

1 **NRCP 35 ALT 1 – Proposed**
2 **(Adopt federal with edits)**

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4 **Rule 35. Physical and Mental Examinations**

5 (a) **Order for Examination.**

6 (1) **In General.** The court where the action is pending may order a party
7 whose mental or physical condition—including blood group—is in controversy to
8 submit to a physical or mental examination by a suitably licensed or certified
9 examiner. The court has the same authority to order a party to produce for
10 examination a person who is in its custody or under its legal control.

11 (2) **Motion and Notice; Contents of the Order.**

12 (A) The order may be made only on motion for good cause and on
13 notice to all parties and the person to be examined; and

14 (B) The order must specify the time, place, manner, conditions,
15 and scope of the examination, as well as the person or persons who will perform it.
16 The examination must take place in an appropriate professional setting and in the
17 judicial district in which the case is pending, unless a different location is agreed to
18 by the parties or ordered by the court.

19 (3) **Recording the Examination.** The party against whom the order
20 was issued may, at that party's expense, have the examination audio recorded. The
21 examiner may also have the examination audio recorded at his or her expense. If
22 the party against whom the order is issued elects to audio record the examination,
23 the party must advise the examiner of the recording prior to commencement of the
24 examination. If the examiner elects to audio record the examination, the examiner

1 must advise of the recording prior to the examination. Any party may obtain a copy
2 of any audio recording pursuant to a written request for the recording.

3 **(4) Observing the Examination.** Unless otherwise ordered by the
4 judge or discovery commissioner for good cause, the party against whom the order
5 was issued may have one observer present for the examination, except that the
6 observer may not be the party's attorney, or anyone employed by the party or the
7 party's attorney. An observer shall not in any way interfere, obstruct, or participate
8 in the examination.

9 **(b) Examiner's Report.**

10 **(1) Request by the Party or Person Examined.** Unless otherwise
11 ordered by the judge or discovery commissioner for good cause, the party who moved
12 for the examination must provide, upon a request by the party against whom the
13 examination order was issued or by the person examined, a copy of the examiner's
14 report within thirty days of the examination or by the date of the applicable expert
15 disclosure deadline, whichever occurs first.

16 **(2) Contents.** The examiner's report must be in writing and must set
17 out in detail the examiner's findings, including diagnoses, conclusions, and the
18 results of any tests.

19 **(3) Request by the Moving Party.** After delivering the reports, the
20 party who moved for the examination may request—and is entitled to receive—from
21 the party against whom the examination order was issued like reports of all earlier
22 or later examinations of the same condition. But those reports need not be delivered
23 by the party with custody or control of the person examined if the party shows that
24 it could not obtain them.

1 (4) **Waiver of Privilege.** By requesting and obtaining the examiner's
2 report, or by deposing the examiner, the party examined waives any privilege it may
3 have— in that action or any other action involving the same controversy,—
4 concerning testimony about all examinations of the same condition.

5 (5) **Failure to Deliver a Report.** The court on motion may order—on
6 just terms—that a party deliver the report of an examination. If the report(s) is not
7 provided, the court may exclude the examiner's testimony at trial.

8 (6) **Scope.** This subdivision (b) applies also to an examinations made by
9 the parties' agreement, unless the agreement states otherwise. This subdivision does
10 not preclude obtaining an examiner's report or deposing an examiner under other
11 rules.

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14 **ADVISORY COMMITTEE NOTE—2018 AMENDMENT**

15 Subdivision (a)(1) permits an examination. Subdivision (a)(2)(B) directs that
16 the examination shall take place in the judicial district where the case is pending
17 unless otherwise stipulated by the parties or ordered by the Court. The examination
18 must be performed by a person licensed or provisionally licensed or certified in
19 Nevada and take place in a professional medical office or setting. A hotel room or
20 attorney's office will not suffice. Subdivision (a)(3) permits the audio recording of an
21 examination without leave of court. As permitted by the rule, either party may
22 transcribe the audio recording of the examination. It is envisioned that the primary
23 purpose of such transcription would be to address by motion any irregularity that
24 occurred during the examination. At trial, a party may use any portion of the

1 transcription as permitted by Nevada law of evidence. Subdivision (a)(4) allows the
2 person being examined to have an observer present during the examination unless
3 otherwise ordered upon a showing of good cause. In cases involving minors,
4 conservators and or guardians, the notice requirements and who may obtain a copy
5 of the report shall be governed by the law applicable to minors, conservators and
6 guardians. If a report is confidential, then obtaining a copy may require an order
7 from the court. If an examination is required as part of a child custody evaluation, a
8 parent as an observer may not be appropriate. The examiner may have a member of
9 the examiner's staff present during the examination if it is necessary in order for the
10 examiner to comply with accepted standards of care or reasonable office procedures.

11 The report required by subsection (b) shall only contain opinions concerning
12 the physical or mental condition in controversy for which the examiner is qualified
13 to render an opinion.

14 The disclosure deadline for the report in Subdivision (b)(1) contemplates that,
15 for the vast majority of cases, the examiner's report will be required to be disclosed
16 at the time of the initial expert disclosure deadline, if that deadline is within thirty
17 days of the examination. There may be rare circumstances that would justify a
18 rebuttal Rule 35 examination. Any report prepared of from a rebuttal examination
19 must be timely disclosed by the rebuttal expert disclosure deadline or within thirty
20 days of the examination, whichever occurs first. If the expert disclosure deadlines
21 have passed, a party seeking a Rule 35 examination must move to reopen the
22 applicable expert disclosure deadlines unless otherwise stipulated in writing by the
23 parties. In order to reopen an expert disclosure deadline, the moving party must

1 demonstrate excusable neglect or changed circumstances, such as where there has
2 been an unanticipated change in a party's physical or mental condition.

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