invade on the sensitive and private relationship and conversations between the examinee and the examining physician. *Id.*

55. *Shirsat*, 169 F.R.D. at 70; *Ragge*, 165 F.R.D. at 609-10; *Galieti*, 154 F.R.D. at 265; *Tomlin*, 150 F.R.D. at 631-32; *see also* Schempp v. Reniker, 809 F.2d 541, 542 (8th Cir. 1987). In *Schempp*, the court affirmed the dismissal without prejudice of a civil suit by a child's maternal grandparents against the child's father for sexual abuse of the child, where the child's mother refused to permit the child to be examined unless she, the mother, was permitted to be present at all times during the examination. *Id.* The court concluded that the expert's examination of the child was essential to the preparation and presentation of the father's defense, and that the presence of the child's mother, who might falsely have alleged the sexual abuse at issue to further her case for custody in a prior divorce proceeding against the father, would prejudice the examination. *Id.*

56. *Ragge*, 165 F.R.D. at 609-10.

57. See *supra* text accompanying note 47 explaining the policy behind permitting the presence of physicians at Rule 35 examinations.

58. *Ragge*, 165 F.R.D. at 609-10; *cf. Galieti*, 154 F.R.D. at 265 (refusing to allow the presence of a third party observer when examiner's impartiality remained unchallenged).

59. *See, e.g.*, *Ragge*, 165 F.R.D. at 609-10 (acknowledging potential for contamination of mental examination by presence of third party observers).

F. Court Reporters or Recording Devices

Some examinees have requested the presence of court reporters or recording devices at a Rule 35 mental or physical examination.[60] The examinees' rationale is that an accurate memorialization of the examination will aid their attorneys in pre-trial and cross-examination preparation.[61] At least two courts have granted such a request. In *Zabkowicz*,[62] discussed above, the District Court for the Eastern District of Wisconsin permitted the presence of the examinee's attorney and recording device based on the examinee's fear that an unsupervised examination could be turned into a deposition. Similarly, in *Di Bari v. Incaica Cia Armadora, S.A.*,[63] the District Court for the Eastern District of New York allowed the presence of a court reporter at a mental examination. This court, however, required the plaintiff to make a stronger showing of need before permitting the presence of a third party. The examinee in *Di Bari* was a middle-aged man, with minimal education, who had difficulty conversing in the English language. These characteristics, according to the court, severely diminished the examinee's ability to communicate with his attorney, making it difficult for him to convey to his attorney the events of the examination, and justifying the presence of a court reporter.[64] Nevertheless, the court required the court reporter to be as "unobtrusive as possible so as not to impede, influence or in any way obstruct defendant's psychiatric evaluation of the [examinee]."[65] And, in an effort to equalize the effect of the presence, the court required the examinee's attorney to deliver a copy of the resulting transcript to the defendant's attorney.[66]

The general rule, therefore, seems to be that courts will permit the presence of court reporters or recording devices only if the examinee can show good cause why the court reporter or recording device is especially necessary to the particular case.[67] Consequently, most courts considering the issue have denied examinees' requests on the grounds that the examinee has failed to make such a showing.[68] The primary reason is that the attorney has alter-

60. *See Tomlin*, 150 F.R.D. at 631-32 (permitting third-party observer or recording device is inconsistent with applicable professional standards).

61. *E.g.*, Shirsat v. Mut. Pharm. Co., 169 F.R.D. 68, 70 (E.D. Pa. 1996); *Ragge*, 165 F.R.D. at 609-10; *Galieti*, 154 F.R.D. at 265; *Tomlin*, 150 F.R.D. at 631-32.

62. 585 F. Supp. 635 (E.D. Wis. 1984).

63. 126 F.R.D. 12 (E.D.N.Y. 1989).

64. *Id.* at 14.

65. *Id.*

66. *Id.*

67. *Cf.* Hirschheimer v. Associated Minerals & Minerals Corp., No. 94 CIV.6155, 1995 WL 736901, at *4 (S.D.N.Y. Dec. 12 1995); Tirado v. Erosâ, 158 F.R.D. 294, 295 (S.D.N.Y. 1994) (denying plaintiff's request for presence of his attorney at examination absent special circumstances); Tomlin v. Holececk, 150 F.R.D. 628, 630 (D. Minn. 1993) (denying request for recorder or observer to promote objectivity).

68. *See, e.g.*, Shirsat v. Mut. Pharm. Co., 169 F.R.D. 68, 70 (E.D. Pa. 1996) (denying request for court reporter or recording device); *Tomlin*, 150 F.R.D. at 631-32 (denying request for tape recorder). *But see* Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 14 (E.D.N.Y. 1989) (permitting use of court reporter in light of examinee's poor English).

native methods to help his preparation.[69] For example, if the examining expert is designated as a "testifying expert," she must provide the examinee a report containing "a complete statement of all opinions to be expressed and the basis and the reasons therefor" as well as "the data or other information considered by the [expert] in forming the opinions."[70] The examining expert may also be deposed by the examinee's attorney,[71] during which the attorney may question the expert about the occurrences of the examination, including the examiner's methodology and questions.[72] If the examining expert is not designated as a testifying expert, the expert must provide the examinee with a report only upon request.[73] This report, if requested, must be "detailed" and must "set[ ] out the examiner's findings, including results of all tests made, diagnoses and conclusions."[74]

G. Examinations by Stipulations

Rule 35 expressly permits the parties to stipulate to mental or physical examinations.[75] The scope of such an examination may be by agreement of the parties.[76] Thus, the examinee and defendant may agree to the presence of the examinee's attorney, doctor, or other person or device. The parties, however, must draft the examination order carefully. Absent express language to the contrary, the provisions and case precedent of Rule 35 will apply to the examination procedures.[77] Therefore, the parties should expressly and unambiguously list and describe every examination method, procedure, and condition that they intend to impose.[78]

III. Policy Considerations

In addition to understanding how the courts have ruled on the issue of the presence of third parties at Rule 35 mental or physical examinations, it also is important to understand the policy reasons behind their decisions. These policy arguments may clarify why each court reached its decision. More importantly, attorneys may use these policy arguments to argue against a certain line of precedent or for an exception to the general rules. There are many such policy arguments, some more persuasive than others, and some applicable only in certain situations.

---

69. Another reason is that the presence of a court reporter or tape recorder would unnecessarily disrupt the examination. *Cf. Tomlin*, 150 F.R.D. at 632 (finding presence of third parties adds artificiality to examination).

70. Fed. R. Civ. P. 26(a)(2)(B).

71. Fed. R. Civ. P. 26(b)(4)(a).

72. Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 598 (D. Md. 1960).

73. Fed. R. Civ. P. 35(b)(1).

74. *Id.*

75. Fed. R. Civ. P. 35(b)(3).

76. *Id.*

77. *Id.*

78. Hittner et al., *supra* note 4, at 11:834.

A. Non-Adversarial Context of the Examinations

The main policy argument against allowing the presence of third parties or devices in a Rule 35 mental or physical examination focuses on the nature of the examination proceedings.[79] Many courts have construed Rule 35 and its 1970 amendments to require a neutral examination of the examinee's condition.[80] In other words, the examination should be scientific and wholly objective, not adversarial. The purpose of the examination, according to this construct, is not simply to help prove one side's case, but to determine the existence, extent, or cause of the examinee's alleged injury.[81]

Furthermore, the courts generally consider the examining physician to be an officer of the court because she is acting under court order to perform an impartial, non-adversarial examination of the facts in order to further the interests of justice.[82] Like any other officer of the court, the courts require the defendant's medical examiner to function in ways that maintain "the independence of [the doctor's] examination."[83] Thus, the doctor may inquire only into the background facts necessary to examine the examinee's injuries, and may not inquire into impermissible subjects.[84]

Courts normally will deny an examinee's request for the presence of an attorney, physician, recording device, or other third party, because their presence would change the purportedly objective nature of the examination by injecting an adversarial atmosphere into it.[85] The courts consider this especially likely when the third party whose presence is requested is the examinee's attorney, who has an ethical obligation to protect his client's

---

79. *See, e.g.*, Tirado v. Erosâ, 158 F.R.D. 294, 298 (S.D.N.Y. 1994) (denying presence of attorney or recording devices because they would change nature of examination).

80. *See* Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969) (holding Rule 35 examination should be non-adversarial); Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 597 (D. Md. 1960) (holding Rule 35 examination should be non-adversarial); *see also* McDaniel v. Toledo, Peoria & W.R.R. Co., 97 F.R.D. 525, 526 (C.D. Ill. 1983) (favoring *Warrick* reasoning arguing against presence of plaintiff's attorney at examination); WRIGHT ET AL., *supra* note 33, § 2230 (providing for report of examination); *cf.* Ewing v. Ayres Corp., 129 F.R.D. 137, 138 (N.D. Miss. 1989) (finding challenge to examiner's independence warrants another Rule 35 examination). *But see* Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 14 (E.D.N.Y. 1989) (noting examinations are really adversarial in nature).

81. *Dziwanoski*, 26 F.R.D. at 597.

82. *Warrick*, 46 F.R.D. at 428; *Dziwanoski*, 26 F.R.D. at 597; Pitcairn v. Perry, 122 F.2d 881, 886 (8th Cir.), *cert. denied*, 314 U.S. 697 (1941); The Italia, 27 F. Supp. 785, 786 (E.D.N.Y. 1939); *see also* WRIGHT ET AL., *supra* note 33, § 2239 (noting examination is objective search for truth).

83. Ewing v. Ayres Corp., 129 F.R.D. 137, 138 (N.D. Miss. 1989). *But see* Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636 (E.D. Wis. 1984) (noting that defendant's expert was not impartial regarding examination).

84. *See* Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D. Ind. 1989). See also text accompanying note 34 for a discussion of impermissible inquiry during examination.

85. *See Ewing*, 129 F.R.D. at 138 (stating purpose of Rule 35 examination is to secure independent examination of party); *McDaniel*, 97 F.R.D. at 526 (holding medical examinations should not be adversarial); *Warrick*, 46 F.R.D. at 428 (reasoning that examination should be divested of adversarial character as far as possible); *Dziwanoski*, 26 F.R.D. at 597 (arguing that examinations would be interfered with and unduly prolonged).

interests.[86] This obligation may cause the attorney to interject during the examination in order to protect the examinee from sensitive, damaging, or improper questions. Many of these objections may be unnecessary or improper, and may result from the attorney's lack of medical expertise.[87]

The probability that an attorney will interfere with the examination increases when the physician investigates the examinee's injuries or the cause of those injuries.[88] The attorney who fears an answer that would adversely affect his client's case, or who desires to influence the examiner's conclusion, may attempt to conduct a mini-trial of his client's case during the course of the examination. This action would impermissibly "move the forum of the controversy from the courtroom to the doctor's office,"[89] and would shift the control of the examination from the examining physician, who is trained in medical examination procedures and is charged with the duty to scientifically evaluate the subject, to the attorney, whose paramount interest is in protecting his client and succeeding on his claim.[90] As such, the presence of a third party or recording device would unnecessarily hinder the discovery process,[91] both by interfering with the examining expert's examination and by compromising her objectivity.[92]

The argument that the presence of a third party, particularly the examinee's attorney, would disrupt the examination and make it difficult for the examining expert to conduct an effective examination carries substantial weight. Even a few well-timed objections could seriously undermine the examination, and it is not difficult to imagine an overzealous attorney making more than a few objections. This, therefore, seems to be a legitimate reason for courts to look with disfavor on an examinee's request for the presence of an attorney during the examination.

On the other hand, the argument that the presence of any third party would compromise the objectivity of the examination is substantially less plausible. Although, as officers of the court, examining experts are not permitted to perjure themselves or harass the examinee or engage in other such misconduct, it is patently unrealistic to expect them to deliver an entirely objective conclusion. Indeed, one of the primary rationales for their appoint-

---

86. *See, e.g.*, *Warrick*, 46 F.R.D. at 428 (contending that presence of attorney injects partisan character into what should be objective proceeding); *Dziwanoski*, 26 F.R.D. at 598 (holding presence of attorney not necessary and proper).

87. *Dziwanoski*, 26 F.R.D. at 598.

88. *See, e.g.*, *Warrick*, 46 F.R.D. at 428 (stating attorney's presence invades physician's province); *Dziwanoski*, 26 F.R.D. at 598 (stating attorney's presence impermissibly controls examination).

89. *Warrick*, 46 F.R.D. at 428.

90. *Id.*

91. *Cf.* Amato v. City of Richmond, 157 F.R.D. 26, 27 (E.D. Va. 1994) (denying newspaper access to deposition).

92. *See* Tirado v. Erosâ, 158 F.R.D. 294, 296 (S.D.N.Y. 1994) (holding that presence of third parties potentially inhibits witness' ability to discuss certain issues); Cline v. Firestone Tire & Rubber Co., 118 F.R.D. 588, 589 (S.D. W.Va. 1988) (stating that plaintiff's attorney should be excluded absent showing of good cause).

ment is to act as a counterweight to the expert the examinee already has designated,[93] who presumably will testify on behalf of the examinee. The fact that the examining expert is selected and paid by the defendant further belies any notion of objectivity.[94] While it is certainly possible that experts occasionally reach conclusions contrary to the positions of their paying clients, experience suggests that this occurs substantially less than fifty percent of the time, which would be the likelihood if the expert's conclusion were truly objective. Maintaining the expert's objectivity therefore does not seem to be a valid reason for denying the presence of third parties in a Rule 35 examination.

This is not to say, however, that an examining expert's objectivity is not desirable. Such an examination is arguably the best, and sometimes the only, method to discover the truth behind plaintiff's allegation of injuries. Indeed, the authors of this article advocate replacing the adversarial "dueling expert" system currently in place with a single expert jointly chosen by the parties. This would make the expert truly objective, and would contribute substantially to the fact-finding process. For now, however, suffice it to say that experts who are chosen and paid by the parties are not objective, and it is chimerical for courts to assume that they are.

B. Symmetrical Examinations

Another policy argument used to deny the presence of third parties or devices in a Rule 35 mental or physical examination is the preference for symmetrical examinations. Normally, an examinee in a mental or physical injury lawsuit will undergo an examination by her own medical expert. This initial examination is useful to determine the extent of the examinee's injuries and to establish scientific evidence to prove those injuries. This evidence will help the attorney determine the amount of damages to request and will fulfill the attorney's obligation to perform a due diligence inquiry into the validity of the lawsuit.

Neither the defendant, her attorney, nor her medical expert are present during these initial medical examinations. This situation usually occurs because the examination is conducted before the examinee files a lawsuit or even gives notice to the defendant of the examinee's injuries. Even if the examination occurs after the examinee files the lawsuit, courts usually will not allow the defendant or her attorney to be present at the plaintiff's examination by her own expert. The principle of giving each party's expert an equal opportunity to examine the plaintiff without interference by the other party, therefore, persuades the courts to deny the examinee's request for the presence of third parties at a mental or physical examination performed for

93. *See, e.g.*, discussion *infra* Part IV.B regarding the presence of third party physicians.

94. *See* Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 14 (E.D.N.Y. 1989) (stating psychiatric examination by defendant's doctor is adversarial).

the defendant.[95] The courts thereby place the defendant on even grounds with the examinee by allowing both parties to obtain an objective and non-intrusive "opportunity to discover the true nature and extent of the injuries suffered" by the examinee.[96] Further, if the courts were to grant the examinee's request for the presence of third parties, the preference for symmetry would require the courts to afford the defendant the same opportunities during the examination conducted by the examinee's own expert.[97] Such a ruling would often require the re-examination of the examinee and thereby subvert the doctrine of judicial economy.[98]

This policy consideration is persuasive due to the general principle that discovery should be fair and should not favor one party over the other. Examinations by the plaintiff's physician are normally performed with only the plaintiff and the examining physician present. Such circumstances increase the effectiveness and the validity of the examinations.[99] In fairness, the defendant should have the same opportunity to gather facts about the nature and extent of plaintiff's purported injury. To facilitate this, the courts should require similar conditions for each party's examination.

C. One-to-One Communication

A third policy argument often used to deny the presence of third parties at Rule 35 mental or physical examinations is the disruption the presence would cause to the one-to-one communication between the physician and the examinee.[100] This policy argument relies on the necessity of such communication to the doctor's findings. Because the physician cannot independently examine the existence and the extent of the injuries, the physician must rely on information given by the examinee by asking questions and analyzing each response. For example, during a physical examination, the physician normally must ask the examinee questions concerning where or when a particular part of his body aches, how the injury occurred, or how the injury adversely affects the examinee's life. The necessity of free and open commu-

---

95. *See Tirado*, 158 F.R.D. at 300 (arguing safeguards needed to ensure adverse party's expert report includes unfavorable facts); Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 597 (D. Md. 1960) (claiming attorney's presence makes objective examination partisan).

96. *Dziwanoski*, 26 F.R.D. at 597 (quoting Bowing v. Delaware Rayon Co., 190 A. 567, 569 (Del. Sup. Ct. 1937)).

97. *See Tirado*, 158 F.R.D. at 300 (contending one party's entitlement to present psychiatrist's expert testimony requires reciprocity).

98. *Id.*

99. *See supra* text accompanying notes 70-74 for a discussion of fairness in discovery in terms of a party's obligations to make expert testimony available to an opposing party.

100. *See Tirado*, 158 F.R.D. at 296 (citing one-to-one interview of patient as principal method of psychiatric examinations); Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 13 (E.D.N.Y. 1989) (pointing to special nature of unimpeded one-to-one communication between doctor and patient); Neumerski v. Califano, 513 F. Supp. 1011, 1016 (E.D. Pa. 1981) (arguing importance of one-to-one communication); Brandenberg v. El Al Israel Airlines, 79 F.R.D. 543, 546 (S.D.N.Y. 1978) (citing doctor's affidavit as proof of importance of personal communication); *Dziwanoski*, 26 F.R.D. at 598 (arguing attorney's presence at medical examination makes attorney additional witness).

nication is even more crucial with regard to psychiatric examinations.[101] These examinations inherently depend on one-to-one communication and a high degree of rapport between the examining physician and the examinee.[102] The normal method of examination for psychiatrists is to probe the examinee's mind by asking indirect and deliberately chosen questions, then analyzing the examinee's verbal and non-verbal responses to those questions.[103] The more the examinee trusts and feels at ease with the doctor, and the less distractions and interruptions, the more likely that the doctor can perform a thorough and valid examination.

The courts believe that the presence of a third party would adversely affect the examination by making it more difficult for the examining physician to obtain accurate facts concerning the background and history of the injury, and by making it more difficult for the physician to observe and properly analyze the examinee's reactions to the physician's questions.[104] This problem is even more likely if the attendee is the examinee's attorney, because the attorney may feel compelled to object to certain questions, to advise the client on many questions, or simply to disrupt or delay the examination. This may throw off the rhythm of the doctor's questioning or break the examinee's concentration on a response.

Additionally, the presence of third parties may decrease the examinee's desire to discuss intimate or embarrassing facts or events.[105] Although an examinee might feel comfortable discussing intimate details while in the presence of a close relative or a trusted attorney, he might not feel comfortable while in the presence of a stranger such as a court reporter, a newly obtained attorney, or an unknown physician. An examinee who does not feel comfortable discussing such personal subjects will be less likely to volunteer all of the essential information or to respond truthfully to the questions. Together, these intrusions and distractions during the mental or physical examination might decrease the effectiveness and validity of the examination.[106]

This policy consideration is highly persuasive. Because one-to-one communication is necessary for an effective examination, the courts should take

---

101. *See Tirado*, 158 F.R.D. at 296 (citing one-to-one interview as principal method of psychiatric examinations); *Di Bari*, 126 F.R.D. at 13 (pointing to special nature of psychiatric examinations); *Neumerski*, 513 F. Supp. at 1017 (holding importance of attorney exclusion even greater during psychological examinations); *Brandenberg*, 79 F.R.D. at 546 (citing particular nature of psychiatric examinations).

102. *See Tirado*, 158 F.R.D. at 296 (arguing presence of third parties increases patient's self-consciousness); *Di Bari*, 126 F.R.D. at 13 (stating lines of communication need to remain open); *Neumerski*, 513 F. Supp. at 1017 (citing doctor's unwillingness to perform psychiatric examination in counsel's presence); *Brandenberg*, 79 F.R.D. at 546 (pointing to physician's reliance upon one-to-one communication when performing psychiatric examinations).

103. *See Tirado*, 158 F.R.D. at 297 (siding with defense argument that private nature of psychiatric examination promotes open exchange and permits observation of body language).

104. *Dziwanoski*, 26 F.R.D. at 597.

105. *See Tirado*, 158 F.R.D. at 296 (arguing plaintiff may not feel comfortable discussing intimate facts with psychiatric expert).

106. *Id.*

every available measure to protect open discussions in the examining room. This requires the courts to deny any requests that would disrupt the conversation between the examinee and the physician, including the presence of an attorney. It also may, under certain circumstances, justify the court granting a request for the presence of those third parties, such as a close relative who could give moral support, that might make the plaintiff feel more comfortable in answering intimate questions. These considerations will ensure that the examining physician obtains all of the relevant information in order to formulate a valid conclusion.

D. Possible Witness

Another policy argument often cited by the courts to deny the presence of attorneys at a Rule 35 mental or physical examination is the risk that the attorneys will be called as a witness at trial.[107] An attorney who is present at the examination will certainly observe the physician's methodology and questions and the examinee's responses. The attorney, therefore, will have actual personal knowledge of the events of the examination. An examinee who needs or wants to challenge the examining physician's methods, observations, or conclusions may need to call the attorney as a witness. This is most likely to occur when the examinee cannot accurately or completely recall the events of the examination. This also may occur when the attorney cross-examines the physician and must contradict the physician's testimony by the attorney's own observations of the examination.[108]

The problem of calling the attorney as a witness is that it directly conflicts with her ethical obligations under the various rules of professional responsibility.[109] These rules absolutely prohibit the attorney from being a witness in a trial in which she represents a party. For example, the Model Code of Professional Responsibility states that "[i]f, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial."[110] This effectively prohibits the examinee's attorney from assuming the dual roles of lawyer and witness during the same trial because of the possible adverse consequences it

---

107. *See Di Bari*, 126 F.R.D. at 14 (citing ethical problems when party attorney becomes potential witness); Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D. Ind. 1989) (stating ethical impossibility of being both attorney and witness in same case); McDaniel v. Toledo, Peoria & W. R. Co., 97 F.R.D. 525, 526 (C.D. Ill. 1983) (finding conflict with litigating attorney impeachment based upon own observations); Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969) (arguing attorney breach of ethics when impeaching expert's testimony based upon attorney presence at examination); *Dziwanoski*, 26 F.R.D. at 598 (contending attorney in effect becomes potential witness).

108. *Dziwanoski*, 26 F.R.D. at 598. The court emphasized the awkwardness of a cross-examination with questions based upon the attorney's own observations. *Id.*

109. *See infra* notes 110-12 and accompanying text for a discussion of the ethical considerations.

110. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1981).

would have on the case.[111] When confronted with this situation, the attorney is ethically obligated to withdraw from the representation.[112] Therefore, the courts often have not allowed an attorney to be present at a Rule 35 examination in order to avoid this potential conflict.

This policy consideration presents a strong argument why attorneys should not be permitted to attend a Rule 35 examination. Courts should be vigilant in ensuring that attorneys do not violate the rules of professional responsibility, and should, whenever possible, take precautionary measures that reduce or eliminate the possibility of a rule violation. By denying the presence of an attorney at an examination, the courts negate the possibility that a party would call the attorney as a witness to testify about any event of the examination, thereby disqualifying the attorney from further representing the client. This policy consideration does not, however, present a strong argument why other third parties should not be permitted to attend a Rule 35 examination. Indeed, to the extent that an attorney might be called as a witness to present relevant testimony concerning the examination, the presence of some other third party becomes useful to obtaining testimony about the same information. Put another way, the attorney would be called upon to testify only when she has information that can be obtained from no other source. The fact that the attorney's testimony would result in her disqualification makes it inappropriate that the attorney be the person to gather the information, but it does not make the information any less relevant.

E. Sensitive Subject Matter

A fifth policy argument that may support the presence of a third party at a Rule 35 mental or physical examination is that the presence is necessary due to the sensitive subject matter of the examination.[113] A complete examination may require the physician to ask about intimate or embarrassing events or to examine private parts of the body. For example, injuries sustained from a sexual assault will require the doctor to physically examine the genital areas of the victim. Likewise, the injuries will require a psychiatrist to ask questions about the subject's past behavior, the events of the assault, and any trauma incurred since the assault. Many examinees, especially those involved in a suit soon after the injury, desire the presence of a third party to help them cope with these intimate or embarrassing situations.

In most reported cases where the examinee has requested the presence of a third party to help them deal with the sensitive subject matter of an examination, the third party they have requested to attend is their attorney or their own medical expert.[114] Courts have not been overly sympathetic to

---

111. *Id.* One of these consequences may be forcing the attorney to choose between participating in the trial as the trial attorney or as a witness. *Wheat*, 125 F.R.D. at 480.

112. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1981).

113. *See, e.g.*, Tirado v. Erosâ, 158 F.R.D. 294, 296 (S.D.N.Y. 1994) (finding plaintiff may have legitimate concern about discussing intimate matters with psychiatrist).

114. *Id.*

these requests, reasoning that such people presumably do not possess the relationship with the examinee necessary to make the examinee more comfortable during the examination.[115] Regardless of an examinee's professed intimacy with their attorney or expert, courts usually conclude that the presence of three people in an examination room, rather than two, will not help an examinee discuss the incident or the injury,[116] and that an examinee who is uncomfortable talking with a trained professional is no more likely to talk merely because her attorney or expert is present.

An examinee's argument for the presence of a third party is stronger, however, when the examinee is requesting the presence of a close family member or friend, such as a spouse, parent, sibling, or child. These relatives and friends often have a long history of a close and intimate relationship with the examinee. Due to this relationship, these people may provide the necessary support and comfort to help the examinee discuss intimate or embarrassing facts. Indeed, it is to these people that most individuals turn during a time of need. Thus, a examinee's argument for the presence of a third party in an intimate or embarrassing examination is more persuasive when the third party is a close friend or relative than if the third party is the examinee's attorney or expert.

F. State Court Rules

A sixth policy argument made by examinees requesting the presence of a third party or recording device at a Rule 35 mental or physical examination is that such presence is symmetrical with the corresponding state law rules.[117] The procedural rules or judicial decisions of many states expressly or impliedly allow third parties to be present at the examination.[118] These states generally consider the examination to be a part of the adversarial process, and therefore recognize the possibility that the examiner will subject the examinee to improper techniques or questions.[119] To deny the examinee his right to an attorney during such an examination "would infringe on his right to be assisted by counsel."[120] The examinees who are before a federal court, therefore, argue that equity requires the court to allow the presence because

---

115. For example, the court in *Tirado* denied the plaintiff's request for the presence of her male attorney and a psychiatrist who was a stranger to the plaintiff because their presence would not provide any mechanisms of support for the plaintiff. *Id.* at 296.

116. *Id.*

117. *See, e.g., id.* at 295 (arguing that plaintiff would have been entitled to presence of attorney and stenographer had action been brought in state court); Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 14 (E.D.N.Y. 1989) (noting that plaintiff cited state court decisions clearly permitting presence of attorney or stenographer).

118. The State of New York is a notable example. Jakubowski v. Lengen, 450 N.Y.S.2d 612 (N.Y. App. Div. 1982); Gray v. Victory Mem. Hosp., 536 N.Y.S.2d 679 (N.Y. Sup. Ct. 1989); Reardon v. Port Authority of N.Y. & N.J., 503 N.Y.S.2d 233 (N.Y. Sup. Ct. 1986); Murray v. Specialty Chems. Co., 418 N.Y.S.2d 748 (N.Y. Sup. Ct. 1979); Milam v. Mitchell, 274 N.Y.S.2d 326 (N.Y. Sup. Ct. 1966).

119. *Di Bari*, 126 F.R.D. at 13.

120. *Id.*

the third party could be present if the suit were pending before the state court.[121]

The federal courts, however, are not persuaded by this symmetry argument.[122] These federal decisions are based on the general principle that lawsuits pending in federal court must follow the Federal Rules of Civil Procedure, even if the parties could bring the identical suit in state court under a different set of procedural rules.[123] The federal rules "take a diametrically opposite view" of the examinations by considering them to be a wholly objective inquiry that is divested of any adversarial tendencies.[124] Thus, the federal courts generally prohibit the examinee's attorney from being present.[125]

G. Other Means to Safeguard the Examinee

A final policy argument used by the courts to deny the presence of third parties at Rule 35 mental or physical examinations is the availability of alternative methods or procedures that will adequately protect the examinee from improper questions or techniques. The first alternative method is the examinee's attorney's ability to cross-examine the defendant's physician and to refute the physician's conclusions at trial.[126] During the cross-examination, the attorney may question the accuracy or validity of the examining physician's methodology, observations, or conclusions.[127] Moreover, the attorney has ample opportunity to prepare for these trial events. First, the attorney may obtain the physician's written report,[128] which, as discussed above, must

---

121. *Id.* This is essentially an *Erie* argument. *In Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), the United States Supreme Court held that federal courts are required to follow state rules of decision in matters that are "substantive" rather than "procedural," or when the matter is "outcome determinative." *York*, 326 U.S. at 106; *Erie*, 304 U.S. at 78. Courts rejecting the argument that federal courts should follow state rules regarding the presence of attorneys at physical or mental examinations apparently conclude that this aspect of Rule 35 is neither substantive nor outcome determinative.

122. *See, e.g.*, Tirado v. Erosâ, 158 F.R.D. 294, 295 (S.D.N.Y. 1994) (stating that federal law generally prohibits presence of counsel during examinations); Di Bari V. Incaica Cia Armadorn, S.A. 126 F.R.D. 12, 13 (E.D.N.Y. 1989) (stating that federal courts take "diametrically opposed view" state courts of third party presence at examinations); WRIGHT ET AL., *supra* note 33, § 2236 (noting that even though state law may permit presence of counsel, federal law denies such a right).

123. *Tirado*, 158 F.R.D. at 295; *cf.* Hanna v. Plumer, 380 U.S. 460, 465-74 (1965) (applying Federal Rules of Civil Procedure in federal diversity case).

124. *Tirado*, 158 F.R.D. at 295; *Di Bari*, 126 F.R.D. at 13.

125. *Tirado*, 158 F.R.D. at 295; *Di Bari*, 126 F.R.D. at 13.

126. *Tirado*, 158 F.R.D. at 299; Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 598 (D. Md. 1960).

127. *See Dziwanoski*, 26 F.R.D. at 598 (stating that if counsel is concerned about examination, counsel may cross-examine examining expert).

128. FED. R. CIV. P. 35(b); *Tirado*, 158 F.R.D. at 299; Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D. Ind. 1989); Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969); *Dziwanoski*, 26 F.R.D. at 598.

contain a detailed account of the examining expert's data and conclusions.[129] Second, the examinee's attorney may request the defendant to disclose the testimony that the examining physician will give at trial, and the attorney may conduct a deposition of the physician.[130] Third, the examinee's attorney may ask her client questions about the methodology and events of the examination.[131] Thus, the examinee is protected from improper questions or techniques during the Rule 35 examination by the fact that the examinee's attorney can expose any improper questions or techniques to the jury at trial, and thereby undermine the credibility of the expert's conclusions.

The second available alternative is the examinee's attorney's ability to request that the court disqualify an examining physician as an expert.[132] To do so, the examinee must present sufficient evidence to show that the expert is not disinterested or trustworthy.[133] If the examinee sufficiently proves that the physician is untrustworthy or interested in the case, the court may deny or revoke an order naming the physician as the examiner.[134] If the court determines that an examination is necessary for a fair preparation and presentation of defendant's case, the court may then designate a physician who the court considers to be impartial.[135]

It is unclear what kind of showing plaintiff must make to convince the court to disqualify an examining expert. Presumably, she must do more than merely show that the defendant is paying the physician's fees, as such a lenient standard would disqualify nearly every expert. A direct pecuniary interest in the outcome of trial might be enough, for example, if the expert were promised a $10,000 bonus if the jury concluded that the plaintiff was not injured. It is difficult, however, to draw a principled distinction between this situation and the much more common situation where, if the expert concludes that the plaintiff *was* injured, she is unlikely to be called by the defendant at trial, and therefore "compensated" for her time. On the other hand, would it suffice to show that, despite being called as an expert in 100 cases, she has *never* concluded that a plaintiff was injured? That in 99% of the cases in which she has been retained as an expert, her conclusions have

---

129. See *supra* notes 70-74 and accompanying text for a discussion of the content of examining physician's reports.

130. FED. R. CIV. P. 26; *see also Tirado*, 158 F.R.D. at 299 (explaining that Rule 26 provides for expert report disclosure and expert deposition).

131. *Dziwanoski*, 26 F.R.D. at 598. However, there are a few problems with this alternative. First, the examinee is less likely to recall the events or questions of an examination in which she was nervous or embarrassed. Second, the examinee may forget the events of the examination. Third, the examinee may consider some events or questions not to be controversial or damaging when they in fact are. Fourth, the examinee may put a spin on the questions and answers in order to bolster his case.

132. *Warrick*, 46 F.R.D. at 428.

133. *Id.*; *Dziwanoski*, 26 F.R.D. at 598.

134. *Warrick*, 46 F.R.D. at 428; *Dziwanoski*, 26 F.R.D. at 598.

135. *Dziwanoski*, 26 F.R.D. at 598; *see also* Scott v. Spranjer Bros., Inc., 298 F.2d 928, 930-31 (2d Cir. 1962) (explaining that trial court's appointment of own medical experts insures impartiality and reduces surprise to parties).

corresponded with the position of the party paying her fees? That this was true in 60% of her cases? Given the difficulty of reconciling the "disinterestedness" standard with the fact that the expert is appointed to perform an adversarial role and paid by one of the parties,[136] it is not surprising that few if any courts have disqualified an expert on this ground.

The third way that a trial court can protect the examinee from improper questions or techniques, other than by permitting the presence of a third party, is by excluding improperly acquired evidence from the record.[137] Because the examining physician is considered an officer of the court, and therefore an impartial participant, she is permitted to ask only general background questions or questions about the existence and the extent of the examinee's injuries.[138] It is improper for the examining physician to ask any other questions that would have a bearing on the defendant's liability.[139] For example, the physician could ask the examinee about the specific events that caused the injury, but she could not ask about the examinee's own negligence that led to the injury. When the defendant proffers evidence of the examining physician's findings or opinions, the examinee may object to, and the trial court may exclude, information that was improperly acquired.[140] Excluding information regarding non-medical matters will protect a examinee who inadvertently made an admission that is inconsistent with her case and was improperly requested by the examining expert.[141]

Permitting a third party to be present during a Rule 35 examination is a powerful way to ensure that the examining expert does not ask improper questions or use improper examination techniques. The presence of third parties, however, can jeopardize the accuracy of an examination, and make it difficult for the defendant to obtain the discovery to which he is entitled regarding the existence and extent of the plaintiff's injuries. For this reason, courts would protect the examination process and increase its effectiveness by requiring the use of alternative methods, and whenever possible, to provide the same protection or benefits to the examinee that are obtained by the presence of a third party.

---

136. See *supra* text accompanying note 31 for a discussion of payment to experts.

137. *See* Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D. Ind. 1989) (noting that evidence obtained through improper questioning may be excluded at trial); *see also Warrick*, 46 F.R.D. at 428 (stating that plaintiff may make evidentiary challenge to use of examination information); *Dziwanoski*, 26 F.R.D. at 597-98 (stating that plaintiff has opportunity to make evidentiary challenge when examination information is offered as evidence).

138. See *supra* text accompanying notes 30-34 for a discussion of concerns regarding examination questions.

139. *Id.*

140. *Wheat*, 125 F.R.D. at 480; *see also Warrick*, 46 F.R.D. at 428 (stating that plaintiff's attorney may challenge how examination evidence is used); *Dziwanoski*, 26 F.R.D. at 597-98 (stating irrelevant evidence obtained from examination is objectionable).

141. *Dziwanoski*, 26 F.R.D. at 598; *cf.* Cline v. Firestone Tire & Rubber Co., 118 F.R.D. 588, 589 (S.D. W. Va. 1988) (emphasizing that non-medical statement will be closely scrutinized).

IV. PROPOSAL OF A RULE

A consideration of the precedents and policy arguments for and against the presence of third parties at Rule 35 mental or physical examinations indicates the necessity for rules or guidelines to follow in making the determination. As stated above, each type of presence presents a vast array of burdens and benefits for the examination. While the burdens have the ability to disrupt and to reduce the validity of an examination, the benefits might increase the flow of discoverable information and reduce any stress on the examinee. As the courts strive for discovery techniques that lead to determining the truth or at least the relevant facts, they should permit conditions that will increase the overall quality of the examination. Therefore, the courts should weigh the possible benefits and detriments of each type of request and allow those that will help more than hinder the examination. Moreover, when the presence of a third party is permitted, courts should always require the third party to act as an impartial observer to reduce any unnecessary interference with the examination process.

A. Attorneys

Courts should not allow the presence of an attorney at a Rule 35 mental or physical examination except on the highest showing of good cause. The presence of an attorney has a high probability of causing adverse effects on the examination, including the injection of an adversarial atmosphere into the examination and the possibility of making the attorney a witness.[142] The consequences of this presence, including delays in the trial and disruptions of the examinations, warrants the exclusion of attorneys. Furthermore, there are numerous pre-trial and trial procedures that will protect the examinee from any impermissible harm. These alternative protective methods make the presence of the attorney unnecessary in most cases. Any benefit derived from the presence, such as the ability to stop an improper line of questioning, may come from another protective device, such as the presence of a physician or striking improperly acquired information from the record. Therefore, the courts should allow the presence of an attorney only in the rare instance when the examinee shows a compelling case for good cause.

B. Physicians

Courts should be more lenient in allowing the presence of a physician at an examination. The presence of a physician may have a minimally adverse effect on the examination, but the presence also has a high probability of facilitating a fair and impartial search for the relevant information. Because these benefits and adverse effects will greatly depend on the specific facts of the case, courts should weigh the likelihood of the adverse effects and bene-

142. See *supra* text accompanying notes 85-87, 107-12 for a discussion of the impact of the presence of the examinee's attorney at examination.

fits based on the circumstances of that particular case in deciding whether to allow the physician to be present.

The presence of a physician may have several potential benefits for the examination. First, physicians are not as inherently adversarial as attorneys. Unlike attorneys, physicians do not have an ethical obligation to zealously represent the best interests of the examinee. Therefore, physicians are more likely to disrupt an examination only when necessary to correct a mistake or to prevent a harm. Second, physicians have specialized training concerning proper examination procedures and questions. This specialized knowledge enables physicians to ascertain whether a question or method is appropriate, thereby allowing them to interject only when necessary. This knowledge also enables the physician to suggest more acceptable examination methods that still would allow the examining physician to obtain the same pertinent information. Therefore, the physician will be able to protect the examinee from both obvious and subtle harm. Due to these distinctions and benefits, courts should allow more leeway in permitting the presence of a physician at the examination.

Courts, however, still should carefully consider the adverse effects of allowing the presence of a physician at an examination. As with attorneys, the presence of a physician may turn the examination into an adversarial contest. Physicians who are paid by the examinee's lawyer may have an economic interest in stalling the examination or preventing the examining physician from discovering certain information. Indeed, the physician may be even more successful with this strategy because the physician more precisely knows which facts are necessary to the doctor's examination technique and which facts, if hidden, would prevent further inquiries into the area. A second potential problem is that the doctors may quarrel over two valid examination techniques. If the doctors have diametrically opposed philosophies, they could turn the examination into an academic debate on which method is more correct or effective. Such an event would have drastic effects on discovery and the trial, causing undue delay and decreasing the ability to ascertain the underlying facts of the case. Therefore, the court that is considering the examinee's request for the presence of his physician should carefully weigh the likelihood of both the adverse and the beneficial effects that the presence could have on the examination.

C. Moral Supporters

Courts should treat the determination of allowing any other third party to be present during a Rule 35 mental or physical examination with due caution. In cases concerning close friends or relatives, the court should allow their presence in only the most extreme circumstances. These people are the most likely to cause severe disruptions during the examination without a good reason. Family members are usually emotionally tied to the lawsuit and the examinee. Even more so than attorneys, family members are apt to interrupt an examination whenever they feel that the physician is causing harm to the examinee. Further, most family members do not have the specialized

legal or medical knowledge of attorneys or physicians. This will cause most of their interruptions to be based on a false sense of harm or impropriety.

On the other hand, friends and family members are more likely to provide comfort and support to the examinee during an extremely intensive or intimate examination. The mere presence or supportive touch of a close relative or friend might put an otherwise frantic examinee at ease. Due to these problems and benefits, the court should allow the presence of friends and family members only in those cases in which the examinee shows a compelling need for support during the examination, such as examinations of a child or examinations that probe into highly intimate areas.

D. Court Reporters or Recording Devices

For different reasons, the courts should similarly limit the presence of court reporters and recording devices to only the most extreme cases. Court reporters and recording devices offer different benefits to the examination. Unlike attorneys, doctors, or close friends or relatives, court reporters or recording devices will not disrupt an examination to protect the plaintiff from harmful methods or improper questions. Similarly, court reporters, who are usually strangers to the examinee, or recording devices will not provide support or comfort to the examinee who is undergoing an intensive examination. To the contrary, the presence of a stranger or device that will transcribe the examinee's answers about intimate subjects may cause the examinee to feel more uncomfortable during the examination, thereby disrupting the examination. The only benefit from such a presence is the ability to compile a transcript of the events of the examination, which may be used as pre-trial preparation or evidence at the trial. This is usually not a compelling reason for allowing such a potential disruption because the attorney may use other less intrusive methods to determine the events of the examination.[143] However, a rare case may occur where such a presence is the only objectively valid means to determine the examinations' events.[144] Due to the high potential for disruption and the ordinary lack of need for the presence, the court should allow the presence of a court reporter or recording device at an examination only in a compelling situation where the attorney does not have an alternative method to discover the examination's events.

CONCLUSION

A Rule 35 mental or physical examination is a very powerful discovery tool. The procedure has the beneficial effect of providing vital information concerning the condition of the examinee, but it also has the great potential to harm either the examinee's mental condition or the examinee's case-in-chief if the examiner uses improper methodologies or asks improper ques-

143. See *supra* text accompanying notes 126-31 for a discussion of means by which examinee's attorney may investigate the examination.

144. See *supra* text accompanying notes 60-66 for a discussion of instances where court reporters or recording devices were permitted during examination.

tions. Due to these potential problems, many examinees want and need the presence of a third party during the examination, especially an attorney, physician, or close friend or relative. However, the presence of third parties also has numerous potential adverse effects, such as creating an adversarial atmosphere in the examination room and causing delay in the discovery process. Because Rule 35 does not give any guidance on the permissibility of third parties in mental or physical examinations, the courts should consider both the benefits and the detriments of such a presence, and grant the request only when the presence will increase the overall effectiveness or validity of the examination.