IME Expert Discovery under Federal Rule 35: Privileges and Perils

Daniel R. Michelmore*

ABSTRACT

Federal Rule 26 privileges each side to either foreclose discovery into their own respective experts by designating them as consulting experts or to narrowly restrict their discovery by designating them as testifying experts. While there is considerable confusion, many courts have applied this privilege framework to discovery issues involving independent medical examiner experts.

But there is another rule, Rule 35, which specifically applies to examiner experts. Once invoked, Rule 35 nullifies any privileges under Rule 26. Under Rule 35, plaintiffs examined by motion or agreement may obtain unfettered discovery from the defense examiner free and clear of the consultative and testifying expert privileges, including draft reports and communications with defense counsel. In seeking this information, however, plaintiffs automatically waive all privileges to their own examiners.

While seemingly equitable, this rule in operation sanctions plaintiffs to wield privilege both as a sword and a shield and, by making plaintiffs the sole arbiter of privilege, usurps the power of the defendant.

Plaintiffs can shop for examiners until they find the opinion they want and can protect any unfavorable opinions from discovery by simply never seeking discovery from the defendant's examiner, thereby maintaining privilege for both. Defendants, on the other hand, are limited to only one examiner, and their assertion of privilege is subject

* Mr. Michelmore is a member in Jackson Kelly PLLC's Pittsburgh office, where his practice focuses on civil litigation in state and federal court at both the trial and appellate levels.

to plaintiffs' blanket override. Rule 35, then, in effect turns the doctrine of waiver on its head, granting plaintiffs the power to waive not only their own privilege but defendants' as well.

In an ideal world, the solution would be re-writing the rule. In the real world, the only available solution is awareness of the perils of Rule 35 and a consequent judicious caution when dealing with independent medical examiners.

INTRODUCTION

The independent medical examination ("IME") is an essential tool in federal personal injury litigation, providing the defense with an opportunity to have plaintiffs examined by a physician to confirm or refute their alleged injuries, their cause, and the opinions of plaintiffs' own treating physicians. Ideally, defense counsel can retain an examining physician whose judgment they trust and who has significant experience as an expert witness. However, plaintiffs often assert injuries that defense counsel have not previously encountered and that require retaining new and unfamiliar physicians specializing in those areas. In those instances where that new examiner reaches opinions supporting the defendant and will present well as a witness, the defendant uneventfully designates the examiner as a testifying expert and has the examiner prepare a report. But where the defendant's examiner confirms plaintiffs' injuries, or makes for a lackluster witness, the defendant may not want either the examiner's testimony or report.[1] In that case, can the defendant simply designate the examining

1 Waggoner v. Ohio Cent. R.R., 242 F.R.D. 413, 414 (S.D. Ohio 2007) ("Often, the results of the examination simply confirm what the injured party's doctors have reported, and the Rule 35 examiner therefore serves only as a consultant to the defending party and not as a trial witness.").

physician as a consulting expert and thereby shield the examiner's opinions from discovery?

Most courts and commentators confronting this issue have decided that the answer lies somewhere in the murky interplay between Federal Rule of Civil Procedure 26(a)(2)'s testifying expert discovery limitations, Rule 26(b)(4)(D)'s prohibition of discovery as to non-testifying consultative experts, and Rule 35's provisions governing IMEs. In weighing these competing considerations, these authorities have come to wildly varying conclusions, casting uncertainty where litigants need clarity. According to Wright and Miller, absent "exceptional circumstances," *nothing but* the consulting examiner's Rule 35 IME report is discoverable due to Rule 26(b)(4)(D)'s consultative privilege.[2] Though some courts have followed that construction,[3] others have concluded nearly the opposite, holding that *most everything* is discoverable from the consulting examiner *except for* communications with counsel and draft reports, which are protected by Rule 26(a)(2)'s testifying expert privilege.[4]

2 *See* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2237 (2d ed.).

3 *See* Castillo v. W. Beef, Inc., 04 CV 4967 (NGG) (ETB), 2005 WL 3501880, at *2 (E.D.N.Y. Dec. 21, 2005) ("Further, Rule 26(b)(4)(B) explicitly states that a non-testifying consultative expert may be subject to depositions and interrogatories 'as provided in Rule 35(b) . . . .'"); Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 632 (D. Kan. 1999) ("Plaintiff may also discover 'through interrogatories or by deposition' facts known or opinions held by [defendant's consulting examiner], if defendant chooses not to rely upon his testimony at trial.").

4 *See* Harrison v. Newman, CV 2:16-2919-RMG, 2017 WL 4277632, at *2 (D.S.C. Sept. 26, 2017) (compelling production of consulting examiner's notes); Nunn v. Show Fountains, Inc., CIV-05-1161, 2006 WL 8436337, at *4 (W.D. Okla. Dec. 4, 2006); Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1192 (11th Cir. 2013) (holding that testifying expert's notes and communications with non-attorneys are discoverable); Bryant v. Dillon Real Estate Co., 18-CV-00479-PAB-MEH, 2019 WL 3935174 (D.

Each of these interpretations unnecessarily complicates an essentially straightforward matter. A review of the language and purpose of Rule 35, contrasted with that of Rule 26, demonstrates that once requested by plaintiffs, *no* privileges protect or limit discovery of either side's examiners, whether past, present, or future, testifying or consulting. But while the rule may appear evenhanded on its face, it overwhelmingly benefits plaintiffs in practice. Rule 35 comes into effect only when plaintiffs make the affirmative act of requesting the defendant's IME materials, which in turn triggers the rule's reciprocal waiver of privileges for both parties.[5] Because the defendant's IME of plaintiffs is an invasion of their privacy by a physician they did not select, the defendant can only do it once.[6] Plaintiffs, on the other hand, can select as many physicians as they desire on as many occasions as they deem necessary.[7] By making plaintiffs' request the sole mechanism for triggering disclosure and waiving privilege for both sides, Rule 35 therefore allows plaintiffs to shop for multiple IMEs and only disclose the ones they want by simply never requesting the defendant's IME materials. On other hand, the rule gives the defendant just a single IME and no say or control in its disclosure.

Colo. Aug. 20, 2019) (finding the examiner's drafts not discoverable because he was a testifying expert); E.N. v. Susquehanna Twp. Sch. Dist., 1:09-CV-1727, 2011 WL 3163186, at *3 (M.D. Pa. July 26, 2011) ("*E.N. II*") (holding that Rule 35 required defendant to produce an IME report prepared by a consulting examiner which defendant characterized as a "draft" because Rule 26(b)(4)(D) only applied to testifying experts).

5 FED. R. CIV. P. 35(b)(4).

6 Tomlin v. Holecek, 150 F.R.D. 628, 632–33 (D. Minn. 1993).

7 *Id.*

I. EXPERT DISCOVERY AND ITS LIMITS UNDER THE FEDERAL RULES

A. Testifying and Consulting Expert Privileges under Rule 26

Rule 26(a)(2) of the Federal Rules of Civil Procedure governs testifying experts and requires that they produce a report and, during the expert discovery period, be subject to deposition regarding their opinions and the facts or data they considered in forming those opinions. Under subsections (b)(4)(B) and (C), draft reports by testifying experts are absolutely protected from discovery. Their communications with counsel are similarly protected except for those communications in which the attorney provides facts or data that the testifying experts considered or assumptions they relied on in forming their opinions.[8]

Rule 26(b)(4)(D) governs consulting experts and provides that "[o]rdinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert . . . who is not expected to be called as a witness at trial."[9] Since consulting experts' ultimate opinions are not discoverable, none of the facts, data, or assumptions communicated to them by counsel, or reports or draft reports prepared containing those opinions, are discoverable either. Rule 26(b)(4)(D)'s consultative privilege protecting facts known or opinions held by consulting experts from discovery is, however, subject to the exception "provided in Rule 35(b)."[10]

8 FED. R. CIV. P. 26(b)(4)(B)–(C).

9 FED. R. CIV. P. 26(b)(4)(D).

10 In addition to Rule 35 IME materials, the consultative privilege is subject to another exception in cases of "exceptional circumstances." FED. R. CIV. P. 26(b)(4)(D)(ii). As this article is concerned solely with IME materials, this second exception will not be addressed herein.

B. The Rule 35 IME Expert Exception

Rule 35 governs IMEs, and subdivision (b) provides that the defendant "must, on request, deliver to the [plaintiff] a copy of the examiner's report."[11] The defense examiner's report "must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests."[12] If the defendant does not provide the IME report to the plaintiff after it is requested, "the court may exclude the examiner's testimony at trial."[13] Finally, "[b]y requesting and obtaining the examiner's report, or by deposing the examiner, the [plaintiff] . . . waives any privilege it may have—in that action or in any other action involving the same controversy—concerning testimony about all examinations of the same condition."[14] Crucially, Rule 35 makes no distinction between testifying and consulting examiners.[15] Thus, unlike the ordinary consulting expert, the consulting IME examiner's opinions are subject to discovery.

The federal discovery rules treat consulting examiners differently than ordinary consulting experts because they serve, or at least were designed to serve, a different purpose. The purpose of Rule 26(b)(4) is to protect attorney work product by allowing counsel to freely confer with consulting experts on key issues in the case without fear their opponent will use

11 FED. R. CIV. P. 35(b)(1).

12 FED. R. CIV. P. 35(b)(2).

13 FED. R. CIV. P. 35(b)(5).

14 FED. R. CIV. P. 35(b)(4).

15 Delgado v. GGNSC Grand Island Lakeview LLC, 4:15CV3124, 2016 WL 5339535, at *2 (D. Neb. Sept. 23, 2016) ("[Rule 35] does not distinguish between examinations by testifying or non-testifying experts . . . ").

that expert against them[16] or piggyback off their work and expense.[17] Rule 35 is designed to give both sides equal access to the true facts of plaintiff's physical condition so as to facilitate the "just, speedy, and inexpensive determination" of the case.[18] Rule 35 thus does not care if a party's consulting examiner is used against it; in fact, it implicitly encourages it. The opinions of the examiners on both sides, regardless of whether they hurt or help the side employing them, are discoverable[19] because marked differences between those opinions sharpen the issues while any agreement increases the potential for expeditious settlement.[20]

16 *See* FED. R. CIV. P. 26 advisory committee's note to 2010 amendment ("[This amendment] is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery."); *see also* Zvolensky v. Ametek, Inc., 142 F.3d 438, at *2 (6th Cir.1998); Precision of New Hampton v. Tri Component Prods. Corp., No. C12-2020, 2013 U.S. Dist. LEXIS 79847, at *7 (N.D. Iowa June 5, 2013); Kingdom Auth. v. City of Rockford, No. 09 C 50240, 2011 WL 245585, at *3 (N.D. Ill. Jan. 26, 2011); Interface Grp.-Nev. v. Men's Apparel Guild, 2:04-CV-0330-JCM-GWF, 2006 WL 8441913, at *2 (D. Nev. Jan. 3, 2006).

17 *See, e.g.*, Plymovent Corp. v. Air Tech. Sols., Inc., 243 F.R.D. 139, 143 (D.N.J. 2007).

18 Hardy v. Riser, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970) ("[Rule 35's] purpose [is] to inform the court and the parties of the true facts as to the physical condition of the party claiming injury . . . [which] helps to further an important federal policy, i.e., securing 'the just, speedy and inexpensive determination of every action'.").

19 E.N. v. Susquehanna Twp. Sch. Dist., 1:09-CV-1727, 2011 WL 2600870, at *4 (M.D. Pa. June 29, 2011) ("*E.N. I*") (requiring defendant produce its consulting examiner's Rule 35 opinions even if "such testimony is either unhelpful or harmful" to its case); Weir v. Simmons, 233 F. Supp. 657, 659–60 (D. Neb. 1964) (requiring plaintiff produce its consulting examiner's Rule 35 opinions "be they favorable or detrimental to the plaintiff's claim").

20 Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 672 (E.D. Wash. 2000) ("An additional benefit is the possibility that the Rule 35 examiner will agree with the

Accordingly, even where the defendant designates the examining physician as a consulting expert, any report the examiner prepares must be produced "on request."[21] However, while Rule 35 requires the consulting examiner's report be delivered if requested, it does not, as Rule 26(a)(2) does for testifying experts, expressly require a report be prepared in the first instance.[22] Indeed, in cases where the physician's exam merely confirms plaintiffs' alleged injuries, paying the examiner to prepare a report is an unnecessary cost. In that event, the defendant may direct its consulting examiner not to bother preparing a report.[23] The defendant cannot, how-

opinion of the examined party's experts or treating physicians thereby increasing the potential for settlement of the case.").

21 Shulin v. Werner Enters., Inc., 1:15CV95, 2017 WL 10379220, at *1–2 (N.D. W. Va. Jan. 9, 2017) (Rule 26(b)(4)(D)'s consultative privilege does not apply to Rule 35 IME reports); E.N. v. Susquehanna Twp. Sch. Dist., 1:09-CV-1727, 2011 WL 3163186, at *3 (M.D. Pa. July 26, 2011) ("*E.N. II*") (requiring defendant to produce consulting examiner report); DeCristo *ex rel.* DeCristo v. Sw. Motor Transp., Inc., CIV. A. No. 89–6080, 1990 WL 156457, at *2 (E.D. Pa. Oct. 12, 1990) (same).

22 Rule 35(b)(5)'s language providing that if a physician fails or refuses to deliver a report the court may exclude his testimony if offered at trial necessarily contemplates situations where the examiner does not prepare a report. FED. R. CIV. P. 35(b)(5). *See also* Delgado v. GGNSC Grand Island Lakeview LLC, 4:15CV3124, 2016 WL 5339535, at *2 (D. Neb. Sept. 23, 2016) (finding that Rule 35 does not "require that a non-testifying expert create an expert report" and that defendant must therefore only "provide a copy of any written report concerning the examination to Plaintiff, if such a report exists"); Waggoner v. Ohio Cent. R.R., 242 F.R.D. 413, 414 (S.D. Ohio 2007) ("[A] Rule 35 report is to be prepared and issued only if requested by the party who is examined. To interpret Rule 26(a)(2) to require a mandatory issuance of the report would contradict the plain language of Rule 35."); Kerns v. Consol. Rail Corp., 90 F.R.D. 134, 139 (E.D. Pa. 1981) (court would have required consulting examiner to prepare and deliver a report had plaintiff requested it).

23 Salvatore v. Am. Cyanamid Co., 94 F.R.D. 156, 158 (D.R.I. 1982) (speculating that "defendant received an oral report from [the consulting examiner], decided it did

ever, through its own unilateral choice, deprive plaintiffs of their right under Rule 35 to discover the defense examiner's opinions. Plaintiffs who want a report can therefore still get one through a court order directing the defense examiner to prepare a report at plaintiffs' expense.[24]

C. Plaintiffs' Reciprocal Waiver of Privilege under Rule 35

In those instances where the defendant does have its examiner prepare a report, that report must be produced to plaintiffs only "on request,"[25] which has a narrow meaning in the context of Rule 35. The Rule 35 exception to Rule 26(b)(4)(D)'s consultative privilege only applies to exams conducted pursuant to motion or agreement of the parties,[26] so plaintiffs ordinarily owe no duty to produce reports prepared by consulting examiners they separately retained. However, under Rule 35, plaintiffs who request the defense examiner's report or take the defense examiner's deposition automatically waive any privilege they have as to their own consulting examiners.[27] Such plaintiffs must then produce all of their own examiner's reports and testimony even if that information is unfavorable to

not like what it heard, and therefore told [the consulting examiner] not to bother preparing a report").

24 *Id.* at 158–59. *But see* Novak v. Capital Mgmt. & Dev. Corp., 01-00039(HHK/JMF), 2004 U.S. Dist. LEXIS 32525, at *6 (D.D.C. Feb. 26, 2004) ("While the rule does not specifically indicate that a report must be prepared, the requirement that it be delivered, once prepared, has to be read to imply that the party who demanded the examination must cause it to be prepared. Accordingly, I will order its preparation at defendants' expense.").

25 FED. R. CIV. P. 35(b)(1).

26 FED. R. CIV. P. 35(a)(2).

27 FED. R. CIV. P. 35(b)(4).

their claims and they do not intend to call the examiners to testify at trial.[28] In those cases where the exam confirms plaintiffs' alleged injuries and a report itself would seem to have little intrinsic value, it may still benefit the defendant to have a report of its own prepared as its existence may prompt a request from plaintiffs, thereby triggering plaintiffs' Rule 35 reciprocal waiver obligations. But by simply not requesting the defendant's report, plaintiffs can shield any unfavorable consulting examiner opinions from discovery.[29]

A defendant cannot obtain plaintiffs' otherwise privileged consulting examiner reports merely by delivering its own report unsolicited.[30] There is no reciprocal waiver where plaintiffs have made no request but are given a copy of the examiner's report by the defendant voluntarily.[31] Accordingly, to ensure it receives the reciprocal waiver it is entitled to under Rule 35, the defendant must provide its IME report only in response to a *specific* request made by plaintiffs *after* the exam.[32] If the defendant never receives such a specific request, it has no duty to turn the report over. For example, the defendant is not obligated to supplement its discovery responses and produce its consulting physician's IME report in response to plaintiffs'

28 Weir v. Simmons, 233 F. Supp. 657, 659–60 (D. Neb. 1964).

29 Garner v. Ford Motor Co., 61 F.R.D. 22, 24 (D. Alaska 1973) ("Admittedly, the procedure under Rule 35 is potentially ineffective in the event plaintiffs do not request a copy of the examination ordered by defendants, since then defendants would not be entitled to receive copies of all reports of any prior or subsequent medical examination of plaintiffs.").

30 1 DISCOVERY PROCEEDINGS IN FEDERAL COURT § 18:13 REPORT OF EXAMINER—WAIVER OF PRIVILEGE (3d ed. 2021).

31 Sher v. De Haven, 199 F.2d 777, 781 (D.C. Cir. 1952); Hardy v. Riser, 309 F. Supp. 1234, 1236 (N.D. Miss. 1970).

32 *See, e.g.*, MICHAEL O' CONNOR, O'CONNOR'S FEDERAL CIVIL FORMS Form 6J:4 (2019 ed.).

standard request for production of "all expert reports" served at the outset of the case, since the request did not contemplate waiving consultative privilege as it was made prior to the defendant even seeking the IME.

II. DISCOVERABLE IME MATERIALS UNDER RULE 35

A. IME Expert Reports

When plaintiffs do make a specific request for the IME report, the defendant must provide it right away. Since the medical examination of the plaintiffs is a factual investigation to collect data upon which to base an expert opinion, it must be conducted prior to the fact discovery cutoff date just like a product inspection or site visit.[33] Given this similarity to other discovery fact-gathering tools, and based on Rule 35's purported silence as to deadlines,[34] some courts have concluded that IME reports are

33 Garayoa v. Miami-Dade County, 16-CIV-20213, 2017 WL 2880094, at *4 (S.D. Fla. July 6, 2017) ("a Rule 35 examination is no different than any other discovery tool that a party uses in obtaining evidence that a testifying expert could use in forming an opinion and creating an expert report."); Valiavicharska v. Celaya, CV 10–4847, 2011 WL 6370059 at *11 (N.D. Cal. Dec. 19, 2011) (denying Rule 35 request because defendants "did not seek the IME of Plaintiff's hand . . . before the discovery cut-off"); *In re* Harper, 15-157-JWD-RLB, 2016 WL 7031883, at *2 (M.D. La. Dec. 1, 2016) ("As a discovery tool, Rule 35 examinations are subject to the Court's discovery deadlines.").

34 Rowland v. Paris Las Vegas, 13CV2630-GPC (DHB), 2015 WL 4662032, at *3 (S.D. Cal. Aug. 6, 2015) ("Rule 35 is silent as to the deadline for conducting an IME . . . ."); Diaz v. Con-Way Truckload, Inc., 279 F.R.D. 412, 416 (S.D. Tex. 2012) ("Rule 35 fails to provide a deadline by which a Rule 35 examination must be conducted or when a report from such an examination must be provided."); Bush v. Pioneer Human Servs., No. C09-0518 RSM, 2010 WL 324432, at *5 (W.D. Wash. Jan. 21, 2010) ("There is no specific deadline for Rule 35 examinations or reports.").

subject to Rule 26(a)(2)'s timing requirements,[35] which provide that expert reports need not be produced until an extended period after the close of fact discovery.[36]

These courts ignore the plain text and purpose of Rule 35. Rule 35 is far from silent on timing; to the contrary, it expressly states that IME reports must be produced "on request," i.e. immediately. Moreover, applying Rule 26(a)(2)'s delayed disclosure deadline to IME reports undermines Rule 35's goal of quickly resolving the case by giving both sides equal access to information about the plaintiff's medical condition.[37] If the report reveals information damaging or helpful to plaintiffs' case, it may cause the parties to settle well before the expert disclosure deadline. That being the case, the defendant must produce its consulting examiner's report immediately when requested or otherwise risk the imposition of sanctions. The only sanction specifically set forth in Rule 35 for failing to deliver a requested report is excluding the defense examiner's testimony at trial.[38] That is no sanction at all when the reason the defendant withholds it is that its opinions are unfavorable to the defendant's position.[39] Courts

35 *Diaz*, 279 F.R.D. at 419; Shumaker v. West, 196 F.R.D. 454, 457 (S.D. W.Va. 2000); Lopez v. City of Imperial, No. 13-0597-BEN(WVG), 2014 U.S. Dist. LEXIS 7291, at *5 (S.D. Cal. Jan. 21, 2014).

36 Henry v. Quicken Loans Inc., No. 04-40346, 2008 WL 4735228, at *6 (E.D. Mich. Oct. 15, 2008).

37 Hardy v. Riser, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970).

38 FED. R. CIV. P. 35(b)(5).

39 E.N. v. Susquehanna Twp. Sch. Dist., 1:09-CV-1727, 2011 WL 2600870, at *4 (M.D. Pa. June 29, 2011) ("*E.N. I*").

therefore retain wide discretion to fashion sanctions beyond those provided in Rule 35,[40] including awarding attorneys' fees to plaintiffs under Rule 37 for having to compel the defendant to hand over its report.[41]

B. IME Expert Interrogatories and Depositions

Plaintiffs can also discover the opinions of the defendant's consulting examiner by interrogatories or deposition. While some courts have construed Rule 35 narrowly as requiring production of nothing but the report,[42] the better-considered view holds that the consulting examiner is subject to broader discovery. First, the explicit text of Rule 26(b)(4)(D) states that although "[o]rdinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by [a consulting] expert," it "may do so" – i.e. it *may by interrogatories or deposition* discover facts known or opinions held by the consulting examiner – "as provided in Rule 35(b)."[43] Rule 35(b)(4), in turn, expressly provides that "[b]y requesting and obtaining the examiner's report, *or by deposing the examiner*, [plaintiff] waives any privilege" to withholding its own reports on the same injuries.[44]

40 *Id.* (citing 7 MOORE'S FEDERAL PRACTICE §35.12[4] (3d.)).

41 DeCristo *ex rel.* DeCristo v. Sw. Motor Transp., Inc., CIV. A. No. 89–6080, 1990 WL 156457, at *2 (E.D. Pa. Oct. 12, 1990)

42 Spencer v. Huron County, 15-CV-12209, 2016 WL 4578102, at *5 (E.D. Mich. Sept. 2, 2016); Adams v. Rush Trucking Corp., 3:06-CV-65, 2007 WL 9729119, at *4 (N.D. W. Va. Jan. 8, 2007); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 246 (N.D. Iowa 1996); Brown v. Ringstad, 142 F.R.D. 461, 465 (S.D. Iowa 1992).

43 Castillo v. W. Beef, Inc., 04 CV 4967 (NGG) (ETB), 2005 WL 3501880, at *2 (E.D.N.Y. Dec. 21, 2005); Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620, 632 (D. Kan. 1999).

44 FED. R. CIV. P. 35(b)(4) (emphasis supplied).

Lastly, subdivision (b)(6) "does not preclude [the defendant from] obtaining an examiner's report or deposing an examiner under other rules."[45] Rule 35 thus clearly permits taking the defense examiner's deposition, as it conditions plaintiffs' reciprocal waiver on either plaintiffs' requesting the defense examiner's report or taking the defense examiner's deposition. Rule 35 further provides that if plaintiffs do neither and, thus, never trigger their reciprocal waiver, the defendant can secure plaintiffs' unprivileged[46] examiner's reports and depositions under "other rules;" namely, a request for production of documents under Rule 34[47] and subpoena for deposition under Rule 30.

The scope of the defense examiner's deposition is subject to no constraints beyond the broad and liberal parameters delineated by Rule 26(b), which permits interrogation into any matter relevant to a party's claim or defense that is reasonably calculated to lead to the discovery of admissible evidence.[48] If a report has been prepared, the examiner may obviously be deposed about that report and the findings, diagnoses, and conclusions therein. Plaintiffs may also inquire into matters outside the report. They may discover all facts known or opinions held by the consulting examiner

45 *Id.*

46 FED. R. CIV. P. 35(b)(3) advisory committee's note to 1970 amendment ("But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report.").

47 Buffington v. Wood, 351 F.2d 292, 297, 297 n.15 (3d Cir. 1965) ("Merely because he has been able to medically examine his adversary, that adversary's decision not to request a copy of the report of his examination under Rule 35(b) (1) should not necessarily bar discovery, under Rule 34, or otherwise, by the defending party, of his adversary's personal medical reports" where the adversary does not argue "that the contents of the reports contained matter in some way privileged.").

48 FED. R. CIV. P. 26(b)(1); Hickman v. Taylor, 329 U.S. 495, 507–08 (1947).

relevant to the subject matter of the litigation, regardless of whether they are set forth in a report or not, and regardless of whether a report was prepared at all. Because the opinions of the consulting examiner, like those of the testifying expert, are discoverable and subject to deposition, so too are the underlying facts, data,[49] and assumptions communicated to the examiner by defense counsel[50] that the examiner considered in forming those opinions. Further, the consulting examiner's communications with third parties,[51] as well as any notes or other writings, must likewise be produced.[52] As with testifying experts, plaintiffs are entitled to these materials so they can effectively explore and challenge the consulting examiner's opinions.[53]

49 Nunn v. Show Fountains, Inc., No. CIV-05-1161, 2006 WL 8436337, at *4 (W.D. Okla. Dec. 4, 2006) (compelling production of the defense consulting examiner's raw testing data resulting from the exam).

50 FED. R. CIV. P. 26(b)(4)(C).

51 FED. R. CIV. P. 26(b)(4) advisory committee's note to 2010 amendment; Pralinsky v. Mut. of Omaha Ins. Co., No. 8:09CV8, 2009 WL 4738199, at *1 (D. Neb. Dec. 4, 2009) (compelling production of recorded oral communications related to plaintiff contemporaneously with delivery of Rule 35 report).

52 Harrison v. Newman, No. 2:16-2919-RMG, 2017 WL 4277632, at *2 (D.S.C. Sept. 26, 2017); *Nunn*, 2006 WL 8436337, at *4; Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1192 (11th Cir. 2013).

53 *Hinchee,* 741 F.3d at 1192 (A testifying expert's notes and communications with non-attorneys are discoverable because "the opposing side must have the opportunity to challenge the opinions of a testifying expert, including how and why the expert formed a particular opinion."); *Harrison*, 2017 WL 4277632, at *2 (Effective deposition and cross-examination "necessarily requires production of the Rule 35 examiner's examination notes, list of materials relied upon, prior testimony, time records related to the examination, *etc.*").

C. IME Expert Draft Reports and Communications with Counsel

Most significantly, unlike testifying experts, the consulting examiner's communications with defense counsel and draft reports are not protected from discovery.[54] The few courts that have addressed this issue have reached inconsistent and even directly contradictory results and have done so in a largely conclusory fashion. One court ruled that the examiner's drafts were not protected because he was a consulting and not a testifying expert;[55] another found that because the examiner *was* a consulting expert his drafts *were* protected unless or until he was designated a testifying expert; [56] a third held that the examiner's drafts were protected precisely *because* he was a testifying expert.[57] Other courts have found drafts discoverable irrespective of whether the examiner testifies or not.[58] While their

54 *Harrison,* 2017 WL 4277632, at *2 ("The plain language of Rule 35(b) does not limit disclosure to only final reports submitted by the examiners and makes no distinction between draft reports and final reports.") (quoting Wellin v. Wellin, No. 2:13-CV-1831-DCN, 2015 WL 1414524, at *2 (D.S.C. Mar. 26, 2015)); E.N. v. Susquehanna Twp. Sch. Dist., 1:09-CV-1727, 2011 WL 3163186, at *3 (M.D. Pa. July 26, 2011) ("*E.N. II*").

55 *E.N. II*, 2011 WL 3163186, at *3 (finding that Rule 26(b)(4)(B) did not protect examiner's draft reports because he was a consulting expert).

56 Botkin v. Tokio Marine & Nichido Fire Ins. Co., No. 12-95-DLB-CJS, 2013 WL 12384663, at *3 (E.D. Ky. Apr. 9, 2013) ("Thus, while the Court will not order the production of notes, test results or draft reports at this time, it will order that Dr. Cooley preserve such documentation in the event he is identified as a trial expert.").

57 Bryant v. Dillon Real Estate Co., No. 18-CV-00479-PAB-MEH, 2019 WL 3935174, at *3 (D. Colo. Aug. 20, 2019) (finding the examiner's drafts not discoverable because he was a testifying expert under Rule 26(b)(3)).

58 *Harrison*, 2017 WL 4277632, at *1–2; Pralinsky v. Mut. of Omaha Ins. Co., No. 8:09CV8, 2009 WL 4738199, at *1 (D. Neb. Dec. 4, 2009).

rationale is equally unclear, these latter decisions reach the right result given the purpose of the typical expert versus that of the examiner.

Rule 26(b)(4) shields testifying experts' communications and draft reports from discovery because they reflect a collaborative effort between counsel and the expert to organize, marshal, and selectively present the expert's opinions to benefit one side, a process which necessarily reveals attorney work product.[59] That concern is inapplicable to Rule 35 reports, which are to be nonpartisan, objective documents[60] prepared independently by the examiner[61] without edit by defense counsel.[62] Because work product is not implicated, there is no basis for protecting the defense examiner's drafts and communications from discovery.[63] By extension, once plaintiffs request this information, they trigger Rule 35's reciprocal

59 Wenk v. O'Reilly, No. 12–CV–474, 2014 WL 1121920, at *4 (S.D. Ohio Mar. 20, 2014).

60 Shirsat v. Mut. Pharm. Co., 169 F.R.D. 68, 71 (E.D. Pa. 1996) (not permitting observer in Rule 35 exam as it "interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry.").

61 Ewing v. Ayres Corp., 129 F.R.D. 137, 138 (N.D. Miss. 1989) ("The purpose of a Rule 35 examination is to secure an *independent* physical or mental examination of a party.") (emphasis in original).

62 Chastain v. Evennou, 35 F.R.D. 350, 353–54 (D. Utah 1964) ("Counsel of course should not edit reports or suggest their being rewritten to correspond with partisan ideas or desires. This . . . would be inconsistent with the spirit of Rule 35 . . . .").

63 *Harrison*, 2017 WL 4277632, at *2 ("The Rule 35(b) exception plainly applies to the Rule 26(b)(4)(D) trial preparation protection Defendant asserts. . . . Defendant waived work product protections under Rule 26(b)(3) with regard to Dr. Pritchard's opinions when Defendant successfully moved for a Rule 35 examination conducted by Dr. Pritchard.").

waiver and must, to put both sides on equal footing with regard to plaintiffs' medical status,[64] produce drafts and communications with their own examiners.[65]

D. IME Expert Trial Testimony

In addition to being discoverable, one side may subpoena the opposing examiner to testify at trial even where its adversary does not designate them as a testifying expert.[66] While several courts have analyzed this issue under Rule 26(b)(4)(D) and held that its consultative privilege precludes compelling the testimony of opposing examiners except upon a showing of "exceptional circumstances,"[67] the correct standard is the balancing test set forth in Federal Rule of Evidence 403.[68] Rule 26(b)(4)(D) only governs

64 Duncan v. Upjohn Co., 155 F.R.D. 23, 25 (D. Conn. 1994) (Rule 35 serves to "preserve[] the equal footing of the parties to evaluate the plaintiff's mental state. . . .") (quoting Tomlin v. Holecek, 150 F.R.D. 628, 633 (D. Minn. 1993)); Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 608 (C.D. Cal. 1995) ("One of the purposes of Rule 35 is to level the playing field in cases where physical or mental condition is at issue. . . . A plaintiff has ample opportunity for psychiatric or mental examination by his/her own practitioner or forensic expert.") (internal quotation marks omitted).

65 Weir v. Simmons, 233 F. Supp. 657, 659–60 (D. Neb. 1964) (By requesting defendant's report, plaintiff triggered Rule 35's reciprocal waiver and was therefore required to produce all his consulting examiner reports, including two reports he did not intend to make use of in the case.).

66 Fitzpatrick v. Holiday Inns, Inc., 507 F. Supp. 979, 980 (E.D. Pa. 1981).

67 Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 672 (E.D. Wash. 2000); Blumhorst v. Pierce Mfg., Inc., No. 4:10-CV-00573-REB, 2013 WL 12138591, at *2 (D. Idaho Feb. 14, 2013).

68 House v. Combined Ins. Co., 168 F.R.D. 236, 246 (N.D. Iowa 1996); Morris v. Mitsubishi Motors N. Am., Inc., No. CV-08-0396-RMP, 2011 WL 13228438, at *3 (E.D. Wash. Mar. 28, 2011); Rubel v. Eli Lilly & Co., 160 F.R.D. 458, 461 (S.D.N.Y. 1995).

the *discoverability* of consulting expert evidence;[69] it has no role in deciding whether any consulting expert evidence actually discovered is then later admissible at trial.[70] Furthermore, it is incongruous to require "exceptional circumstances" to compel an opposing examiner to testify at trial when that same testimony is available by deposition as of right pursuant to Rule 35.[71] Instead, then, the question should be governed by Rule 403 and whether the probative value of the testimony outweighs its potential prejudice.[72] In cases where both sides' examiners substantially agree, the prejudice in allowing one party to piggyback off the other's effort and expense in preparing for trial outweighs what little value may be offered by the examiners' cumulative testimony.[73] But when the opposing examiner possesses unique evidence that advances arriving at the truth of the matter,[74] they may be called, provided their customary fees are paid[75] and the jury is not informed of how they first became involved in the case.[76] The fact that the defendant retained the examiner is inherently prejudicial, as jurors might assume they are only hearing about it from plaintiffs because the defendant suppressed evidence it had an obligation to offer.[77]

69 Crowe v. Nivison, 145 F.R.D. 657, 657–58 (D. Md. 1993).

70 *Morris*, 2011 WL 13228438, at *2.

71 *Id.*

72 *See* FED. R. EVID. 403.

73 *Rubel*, 160 F.R.D. at 461–62.

74 *Crowe*, 145 F.R.D. at 658.

75 Fitzpatrick v. Holiday Inns, Inc., 507 F. Supp. 979, 980 (E.D. Pa. 1981).

76 House v. Combined Ins. Co., 168 F.R.D. 236, 248 (N.D. Iowa 1996); *Morris*, 2011 WL 13228438 at *3; Peterson v. Willie, 81 F.3d 1033, 1038 (11th Cir. 1996).

77 *House*, 168 F.R.D. at 243.

III. CONCLUSION: PROCEED WITH CAUTION

Conducting an IME does not, in itself, bring Rule 35 into effect. Instead, Rule 35 only activates if plaintiffs subsequently seek discovery from the defendant related to that IME which, in turn, automatically triggers plaintiffs' reciprocal waiver of any privileges relating to their own separately obtained IME materials.[78] At that point, according to the case law, examiners on both sides then cease being partisan experts whose purpose is to advocate within reasonable grounds on behalf of the side that employed them and become, in effect, independent, non-adversarial "officers of the court"[79] whose roles are to inform both sides and the court of the true facts of plaintiffs' alleged injuries so as to facilitate the "just, speedy, and inexpensive determination" of the case.[80] Because of this independent role,[81] the work product concerns undergirding Rule 26's discovery

78 FED. R. CIV. P. 35(b)(3) advisory committee's note to 1970 amendment ("To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor.").

79 Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 596–97 (D. Md. 1960) ("The physician is an 'officer of the Court' performing a non-adversary duty."); Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969) ("The examining doctor is, in effect, an 'officer of the court' performing a non-adversary duty.").

80 Hardy v. Riser, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970) ("[Rule 35's] purpose [is] to inform the court and the parties of the true facts as to the physical condition of the party claiming injury . . . [which] helps to further an important federal policy, i.e., securing 'the just, speedy and inexpensive determination of every action.'").

81 Notably, some courts and commentators have posited that it is unrealistic and artificial to consider examiners to be any more "independent" than any other paid expert, McKisset v. Brentwood BWI One LLC, No. WDQ-14-1159, 2015 WL 8041386, at *3 (D. Md. Dec. 4, 2015), as examiners too typically work exclusively for one side or the other, Christopher Robertson, *The Problem of Biased Experts, and Blinding as a Solution: A Response to Professor Gelbach*, 81 U. CHI. L. REV. DIALOGUE 61, 62 (2014), and often derive a substantial part, if not all, of their income from providing expert

privileges for consulting and testifying experts are not implicated for Rule 35 examiners, and there are no constraints on their discovery beyond those placed on all discovery; namely, that the discovery seek information reasonably calculated to lead to admissible relevant evidence.[82]

Given the ramifications of this analysis and indeed, given how Rule 35 has been variously interpreted and applied, both sides must be circumspect when employing IME examiners. The defendant even more so, because Rule 35, once in motion, removes its ability to control events and exposes it to potentially greater negative consequences. Under the rules, plaintiffs can select as many examiners to perform as many IMEs as they wish[83] until they get the witness and opinion they prefer, and can then designate that examiner as a testifying expert, protecting drafts and communications containing work product from disclosure.[84] More importantly, plaintiffs possess sole discretion to shield any other IMEs they did *not* like from any discovery whatsoever by simply not requesting discovery from defendant's examiner, thereby never triggering Rule 35 and its reciprocal waiver of Rule 26(b)(4)(D)'s consultative privilege.[85] Waiver,

services, Stephen Kaneshiro, Comment, *Doctored Claims*, 52 ARIZ. ST. L.J. 667, 675–76 (2020); John C. McLaren, *Defense Medical Examinations: The Fallacy of Impartiality*, HAW. B.J. 6 (2000), all of which creates incentives and inherent bias in favor of the party that retained them. Hon. Mark I. Bernstein, *Jury Evaluation of Expert Testimony Under the Federal Rules*, 7 DREXEL L. REV. 239, 268 (2015); Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 177 (2010). As this article is concerned only with how Rule 35 currently operates in practice, these policy concerns are beyond its scope.

82 Hickman v. Taylor, 329 U.S. 495, 507 (1947).

83 Tomlin v. Holecek, 150 F.R.D. 628, 632–33 (D. Minn. 1993).

84 This practice of using multiple experts to get the most favorable opinion has been referred to "expert mining." Jonah B. Gelbach, *Expert Mining and Required Disclosure*, 81 U. CHI. L. REV. 131, 131 (2014).

85 Weir v. Simmons, 233 F. Supp. 657, 659–60 (D. Neb. 1964).

then, is the price of defendant's report,[86] and plaintiffs can *choose* not to pay it. The defendant, on the other hand, only has one shot at examining plaintiffs,[87] and no choice but to live with its results,[88] as its assertion of privilege over IME discovery is subject to plaintiffs' blanket override. Rule 35, in operation, therefore unfairly advantages plaintiffs over defendants and undermines its own purpose of equal access and full transparency regarding plaintiffs' medical condition by conferring upon plaintiffs sole authority to withhold their own IME materials but compel the defendant to disclose its IME materials.

Defense counsel must therefore vet prospective examiners as thoroughly as possible because once the IME starts, the defendant is stuck with them. As for plaintiffs, they should only request the defendant's IME materials when they are sure their own are airtight; once Rule 35 is invoked, there is nothing protecting any of this material from being discovered by the other side.

Counsel must accordingly be judicious in their communications with the examiner.[89] Matters discussed should be limited primarily to retention, compensation, and scheduling. Further, counsel should narrowly limit the scope of the examination and instruct the examiner to stay within those bounds. The first line of defense against having to disclose unfavorable opinions is to prevent them from being made in the first place by limiting the exam and report to only those areas counsel is confident will return

86 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 6.13.3 (Richard D. Friedman ed., 3d ed. 2021).

87 *Tomlin*, 150 F.R.D. at 632–33.

88 Novak v. Capital Mgmt. & Dev. Corp., 01-00039 (HHK/JMF), 2004 WL 7334070, at *1 (D.D.C. Feb. 26, 2004).

89 JAY E. GRENIG & JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE § 10:12 (4th ed.).

favorable opinions. Moreover, in the event the examiner still develops opinions beyond that scope, it is better to put the burden on the opposing side to unearth them through deposition than to hand them over on a silver platter in a report or draft. In terms of documents, counsel can provide the examiner with copies of the pleadings, discovery responses, deposition transcripts, and plaintiff's medical records. These materials should be provided in full, not selectively, and without comment, and with opposing counsel carbon copied. Doing otherwise risks the appearance of trying to influence the examiner, damaging the credibility of both counsel and the examiner with the factfinder and, in egregious circumstances, may even warrant the imposition of sanctions.[90]

90 Ewing v. Ayres Corp., 129 F.R.D. 137, 138 (N. D. Miss. 1989) (sanctioning plaintiff for sending, *ex parte*, another doctor's deposition transcript in apparent attempt to influence the examiner's opinion).