UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – April 27, 2016

Present:	Jonathan Hafen, Paul Stancil, Kent Holmberg, Rod Andreason, Judge Blanch, Terri McIntosh, Judge Baxter, Barbara Townsend, James Hunnicutt, Steve Marsden, Trystan Smith, Lincoln Davies, Judge Furse, Amber Mettler, Judge Anderson
Telephone:	Judge Pullan
Staff:	Nancy Sylvester, Heather Sneddon
Guests:	David Bridge, Peter Summerill

I. Welcome and approval of minutes. [Tab 1] – Jonathan Hafen.

Jonathan Hafen welcomed the committee and invited a motion to approve the minutes. James Hunnicutt moved to approve. Kent Holmberg and Rod Andreason identified minor typographical errors. With those adjustments, Mr. Hunnicutt renewed his motion. Paul Stancil seconded. The minutes were unanimously approved.

II. Rule 35. Physical and mental examination of persons. [Tab 2] – Trystan Smith, David Bridge, Peter Summerill.

Mr. Hafen invited Trystan Smith to introduce the committee's guests and to tee up the discussion of the proposed amendments to Rule 35. Mr. Smith introduced David Bridge, an insurance defense lawyer, and Peter Summerill, a plaintiff's lawyer, both of whom have great trial practices and experience with Rule 35. Mr. Smith reminded the committee that Frank Carney first brought Rule 35 before the committee. Through further discussion, the committee agreed that a Rule 35 expert disclosure should be given if an examination is done; the only remaining question is the timing of that disclosure. Mr. Smith commented that, in his practice, disputes arise with respect to whether a report should be disclosed as soon as practicable, e.g., within 10, 14 or 21 days after the examination, or whether the report should be disclosed at the same time as Rule 26(a)(4) reports, which may be many months after the examination. Other issues exist regarding whether a Rule 35 exam constitutes fact or expert discovery, the nomenclature for the exam, etc. But, he said, those issues were not before the committee. Instead, we want to hear from our guests the reasons why a Rule 35 examination report should be treated the same or differently from any other expert report in terms of the timing of the disclosure.

Discussion:

- Mr. Bridge responded that a Rule 35 examination report is an expert report and, therefore, should be disclosed in conjunction with the expert disclosure deadline. Plaintiffs get to hold their expert disclosures, so defendants should be on equal footing in that respect. Mr. Hafen asked what Mr. Bridge has seen in his practice as far as the disclosure timing. Mr. Bridge responded that he typically waits until plaintiffs ask for the Rule 35 report, or if he intends to use it, he discloses it at the time of expert reports. Mr. Hafen asked Mr. Bridge to consider the

scenario where a Rule 35 examination is done early in the case, and it reveals that the plaintiff has brain cancer. Should the Rule 35 report be disclosed sooner in that scenario? Mr. Bridge responded that usually, in the context of a Rule 35 exam, there is no patient/doctor relationship. Therefore, there is no obligation to disclose. However, as an attorney, if he knew that, he would personally want to disclose. Nancy Sylvester asked whether there had been any discussion last time that a doctor has an obligation to disclose, even if there is no patient/doctor relationship. Mr. Bridge said that he did not know what the doctor's obligations would be in that scenario.

- Judge Blanch commented that Rule 35 may be contemplating, potentially, different types of reports. If a person is compelled under Rule 35 to be examined, not at their own choosing, that generates an obligation on the health care provider to produce a record of the examination—a medical record. That may not have to include the doctor's opinions, or the types of analyses that are contained in a full expert report, but it would presumably be available like any other medical record. If a defendant wants to use the Rule 35 doctor as an expert, however, then the report would have to comply with all of the requirements of Rule 26. He asked the guests for their reaction to that reading of the rule. Mr. Bridge responded that medical records always include "impressions" and "diagnoses." He doesn't believe you can separate those from the medical record. If a plaintiff can have a consulting expert and conduct tests and not be required to disclose those, why shouldn't the defendant have the same opportunity? Judge Blanch commented that the difference is that Rule 35 involves a compelled health examination of the plaintiff. He asked Mr. Bridge about the situation where the first Rule 35 examiner does not come back with conclusions that are helpful, and whether a second or third Rule 35 examination should be allowed. Mr. Bridge said that it seems unreasonable to have unlimited examinations, but that there could be a reason for a second opinion on an examination. If a defendant could establish good cause for a second examination through a motion, he thinks that should be permitted.

- Judge Pullan asked whether a Rule 35 report's contents are substantially different than a Rule 26(a)(4) report. He doesn't believe it is wise for us to require something to be done twice—it just makes the process more expensive. But we need to get a sense from practitioners of how these reports differ. Under Rule 26(a)(4), parties have to produce a report that includes a complete statement of all opinions the expert will offer at trial, and the bases and reasons for them. Is a Rule 35 report something less than that? Mr. Smith responded that, practically speaking, they are the same. A Rule 35 examiner will give the information necessary for a Rule 26(a)(4) report because that is what the defense attorney will ask for. And it is not the same as a medical record—he has never seen that before. There is not a medical record that is prepared by a Rule 35 examiner and then a second expert report. Mr. Bridge commented that he has never seen a Rule 35 report be different from a report under Rule 26(a)(4), except in cases where additional information was provided or transpired in discovery or in treatment after the examination. Doctors are typically instructed up front that all of their opinions and conclusions need to be included for fear of not being able to use opinions at trial that aren't included.

- Peter Summerill commented that, on this specific issue, there is a delineating difference between the reports. The Rule 35 report is a medical examiner's report, not an expert report. And the more difficult issue is that they are not bound by a Rule 35 report—it is part and parcel of fact discovery. Many judges have so ruled. Therefore, the plaintiff should be advised of any new facts that have been discovered as a result of the examination—some of those facts may be facts that were unknown to the plaintiff. If the Rule 35 report is withheld until the close of fact discovery, it allows the defense to hide the ball and spring new facts on the plaintiff during the

course of expert discovery. A Rule 35 report is in effect a substitute of what would ordinarily be produced through a normal exam. The plaintiff has an examination done by a doctor of her/his own choosing, and a medical record is created. In this case, we are forcing someone to go to a doctor not of their own choosing, and to receive no information from that examination. Why can't the report be disclosed at or shortly after the examination? The doctor has all of the facts, and the report has been completed. Mr. Hafen asked Mr. Summerill if he had ever seen multiple versions of a report, e.g., a Rule 35 report and then an expert report from the same person. Mr. Summerill said that he had. The examiner is not bound by what is in his/her Rule 35 report. What the defense lawyers are asking to have happen is the equivalent of taking the deposition of a treating physician blind. You have no idea what they've done, what tests they've conducted, etc. You can't make an educated decision on whether to take a deposition or ask for a formal report. Medicine is much more involved—you want that information during fact discovery. He addressed Judge Blanch's hypothetical of brain cancer being discovered during the Rule 35 exam. Mr. Bridge pointed out that the Rule 35 exam is exclusively for determining what injuries were caused by the accident, but Mr. Summerill said if the Rule 35 examiner finds an additional injury, or an alternative cause of the injury, the plaintiff should be apprised of that fact to deal with it during treatment through additional providers.

- Lincoln Davies said the purpose of the Rule 35 exam is to level the playing field—to let the defendant have a chance to examine the plaintiff. He asked the guests what typically happens on the plaintiffs' side. Mr. Summerill said that, under the new rules, plaintiffs have to frontload everything. The defendants get all of the plaintiffs' treatment records through initial disclosures. The Rule 35 exam does not really level the playing field—it is not really an "independent" medical examination. The examinations are conducted by hired guns used by the defense bar. Steve Marsden commented that the "hired gun" issue goes both ways—plaintiffs use "hired guns" as well. Mr. Summerill responded that in his practice, he rarely hires a medical examiner. He uses the treating physicians. Mr. Marsden asked whether treating physicians' depositions are taken during fact discovery. Mr. Summerill responded that they are, and that they are disclosed at the outset as fact/expert witnesses. Mr. Davies asked Mr. Bridge whether that was true. Mr. Bridge said that he has seen retained experts by plaintiffs, but usually the treating physicians are disclosed from the beginning. That said, the plaintiff is in the possession of all of the facts from the get-go. Mr. Marsden commented that, at least in some cases, the IME results in the discovery of a new condition or alternate causation; otherwise, it would be irrelevant. The plaintiff, therefore, is not in possession of all the facts.

- Judge Pullan challenged the assertion that the plaintiff elects a report or deposition of the medical examiner blind. The "mini" disclosures under Rule 26(a) are given before a plaintiff has to make the election. The plaintiff isn't going into it any more blind than he/she is with any other expert. That said, there's no harm in requiring earlier disclosure of a Rule 35 report. These examiners fall in the gray area between fact and expert witnesses. He has not heard anything yet that would suggest there is any harm to anyone knowing about the content of the report earlier. If it is prepared, why not disclose it upon request. Mr. Summerill said that when the 2011 rule amendments were adopted, one of the goals was to achieve a speedier and more efficient judicial process. Disclosing the Rule 35 report earlier advances those goals. When a dispute over Rule 35 reports arises, what he sees most often is a citation to the advisory committee note, which says, "Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or deposition." Defendants use it as a basis to withhold production of the Rule 35 report. In his view, however,

the note is actually addressing the scenario where you're asking for discovery from an expert witness as opposed to addressing compliance with Rule 35.

- Mr. Hafen asked whether the expectation would be that when people are disclosing experts, the defendant would have the right but not the obligation to disclose the Rule 35 examiner as an expert, then the plaintiff could elect a deposition or some sort of additional report. Mr. Smith responded that the harm in that interpretation is that it doesn't reflect the current practice. Now the expectation from judges and opposing lawyers, and the practice, is that the initial report contains all of the doctor's opinions. If the report is disclosed up front, and then again later, the question arises as to why the initial report did not contain all of the doctor's opinions. And if the initial report is more like a medical record, it will not contain all of the doctor's opinions. It will not look like a rebuttal of a treating physician's report. A Rule 26 report is going to look like an expert report with a full, extensive discussion of the doctor's opinions, all the bases for them, all the data that the doctor relies upon, and all of the information under Rule 702. If the initial Rule 35 report becomes a medical record, it will be 1.5 pages instead of 11-13 pages.

- Mr. Hafen raised Rule 35's counterpart in the federal rules, which requires the report to be delivered upon request. He asked whether the federal rules contemplate two different reports. Mr. Summerill responded that he did some research on that issue and reviewed the federal rule annotations, but could not find anything that addressed that issue directly. Mr. Smith commented that the federal rule is interpreted to mean "within a reasonable time," i.e., within 30 days of the request. The point is, right now, there are not two separate-looking reports. Judge Pullan said that the language could be changed to say that a Rule 35 report must comply with the expert report requirements of Rule 26. But if we say it must be produced "upon request," what is stopping one side from just saying that they'll get it to you when they receive it from the doctor, and the doctor produces it at the time of expert disclosures? Should we put in a deadline?

- Mr. Marsden commented that, according to Mr. Summerill, the plaintiff's initial medical records are really like reports from unbiased treating physicians. He asked whether that is Mr. Smith's experience. He wondered whether, in practice, there is a different level of advocacy from the plaintiff's medical experts/treating physicians, and the defense's IME. Mr. Smith responded that the plaintiff's doctor is an advocate for the patient. In his view, the plaintiffs' doctor is not objective. Although he sees plaintiffs' doctors with pre-existing relationships with the patient, with all due respect to Mr. Summerill, he said that 90% of patients have been directed to receive treatment from a doctor or clinic that the plaintiff's lawyer has a relationship with. Those people are treated as retained experts, not Rule 35 doctors, so defendants don't receive that disclosure within fact discovery. Mr. Hafen asked Mr. Smith whether records have to be turned over if there has been an exam. Barbara Townsend responded that they do, and in serious accidents where patients have gone to the ER, those records are objective. Mr. Smith commented that there is a difference between medical records and reports. The record is what you would imagine—history and subjective/objective stuff. It may have just a very short description of what happened. The report is very different. The doctor spends time on the report.

- Judge Furse asked Judge Pullan whether, if the Rule 35 and Rule 26 reports are the same, he thinks that the plaintiff should not have the option to depose the medical examiner/expert. Judge Pullan said no; he is just suggesting that one way to clear up any ambiguity is to say that

the content of a Rule 35 report must meet the requirements of Rule 26(b)(4). The plaintiff could still request a deposition.

- Mr. Davies asked the guests about the relationship between the defense lawyers and the doctors conducting the Rule 35 exam. A few years ago, when the committee was discussing Rule 35, defense lawyers reported that it is often difficult to get a Rule 35 report because doctors are unwilling to conduct such exams. Would there be a chilling effect if the rule is more onerous in requiring the production of a report earlier? Mr. Summerill responded that, in his experience, defense lawyers have a roster of doctors that they rely on. It is a cottage industry. Before the 2011 rule changes, defendants had no problem getting a Rule 35 report out. Mr. Bridge said that sometimes he experiences great difficulty in getting experts. Try getting a neurosurgeon—they make so much money that it is very expensive to get them to do a Rule 35 exam and report. You have to search nationally for that kind of expert, especially for medical malpractice cases. It is a problem. Further, with respect to the report itself, he has never seen an IME report—doctors that have been used by defense lawyers a lot, as a matter of course, issue their report, which stands as a final report. There are no hidden conclusions—Rule 35 requires that all conclusions and diagnoses be in the report. Rule 35 examiners are laying out everything they see and find. In practice, Rule 35 reports are no different than Rule 26 reports.

- Amber Mettler asked the guests what the practical effect would be if Rule 35 reports were not disclosed until rebuttal reports were due. Mr. Summerill responded that, if the plaintiff retains a medical expert, that expert is disclosed in the initial Rule 26 disclosures. If a defendant retains someone to do an exam, they should have to disclose the Rule 35 report. Mr. Smith commented that, in that situation, the defendant would disclose the Rule 35 report and the Rule 35 examiner as a testifying expert at time of rebuttal reports. Judge Blanch questioned whether that gets back to the hybrid nature of the rule. If the parties are disclosing facts known to everyone, that's fine. But Rule 35 also includes other factual observations that if not known during fact discovery, could put the other side at a disadvantage.

- Judge Furse commented that the problem seems to have arisen after the 2011 rule changes because, before that, the parties always got both a report and a deposition. Now, since parties only get one or the other, there is more resistance to producing the Rule 35 report early. Mr. Smith said that is the problem exactly. The whole point of the rule changes was to curtail waste in discovery. Before the changes, Mr. Summerill is right—defendants produced the Rule 35 report early. Still, some lawyers were doing depositions of the Rule 35 examiner, which were a waste. Ms. Townsend asked what has changed since the 2011 amendments. If a plaintiff requests a report after an IME, does the plaintiff receive it? Are defense attorneys waiting until after fact discovery to produce it? Mr. Summerill responded that sometimes he receives it when requested. Some lawyers, however, will say that if the Rule 35 report is produced, then the plaintiff cannot depose the Rule 35 examiner. He thinks they are conflating the Rule 35 report and expert reports under Rule 26. He usually gets the Rule 35 report but he has had to fight over it sometimes.

- Judge Pullan asked how quickly a Rule 35 report is being prepared after the examination. Mr. Summerill reported that he usually receives them within 30 days of asking. Judge Pullan said that he really thinks they are separate reports from Rule 26 reports. There is a gray area between fact and expert witnesses. The sooner we know things, the better. If everyone could live with a 30-day disclosure requirement following the IME, we should encourage that disclosure. Mr. Smith commented that the downside is burden-shifting. In his view, you get one

set of facts and one set of complete opinions from the party who doesn't have the burden of proof. In 90% of cases, fault isn't the issue. The issue is damages, and whether the damages are what the plaintiff claims, and whether they are reasonable. Production of a Rule 35 report early means that the defendant must lay out why the plaintiff's claims and damages are not reasonable, and then later the plaintiff comes in to explain why they are reasonable through a Rule 26 report. Then the defendant has to counter that through a rebuttal Rule 26 disclosure. Judge Pullan commented that the defendant still has that opportunity on rebuttal. The defendant can rely on the Rule 35 examiner or use someone else. Mr. Smith asked why the defendant should have to go first with a report. Judge Pullan said that is the cost of conducting an examination on the physical person of the plaintiff by a doctor not of the plaintiff's choosing. Mr. Smith said the only way for a defendant to defend him or herself in a personal injury action is to look at the body. Mr. Marsden asked whether defense lawyers use medical experts who testify but who have not examined the plaintiff. Mr. Summerill said that he relies on treating physicians, so the notion that there is burden shifting is not accurate. Defendants get the identities of the treating physicians and their records—defendants get to test causation as part of fact discovery. Occasionally he will use a doctor to discuss and summarize 10,000 medical records to give the bigger picture, but he will bring in key providers to discuss specific medical issues. Judge Pullan asked what the advantage is to the defendant of holding on to the Rule 35 report, beyond just a tactical advantage. The defendant has it, it is information the defendant will offer in his/her case in chief, why not disclose it? Ms. Townsend noted that an earlier disclosure would also promote settlement.

- Judge Furse asked whether there is a way for an examining physician to include only facts in a Rule 35 report, and put conclusions in a Rule 26 report. Mr. Smith said that could happen. Mr. Summerill said that without the conclusions, you're sending a plaintiff in for an examination and the physician could come up with entirely different diagnoses and the plaintiff is left in the dark. Mr. Marsden responded that the plaintiff would have the foundational information—just not the diagnosis. Mr. Summerill agreed, but the report would need to include at least the diagnostic impressions.

- Mr. Hafen said he sees two issues: the timing of the Rule 35 disclosure and the form of the Rule 35 report. He took a straw poll, which revealed that a clear majority of the committee believed the Rule 35 report should be disclosed prior to the close of fact discovery. The main issue, then, is the form of the report. What should be disclosed early?

- James Hunnicutt asked Mr. Summerill if the rule is broken. How often is he disappointed with the contents of a Rule 35 report? Mr. Summerill said that Rule 35 reports are pretty consistent and fairly complete. What is broken is the timing. Assuming the defense could bifurcate factual observations from opinions, Judge Blanch questioned whether we would just be opening up litigation on that issue. Mr. Bridge said that if the factual disclosure includes all tests conducted, impressions, and diagnoses, that is the whole report. That includes the conclusions. Given that, Mr. Hafen asked whether there is any reason to change the current form of the report. Messrs. Smith and Bridge said there is nothing in their standard Rule 35 reports that is not in a Rule 26 report. Mr. Summerill said the reports that defense counsel are generating may not be different, but they are different under the rules. A Rule 26 report includes literature citations, studies relied upon, etc. A Rule 26 report locks the expert in. Rule 35 is substantively different. Traditionally what has been supplied by defense counsel complies with both, but he has never seen a Rule 35 report that contains citations to literature. Mr. Hafen commented that there is a fairness issue. The plaintiff gets a Rule 35 report that is virtually the same as a Rule 26 report,

and the plaintiff also gets to elect to depose the Rule 35 examiner. Doesn't that give plaintiffs an advantage? Mr. Summerill said that it is an advantage, but it is part of a unique system—there is an adversarial relationship between the examiner and the patient. The patient is subjected to an invasive examination, and the trade-off is that the plaintiff receives the Rule 35 report. Mr. Smith said that if the rule is changed to require early disclosure of the Rule 35 report, the plaintiff will not only get that advantage but also get to choose to take a deposition as well.

- Mr. Hafen asked whether disclosure within 30 days of the examination is appropriate. The federal rule requires disclosure upon request. Should it be a mandatory disclosure or upon request? Messrs. Smith and Bridge said that it doesn't matter; it will get produced either way. Judge Pullan said that the problem he sees with production "upon request" is that the defense bar may say that the report will not be produced until the end of fact discovery when the defendant receives the report from the examiner. If we want to require disclosure within a reasonable time, we should say that. On the fairness issue, we shouldn't underestimate the degree to which a Rule 35 exam really impinges upon the privacy and liberty interests of an individual. The plaintiff is compelled to go to a doctor not of his/her choosing who examines their physical body. The idea that someone can withhold that report for some tactical reason makes no sense to him. If the defense wants to avail itself of a Rule 35 exam that impinges upon that interest, then the plaintiff should get that report within a reasonable time. From the guests, Mr. Hafen said that it sounds like a reasonable time frame is 30 days.

- Ms. Mettler asked whether some of the unfairness Mr. Smith has mentioned could be mitigated if we modified Rule 26 to say that if a Rule 35 examiner is used as an expert, there is no deposition. Mr. Smith said that would be fine. The issue is that plaintiffs get both the report and a deposition, which is unfair. Judge Blanch said that would force the plaintiff to accept the defendant's election.

- Mr. Hafen directed the committee to pages 5 and 6 of the materials, which include a proposed addition to the advisory committee note to Rule 35, and the removal of the last sentence of the note. The proposal does not include a time for when the Rule 35 report should be disclosed. Judge Baxter commented that the federal rule (on pages 7 and 8) has some language under the first part of subsection (b)(1) that might be useful. We just need to deal with the timing. Mr. Smith said if we want additional information in a Rule 35 report, we should add it to Rule 35(b). In practice, there is no difference. Mr. Hafen said it comes back to the fairness issue: if the plaintiff gets a full report and a deposition, is that fair? And assuming it is done that way, is the deposition a fact or expert deposition? If it is a fact deposition, would there be another expert deposition? Mr. Smith responded that currently, under the rule and in practice, it is an expert deposition. Judge Furse commented that you could argue that you want to depose the Rule 35 examiner only on a factual basis. Mr. Smith said he hasn't seen anyone argue that, and suggests that we simply make it one report. In practice, no Rule 35 doctor is coming back to do a second report. Judge Pullan asked whether the language in Rule 35 has become infused with special meaning; if that's the case, he is reluctant to change it. He would simply add that the Rule 35 report should meet the requirements of Rule 26(b)(4). Ms. Townsend asked whether we would be requiring defendants to disclose an expert every time they do an IME if that change is made. If Rule 35 and 26 reports are functionally the same, perhaps we need to make the Rule 35 report different. Rod Andreason said that, although he is not familiar with this area, we need to get the facts out early. To balance that, perhaps we don't compel conclusions in the Rule 35 report. That is more akin to expert opinion. Mr. Hafen asked whether a diagnosis is a conclusion. Ms.

Townsend said that Rule 35 is talking about medical diagnoses and conclusions, which are a little different from expert opinions. Judge Furse said that if the Rule 35 report does not include diagnoses and conclusions, what you would have are test results and patient history. The treating physicians include their impressions and conclusions in medical records. Mr. Hafen commented that he is concerned we will make things worse by changing the form of the Rule 35 report when practitioners in this area are saying that the reports are functionally equivalent. Ms. Mettler responded that they have become the same because of the development of the practice, but that changed with the 2011 rule amendments. Mr. Smith said that before the rule changes, all Rule 35 examiners were giving both a report and deposition. The real question is whether the committee wants to treat Rule 35 experts differently than all other experts under the new Rule 26 where the other side must elect either a report or deposition.

- Mr. Marsden commented that Rule 35 examinations seem to be at the heart of personal injury lawsuits. He is in favor of the defense bar and plaintiff's bar getting together to decide if this is a real issue, and if so, to propose the appropriate solution. He doesn't think we should feel the compulsion to change the rules. Terri McIntosh said that we should address the committee note, particularly the last sentence that seems to be causing a problem in practice. Judge Pullan moved to change Rule 35 to require disclosure of the report within 30 days of completion of the exam, and that we not adjust the language relating to the content of the report. Judge Blanch seconded the motion. Mr. Marsden moved that we table that motion and assign the rule to a subcommittee. He asked how fully the committee has surveyed the defense and plaintiff's bar on this issue, which the committee discussed. Mr. Marsden doesn't think anyone is hurt by having a set of people study the issue more rather than making a change and then finding out that the plaintiff's bar didn't get fully vetted. His is a process point. Let's make sure what we are doing is the right thing. Not to criticize any of today's presentations, but he doesn't have the sense that the plaintiff's bar or the defense bar has really focused on this, and really struggled with it, to come up with competing positions/compromises. Judge Furse seconded the motion. Mr. Hafen took a vote: 6 were in favor of tabling the issue; 8 were opposed. Mr. Marsden's motion failed.

- Back to Judge Pullan's motion, which had been seconded, Mr. Hafen reminded the committee that anything we approve goes out for comment. He asked whether there was further discussion to be had on Judge Pullan's motion. Mr. Smith asked whether a plaintiff will still be allowed to elect a deposition under Judge Pullan's proposal. Judge Pullan said yes, the plaintiff still gets to choose a report or deposition. The format of the report will not be addressed, which will allow the standard practice to continue. If the defense wants to add something to the report when a report is elected under Rule 26, they could do that. Mr. Hunnicutt asked whether the deadline should be 28 rather than 30 days. Ms. Sylvester asked whether we should do anything about the committee note. Mr. Hafen asked Judge Pullan whether his motion includes the change proposed in the committee note. Judge Pullan said it does. Judge Blanch seconded the motion. Mr. Hunnicutt suggested that "medical" be removed. Judge Baxter said the committee note talks about the term medical. Mr. Hafen asked whether there is a non-medical examiner under Rule 35. Mr. Hunnicutt said a handwriting or vocational assessment expert could fall under Rule 35. Mr. Andreason is in favor of removing "medical" from the rule and the note. Judge Pullan is fine with that. Mr. Hafen took a vote: 7 were in favor of Judge Pullan's motion with the foregoing modifications; 8 were opposed. The motion failed.

- Judge Furse moved to study this matter further and to create a subcommittee for it. She thinks this is one where a meet and confer between the defense and plaintiff's bars would really help

the committee. Ms. Mettler seconded the motion. Mr. Hafen commented that the subcommittee could have several members of the plaintiff's and defense bars, they would look at Rule 35, post-2011 rule changes, and address the timing and fairness issues raised by the new status. Judge Blanch said that he agrees with Mr. Marsden's point generally. We should be more reticent about changing the rules. That said, the committee has been talking about this rule *ad nauseum*. The issue before the committee right now is simply the timing of the report. The earlier straw poll showed a clear majority of members felt it should be disclosed during fact discovery. Can't we come up with when that should be? There is a dispute going on with respect to that issue, and judges are coming to different conclusions on it. Judge Anderson commented that he did not vote for the motion because he doesn't like the idea that the defendant has to do both a full report and a deposition. Mr. Smith said that has been the problem since November 2011. The whole idea behind the rule changes was to reduce the time and expense of fact and expert discovery. Expert discovery costs a lot of money. Judge Furse said that is why she proposes that it be studied further with input from both sides. Mr. Marsden said that he is not comfortable right now saying what should go in a Rule 35 report. Judge Pullan said that he is reluctant to reopen the issues on Rule 35 again. If we survey everyone again, we're going to reopen a lot of issues beyond the timing of the disclosure. Mr. Summerill said that he talked to and emailed a lot of people about Rule 35, and said that one issue came up repeatedly: why we are allowing Rule 35 exams in Tier 1 cases. Mr. Smith said that addressing the form of Rule 35 reports is going to be difficult. The doctor wants to write it the way the doctor writes it. Ms. Townsend said that the issue before the committee was just the timing of the disclosure. Judge Anderson responded that the timing affects whether a plaintiff may get both a report and a deposition. If the motion is changed to say that by requesting a Rule 35 report, the plaintiff is electing a report and does not get a deposition, that would reduce expense and make it more even. Ms. Townsend asked whether that would be okay with the plaintiff's bar. Mr. Summerill said he didn't know. Mr. Hafen commented that we need more study on that.

- Going back to Judge Furse's motion, he asked who would be on the subcommittee. He suggested Ms. Townsend and Mr. Smith, and that they be charged with going out and talking with the plaintiff's and defense bars. Judge Furse suggested that they look at the timing, fairness, and form issues, taking cost into account, to see if they can reach an agreed proposal to address the problems that have arisen since the 2011 rule changes. If they cannot come to an agreement, they should submit competing proposals for change. Mr. Hafen suggested they come back with their proposal(s) for the June meeting. Mr. Hafen took a vote: All voted in favor of Judge Furse's motion except Judge Pullan, Judge Blanch, and Mr. Hunnicut. The motion passed.

III. Adjournment.

The meeting adjourned at 5:55 pm. The next meeting will be held on May 25, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.