

Rule 35 Mental Exams

by

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Others Present at Mental Exam

- Presence of Plaintiff's Attorney:
 - Approved:
 - *Gensbauer v. May Department Stores Co.*, 184 F.R.D. 552, 553 (E.D. Pa. 1999); *Vreeland v. Ethan Allen, Inc.*, 151 F.R.D. 551 (S.D.N.Y. 1993); *Showell v. Trump Taj Majal Casino*, 200 U.S. Dist. LEXIS 14736 (E.D. Pa. 2000); *U.S. Sec. Ins. Co. v. Cimino*, 754 S.2d 697, 700-01 (Fla. 2000) (“Florida follows a liberal view when determining whether attorneys may attend examinations”); *Parsons v. Hytech Tool & Dye, Inc.*, 241 A.D.2d 936 (N.Y. App. Div. 1997) (“A plaintiff being examined by a defense physician is entitled to have his or her attorney present during the examination unless defendant makes a positive showing of necessity for the exclusion of the attorney”); *Tietjen v. Dep’t of Labor and Industry*, 534 P.2d 151, 154 (Wash. 1975) (holding that an attorney is entitled to be present and “[a]ny unnecessary interference caused by an attorney could be alleviated by specific court order.”)
 - Disapproved:
 - *Greenhorn v. Marriott Int’l Admin. Svcs., Inc.*, 216 F.R.D. 649, 654 (D. Kan. 2003) (denying Plaintiff’s request to have her counsel present during mental exam); *Hirschheimer v. Associated Minerals and Minerals Corp.*, 1995 WL 756901 at *3 (rejecting plaintiff’s request to have counsel present during Rule 35 exam); *EEOC v. Grief Bros. Corp.*, 218 F.R.D. 59 (W.D.N.Y. 2003) (denying request that counsel be present or that examination be recorded).

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Others Present at Mental Exam (cont'd)

- Presence of Plaintiff's Treating Physician or Mental Health Practitioner
 - Approved:
 - *Sanden v. Mayo Clinic*, 495 F.2d 221 (8th Cir. 1974); *Bennett v. White Lab.*, 841 F. Supp. 1155 (M.D. Fla. 1993); *Warrick v. Brode*, 46 F.R.D. 427 (D. Del. 1969); *Dziwanoski v. Ocean Carriers Corp.*, 26 F.R.D. 595 (D. Md. 1960).
 - Disapproved:
 - *State ex rel. Hess v. Henry*, 393 S.E.2d 666, (W. Va. 1990); *Bartell v. McCarrick*, 498 So.2d 1378 (Fla. App. 1986).
- Articles and Other Sources
 - William Scott Wyett and Richard A. Bales, "The Presence of Third Parties at Rule 35 Examinations", 71 Temple L. Rev. 103 (1998).
 - Thomas M. Fleming, "Right of Party to Have Attorney or Physician Present During Physical or Mental Examination at Instance of Opposing Party."

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Plaintiff Can Sue Mental Health Practitioner Conducting Rule 35 Exam

- In *Harris v. Kreutzer*, 624 S.E.2d 24 (Va. 2006), the Virginia Supreme Court approved a cause of action for medical malpractice against a psychologist for conduct in a court-ordered independent mental exam that harmed the plaintiff.

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Plaintiff Need Not Submit Expert Testimony to Prove Emotional Distress Damages

- *See, e.g., Biggs v. Village of Dupo*, 892 F.2d 1298, 1304 (7th Cir. 1990); *Rakovich v. Wade*, 819 F.2d 1393, 1399, n.6 (7th Cir.), *vacated on other grounds*, 850 F.2d 1179 (7th Cir. 1987) (en banc), *on reh'g*, 850 F.2d 1180 (7th Cir.) (en banc), *cert denied*, 488 U.S. 968 (1988); *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3rd Cir. 1986); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *Cohen v. Bd. of Ed., Smithtown Central Sch. Dist.*, 728 F.2d 160, 162 (2nd Cir. 1984); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272-73 (8th Cir. 1981); *Nekolny v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719, 72 L. Ed. 2d 139 (1982); *Bolden v. Southeastern Pa. Transp. Auth.*, 21 F.3d 29, 34-36, n.3 (3rd Cir. 1994); *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Kucia v. Southeast Arkansas Community Action Corp.*, 284 F.3d 944, 948 (8th Cir. 2002); *Williams v. Trader Publishing Co.*, 218 F.3d 481, 486 (5th Cir. 2000); *Montgomery v. Vitasta Bazaz-Sehgal*, 798 A.2d 742, 2002 Pa. LEXIS 1243 (Pa. 2002).

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Courts Recognize the Adversarial Nature of a Rule 35 Exam

- *See, e.g., Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 210-11 (5th Cir. 1990).

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Audio and/or Video Recordation of Mental Exams

- *Jacob v. Chaplin*, 639 N.E. 2d 1010, 1011 (Ind. 994) (allowing either party to record “in the absence of some overriding reason to prohibit that recording); *Langfedt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144, 1147 (Alaska 1989).
- In *B.D. v. Carley*, 704 A.2d 979, 981 (N.J. App. Div. 1998), the Court found that Plaintiff’s right to preserve evidence of the nature of the examination, the accuracy of the examiner’s notes or recollections, the tones of voice and the like outweighed the examiner’s preference that there be no recording device. *See also Dauber v. Incaica Cia Armadora*, 126 F.R.D. 12, 14 (E.D.N.Y. 1998) (permitting stenographer); *Sidari v. Orleans City*, 174 F.R.D. 275, 291 (W.D.N.Y. 1960) (permitting audio recording); *Zabkowicz v. West Bend Co.*, 585 F.Supp. 635, 636 (E.D. Wis. 1984) (permitting video camera).

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A Treating Mental Health Practitioner Is Not Deemed to be “Retained or Specially Employed to Provide Expert Testimony” within the Meaning of Rule 26(a)(2)(B) of the Federal Civil Rules

- *Widhelm v. Wal-Mart Stores, Inc.*, 162 F.R.D. 591 (D. Neb. 1995); *Mangla v. The University of Rochester*, 168 F.R.D. 137 (W.D.N.Y. 1996).

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Is Treating Physician Entitled to Professional Fees For Deposition?

- Some courts have held that the treating practitioner is not being deposed as an expert retained for trial, and thus is only entitled to the per diem plus mileage fees for his/her deposition testimony. *See, e.g., Mangla v. The University of Rochester*, 168 F.R.D. 137 (W.D.N.Y 1996); *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 350 (D. Colo. 1995).

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If the Treating Practitioner is to Testify to Matters Beyond His/Her Observations During the Course of Treatment, Then the Treating Practitioner Needs to Be Identified and Must Submit an Expert Report

- *See, e.g., Bucher v. Gainey Transp. Svc. of Indiana, Inc.*, 167 F.R.D. 387 (M.D. Pa. 1996); *Wreath v. United States*, 161 F.R.D. 448 (D. Kan. 1995)
- Some courts have held that “[i]t is common place for a treating physician during, and as part of, the course of treatment of a patient to consider things such as the cause of the medical condition, the diagnosis, the prognosis, and the extent of disability caused by the condition, if any”. *See, e.g., Piper v. Harnischfeger Corp.*, 170 F.R.D. 173 (D. Nev. 1997); *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296 (D. Nev. 1998) (court holds that the treating physician is not normally subject to the strict disclosure requirements of Rule 26(a)(2)(B)); *Sprague v. Liberty Mutual Ins. Co.*, 177 F.R.D. 78 (D.N.H. 1998) (stating “the majority of other courts in the country have concluded that Rule 26(a)(2)(B) reports are not required as a prerequisite to a treating physician expressing opinions as to causation, diagnosis, prognosis, and extent of disability where they are based on the treatment”).

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When Are the Patient's Statements to His/Her Treating Physician Admissible as an Exception to the Rule Against Hearsay?

- In *Low v. State*, 119 Md. App. 413, 705 A.2d 67 (1998), the question before the Court was whether a physician was a “treating” or “examining” physician for the purpose of determining whether statements made to that doctor by a 12-year-old victim of sexual abuse were substantive evidence under Maryland Rule 5-803. Statements by a patient to a physician consulted for diagnosis and treatment are admissible in Maryland. *See Choi v. State*, 134 Md. App. 311, 321, 759 A.2d 1156 (2000).

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Is the Deposing Party Required to Pay a Reasonable Fee for Time Spent by an Expert in Preparing for Deposition?

- The courts are split on this issue as to whether an expert's time spent preparing for a deposition is compensable.
 - Some Courts have held that expert preparation time is compensable. *See, e.g., Profile Prods., LLC v. Soil Mgmt. Technologies, Inc.*, 155 F. Supp.2d 880, 886 (N.D. Ill. 2001); *Collins v. Vill. of Woodridge*, 197 F.R.D. 354, 357-8 (N.D. Ill.1999); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (E.D.N.Y. 1997); *Bridges v. Eastman Kodak Co.*, 1996 U.S. Dist. LEXIS 809, No. 91 Civ. 7985 (RLC), 1996 WL 47304, at *15 (S.D.N.Y. Feb. 6, 1996), *aff'd*, 102 F.3d 56 (2d Cir. 1996); *McNerney v. Archer Daniels Midland Co.*, 164 F.R.D. 584, 587 (W.D.N.Y. 1995); *McHale v. Westcott*, 893 F. Supp. 143, 151 (N.D.N.Y. 1995); *Hose v. Chicago & N. W. Transp. Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994); *Hurst v. United States*, 123 F.R.D. 319, 321 (D.S.D. 1988).
 - Other courts have refused to award compensation for preparation time, at least in the absence of compelling circumstances, such as where the litigation is particularly complex or the expert must review voluminous records. *See, e.g., S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212, 214 (E.D. Wis. 1994); *EEOC v. Sears Roebuck & Co.*, 138 F.R.D. 523, 526 (N.D. Ill. 1991); *Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47 (D.C. Ill. 1989); *Benjamin v. Gloz*, 130 F.R.D. 455, 457 (D. Colo. 1990); *M.T. McBrian, Inc. v. Liebert Corp.*, 173 F.R.D. 491, 493 (N.D. Ill. 1996).

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Are Ex Parte Interviews with Plaintiff's Treating Mental Health Practitioner Permissible?

- EEOC v. Boston Market Corp., 2004 U.S. Dist. LEXIS 27338 (E.D.N.Y. Dec. 16, 2004).

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Courts Place Certain Restrictions on Mental Examinations

- Time Limits:
 - *Hirschheimer v. Associated Minerals & Minerals Corp.*, 1995 WL 736901 at *5 (S.D.N.Y. 1995) (granting plaintiff's request to restrict examination to two 90-minute sessions).

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When, if Ever, May an Expert Witness Opine on The Plaintiff's Credibility?

- In *Nichols v. American National Ins. Co.*, 154 F.3d 875 (8th Cir. 1998), the Court held that the expert psychiatrist could not comment on plaintiff's reliability "in the guise of a medical opinion". "The challenged testimony impugning Nichols' psychiatric credibility and suggesting that recall bias, secondary gain, and malingering had influenced her story was not a proper subject of expert testimony under Fed. R. Evid. 702."

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Whether Rule 35 Mental Exams Should be Ordered for “Garden Variety” Emotional Distress Claims

- Majority Approach:
 - Under the majority approach in Rule 35 cases, an mental exam is not ordered unless the following factors are present: (1) a claim for intentional or negligent infliction of emotional distress; (2) an allegation of specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff’s concession that his or her mental condition is “in controversy”. Under this test, plaintiffs are not ordinarily required to submit to Rule 35 mental examinations when they pursue “garden variety” claims seeking compensatory damages for emotional distress, as such claims do not sufficiently place the plaintiff’s mental condition “in controversy”. *See, e.g., Ruhlmann v. Ulster County Dep’t of Social Servs.*, 194 F.R.D. 445, 449-50 (N.D.N.Y. 2000), *citing Jackson v. Chubb Corp.*, 193 F.R.D. 216, 226, n.8 (D.N.J. 2000); *Ford v. Contra Costa County*, 179 F.R.D. 579, 579-80 (N.D. Cal. 1998); *Vanderbuilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997); *EEOC v. Old Western Furniture Corp.*, 173 F.R.D. 444, 445-46 (W.D. Tex. 1996); *Neal v. Seigel-Robert, Inc.*, 171 F.R.D. 264 (E.D. Mo. 1996); *Turner v. Imperial Stores*, 161 F.R.D. 89, 98 (S.D. Cal. 1995); *Bridges v. Easman Kodak Co.*, 850 F. Supp. 216 (S.D.N.Y. 1994); *Sabree v. United Brotherhood of Carpenters & Joiners of America, Local No. 33*, 126 F.Rr.D. 422 (D. Mass. 1989); *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (M.D. Fla. 1988); *Cody v. Marriott Corp.*, 103 F.R.D. 421 (D. Mass. 1984); *Miller v. Colonial Refrigerated Transportation, Inc.*, 81 F.R.D. 741 (M.D. Pa. 1979).

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Whether Rule 35 Mental Exams Should be Ordered for “Garden Variety” Emotional Distress Cases (cont’d)

- Minority Approach:
 - However, a minority of courts have more liberally defined the circumstances under which a plaintiff sufficiently places their mental condition “in controversy”, such that they must submit to a Rule 35 mental exam. For example, Judge Facciola of the United States District Court for the District of Columbia takes the view that “an employee who seeks compensatory damages for emotional pain suffered as a result of employer’s action has placed the existence and extent of their alleged mental injury in controversy, giving the employer good cause to seek [a Rule 35 mental] examination.” *Nuskey v. Lambright*, 251 F.R.D. 3 (D.D.C. 2008) (quoting *Smith v. Koplan*, 215 F.R.D. 11 (D.D.C. 2003) (internal citations omitted). For more examples of Judge Facciola’s rulings on this subject, see also *Roberson v. Bair*, 242 F.R.D. 130 (D.D.C. 2007); *Kalantar v. Lufthansa German Airlines*, No. 01-644 (HHKJMF), 2007 U.S. Dist. LEXIS 26666, 2007 WL 1098708 (D.D.C. 2007); *Benham v. Rice*, 238 F.R.D. 15 (D.D.C. 2006); *Doe v. District of Columbia*, 229 F.R.D. 24 (D.D.C. 2005); *Chiperas v. Rubin*, No. CIV.A. 96-130 TPJ/JMF, 1998 U.S. Dist. LEXIS 23578, 1998 WL 765126 (D.D.C. 1998). For examples of other courts similarly holding, see *Everly v. United Parcel Services, Inc.*, 1991 U.S. Dist. LEXIS 1255, *2, No. 89-C 1712, 1991 W.L. 18429, *1 (N.D. Ill. 1991); *Zabkowicz v. Westbend Co.*, 585 F. Supp. 635 (E.D. Wis. 1984).

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Report on Proposed Amendments to Rule 26 re Communication between Counsel and Expert Witness (Forensic Mental Health Practitioner)

- Overview:
 - At its September 2009 meeting, the U.S. Judicial Conference submitted to the U.S. Supreme Court a proposed Amendment to Fed. R. Civ. P. 26(a)(2) and 26(b)(4), relating to the disclosure and discovery of expert opinion. If the Supreme Court adopts the amendment, and if Congress does nothing to block its implementation, the amendment would take effect on December 1, 2010.
- Text:
 - The text / report of the proposed amendment is available at http://federalevidence.com/pdf/2009/Misc/AdvCommRules_Report_Sept_09.pdf
- Articles / Other Sources:
 - Sean Wajert, “Federal Rule of Civil Procedure 26: Amendment Update”, January 22, 2010, available at <http://www.masstortdefense.com/2010/01/articles/federal-rule-of-civil-procedure-26-amendment-update/>
 - Federal Evidence Review Blog, “Proposed Amendment to Fed. R. Civ. P. 26 Would Change Expert Witness Disclosure and Discovery Requirements”, October 30, 2009, available at <http://federalevidence.com/blog/2009/october/proposed-amendment-fed-r-civ-p-26-would-change-expert-witness-disclosure-and-disco>

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Plaintiff's Have Challenged the Use of the MMPI-II

- In *Soroka v. Dayton Hudson Corp.*, 6 IER Cases BNA 1491, 1492-93 (Cal. Ct. App., 1st Dist. 1991), the MMPI-II was refused in an employment case on the ground that, among other things, defendant would not be entitled to answers to these questions through normal discovery procedures, and therefore should not be entitled to obtain this irrelevant and potentially prejudicial information through the use of an MMPI test.

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Plaintiffs Have Challenged Use of the “Fake Bad” Scale

- Overview:
 - The “Fake Bad” Scale is a test which was created essentially as a psychological lie detector test, whereby the administering expert would determine when plaintiffs were being untruthful in their testimony regarding the extent of their injuries. However, as summarized in many of the articles below, the Scale has recently come under fire as an invalid and inaccurate test.

- Summary of the Scale:
 - Paul R. Lees-Haley, Ph.D., ABPP, “The Fake Bad Scale (FBS)”, available at http://www.phhp.ufl.edu/~rbauer/forensic_neuropsychology/FBS%20Handout.pdf

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Plaintiffs Have Challenged Use of the “Fake Bad” Scale (cont’d)

- Articles and Other Sources on Challenges to the Scale:
 - Tim Titolo, “Autopsy on Fake Bad Scale”, October 20, 2009, available at <http://brainandspine.titololawoffice.com/2009/10/articles/articles-1/autopsy-on-fake-bad-scale/>
 - Karen Franklin, Ph.D., “New MMPI Scale Invalid as Forensic Lie Detector, Courts Rule”, March 5, 2008, available at <http://forensicpsychologist.blogspot.com/2008/03/new-mmpi-scale-invalid-as-forensic-lie.html>
 - Michael Phelan, “Fake Bad Scale: Weapon of Defense Neuropsychologists”, March 5, 2008, available at <http://richmond.injuryboard.com/head-and-brain-injuries/fake-bad-scale-weapon-of-defense-neuropsychologists.aspx?googleid=232632>
 - Jon Coppelman, “Bullshit as Science: A Test for Malingerers”, March 5, 2008, available at <http://www.workerscompinsider.com/archives/000833.html>

Saunders & Walker Blog, “MMPI Fake Bad Scale Excluded in Florida Auto Crash Cases”, March 5, 2008, available at http://www.saundersblog.com/2008/03/mmpi_fake_bad_scale_excluded_in_florida_auto_crash_cases.html

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Proposed DSM-V

- Overview:
 - The American Psychiatric Association (APA) has announced the proposed revised version (which will be the 5th edition) of the Diagnostic and Statistical Manual of Mental Disorders – i.e., the DSM-V.
 - The proposed DSM-V, including the proposed revisions and draft changes to diagnostic criteria from the DSM-IV, has been made available to the public for comment. The DSM-V is scheduled to be finalized by 2013.
- Text:
 - The proposed draft revisions, together with a number of other related materials, are available through the APA's website at <http://www.dsm5.org/Pages/Default.aspx>, and at <http://www.psych.org/dsmv.aspx>.
- Articles / Other Sources:
 - John Gever, "Big Changes for the Psychiatrist's 'Bible'", February 10, 2010, available at <http://abcnews.go.com/Health/MindMoodNews/psychiatrist-bible-revisions-diagnostic-statistical-manual-mental-disorders/story?id=9795049>
 - John M. Grohol, "A Look at the DSM-V draft", February 9, 2010, available at <http://psychcentral.com/blog/archives/2010/02/09/a-look-at-the-dsm-v-draft/>
 - *The Economist*, "That Way, Madness Lies", February 4, 2010, available at http://www.economist.com/sciencetechnology/displayStory.cfm?story_id=15450623