Buffalo Law Review

Volume 13 | Number 3 Article 10

4-1-1964

Physical and Mental Examinations of Defendants Under Rule 35

Peter H. Bickford

doubtedly correct under principles of stare decisis and strict construction of precedent.

On the other hand, while this interpretation stands now, it would appear inevitable that further change will occur. Stoutly opposed to the strict interpretation of *Campbell* and *McDonald* are the views of Judge Burger and more than likely at least two other judges of the District of Columbia Court of Appeals, Judges Bastian and Miller. Just as Judge Burger's views in *Blocker* were influential in *McDonald* and wrought important modifications upon *Durham*, perhaps his expansive views in *Gray*, formed in the spirit of *McDonald*, will ultimately prevail and lead either to the reversal of *Durham* or the re-establishment of the right-wrong and control tests to independent and co-equal status with *Durham* in the District of Columbia.

JOSEPH S. FORMA

PHYSICAL AND MENTAL EXAMINATIONS OF DEFENDANTS UNDER RULE 35

I

Prior to the adoption of the Federal Rules of Civil Procedure in 1937[1] it was considered a gross breach of the sacred right of the privacy of the person to force any person to submit to a physical or mental examination against his will.[2] To protect this policy the Supreme Court impressively decided that there was no inherent power in a federal court to make or enforce an order to submit to such an examination[3]—despite the observation in the dissent that even at common law physical or mental examinations were often ordered when the ends of justice required.[4] The "inviolability of a person" policy prevailed until the promulgation of Rule 35(a) of the Federal Rules of Civil Procedure. Prior to Rule 35(a) a person could bring suit in a federal court seeking redress for alleged injuries, yet shield himself from examination of those alleged injuries by the other party by pleading the inviolability of his person. Rule 35(a), however, allows the court in its discretion to order a mental or physical examination of a party when that party's mental or physical condition are in controversy and good cause for such examination is shown.[5]

1. For an official text of the Federal Rules of Civil Procedure as they read when they become effective in 1938, see 308 U.S. 645. These Rules were drafted pursuant to the authority of the Rules Enabling Act of June 19, 1934, 48 Stat. 1064 (1934), 28 U.S.C. §§ 723b, 723c (1934). The present Enabling Act is found in 28 U.S.C. §§ 2071, 2072 (1952) and an up-to-date text of the rules is found at the end of title 28 U.S.C.A.

2. Union Pac. Ry. Co. v. Botsford, 141 U.S. 25 (1891).

3. Union Pac. Ry. Co. v. Botsford, *supra* note 2. *But cf.* Camden & Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900) and People *ex rel.* Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957) which recognize such inherent power to order physical or mental examinations in state courts.

4. Union Pac. Ry. Co. v. Botsford, 141 U.S. 25 (1891) (Brewer, J. dissenting). See also 8 Wigmore, Evidence § 2220 (McNaughton rev. 1961).

5. The text of Rule 35(a) is as follows:

(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order

The constitutionality of the Rule, which is a direct contradiction of the "inviolability of the person" policy, was upheld by the Seventh Circuit in 1940,[6] and one year later in the famous case of *Sibbach v. Wilson & Co.*[7] the Supreme Court, by a 5 to 4 vote, decided that Rule 35(a) was within the mandate of the Enabling Act of Congress and was not an abridgement of the substantive rights of the individual.[8] The Court in *Sibbach* refused to equate "substantive" with "important" or "substantial" and concluded that the Rule came squarely within the meaning of procedure. It should be emphasized, however, that if it were not for Rule 35(a) the cases denying the inherent power in the federal courts to compel anyone to submit to a physical or mental examination would still be good law.[9] Therefore, "the Rule creating de novo the obligation to submit should be strictly construed."[10] The requirements for compelling examination under the Rule, in this light, become extremely important. A brief discussion of them is warranted.

First, Rule 35(a) provides that the trial court "may order" an examination. It is clear that the granting of such an order rests within the sound discretion of the court.[11] This discretion is given a broad scope. For instance, it has been held that "even after determining that a physical or mental examination is advisable the power still rests with the court to determine the physician who shall conduct the examination."[12] Given the court's discretionary power, the following requirements constitute the framework within which that discretion must operate.

The physical or mental condition of a party must be "in controversy."[13] The "in controversy" requirement appears to be the least questioned aspect of Rule 35(a). An interesting district court case decided shortly after the promulgation of the Rules raised the question for the first time.[14] The case involved a suit for damages for alleged libel. Defendant was charged with having made certain defamatory statements concerning plaintiff's physical and mental character. On defendant's motion for examination of the plaintiff, the court held that the physical and mental condition of the plaintiff was not "in con-

---

him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

6. Countee v. United States, 112 F.2d 447 (7th Cir. 1940).

7. 312 U.S. 1 (1941).

8. The present Enabling Act, 28 U.S.C. § 2072, which is substantially similar to the Act of 1934, reads in part as follows: "Such rules shall not abridge, enlarge or modify any substantive right . . . ."

9. Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).

10. *Id.* at 76.

11. See Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952); Teche Lines, Inc. v. Boyette, 111 F.2d 579 (5th Cir. 1940); The Italia, 27 F. Supp. 785 (E.D.N.Y. 1939).

12. The Italia, *supra* note 11, at 786. See also Leach v. Grief Bros. Cooperage Corp., 2 F.R.D. 444 (S.D. Miss. 1942).

13. See Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955); Beach v. Beach, 114 F.2d 479 (D. C. Cir. 1940); Wadlow v. Humberd, 27 F. Supp. 210 (W.D. Mo. 1939).

14. Wadlow v. Humberd, *supra* note 13.

troversy" as required by Rule 35(a). The court reasoned that the controversy was whether defendant wrote the alleged statements with a malicious mind—not whether plaintiff's mental and physical condition were actually such. The case has been criticized[15] and does not appear to be controlling today. The "in controversy" requirement is generally met if a party's physical or mental condition have any substantial relationship to the subject of the lawsuit.[16] Because of the scope of the "good cause" requirement, however, the "in controversy" question is seldom raised.

"The order may be made only on motion for good cause shown. . . ."[17] In determining "good cause" the court must weigh the necessity and probative value of an examination on the one hand, against the ever-present "inviolability of the person" consideration on the other hand.[18] To illustrate, in one instance it was held not to be an abuse of discretion to deny a motion for a physical examination where plaintiff had disavowed damages for any present suffering and sought redress only for past physical injury and mental disturbance from which he had fully recovered.[19] Yet in another instance, where it appeared doubtful to the court that defendant had a legal defense, an examination was allowed defendant under Rule 35 (a) to determine the extent of plaintiff's injuries despite the fact that the examination carried with it the possibilities of considerable pain and discomfort to the plaintiff.[20] The standard of "good cause" under Rule 35(a) is much higher than under the other discovery rules.[21] The rationale of this strict standard is that "under Rule 35, the invasion of the individual's privacy by a physician or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate."[22]

Finally—and of most significance to the scope of this paper—the breadth and/or limitation of the persons who may be examined under Rule 35(a) raises numerous and interesting questions. The Rule specifically speaks of the examination of a *party* whose physical or mental condition are in controversy. The applicability of this condition has been strictly construed by the courts.[23] A guardian ad litem, therefore, is not a "party" within the meaning of Rule 35(a); nor are the parents of a petitioner in a nationality suit considered parties.[24] This extremely narrow interpretation of the "party" requirement

15. Beach v. Beach, 114 F.2d 479, 482 n.20 (D.C. Cir. 1940).
16. See, *e.g.*, Beach v. Beach, *supra* note 15; Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).
17. Fed. R. Civ. P. 35(a).
18. *Compare* Guilford Nat'l Bank v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962) *and* Coca-Cola Bottling Co. v. Torres, 255 F.2d 149 (1st Cir. 1958) *with* Leach v. Grief Bros. Cooperage Corp., 2 F.R.D. 444 (S.D. Miss. 1942) *and* Klein v. Yellow Cab Co., 7 F.R.D. 169 (N.D Ohio 1944, 1945).
19. Coca-Cola Bottling Co. v. Torres, *supra* note 18.
20. Klein v. Yellow Cab Co., 7 F.R.D. 169 (N.D. Ohio 1944, 1945).
21. See Guilford Nat'l Bank v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962).
22. *Id.* at 924.
23. Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).
24. Dulles v. Quan Yoke Fong, 237 F.2d 496 (9th Cir. 1956); Chin Nee Deu v.

under Rule 35(a) caused considerable comment and criticism which resulted in the recommendation of a proposed amendment to the Rule in 1955 which would have expanded its scope to include examination of "the blood relationship of a party or of an agent or a person in the custody or under the legal control of a party."[25] The proposal, however, was not included in the amended Federal Rules of Civil Procedure adopted in 1963. Rule 35(a) remains unchanged.[26]

II

From the foregoing discussion it might appear that the requirement that the person to be examined must be a party is an extremely narrow authorization. But a question of the broadness of the "party" requirement of Rule 35(a) is very much in existence, as well as the question of its limitations. Until recently, however, the problem of breadth apparently was never squarely faced. The problem, simply stated, is this: How do you justify or explain the applicability of Rule 35(a) to examination of the party who does not resort to the federal courts? The suggested theory behind Rule 35(a) begs the question. It has been argued in support of the Rule that a person who comes into the federal courts seeking redress for his injuries has, in effect, waived the right to claim the protection of the sanctity of the body or mind. He must disclose that for which he seeks recovery: "In the interests of justice, the plaintiff, by seeking relief, must submit to a physical examination to aid in the ascertainment of the truth of his claims—he may not conceal, or make difficult of proof, that which is the very basis of his action and which is particularly within his knowledge."[27] Obviously, the same argument cannot be used to justify compelling a defendant—or a plaintiff who has had his case removed to a federal court against his will—to submit to a physical or mental examination. Until now, however, there appears to have been no need for any further justification or rationale. The situation simply has not arisen. In practically all personal injury suits it is the plaintiff's physical or mental condition as a result of such injury that is in controversy—certainly not the defendant's. Also, since most states have a substantially similar examination

---

Dulles, 18 F.R.D. 350 (S.D.N.Y. 1955). *But cf.* Lee Wing Get v. Dulles, 18 F.R.D. 415 (E.D.N.Y. 1955) where the district court held that an alleged mother may be required to submit to blood tests, though not a party, since maternity had been put in issue. The federal court seems to look primarily to the provisions of New York's Civ. Prac. Act § 306-a (now N.Y. CPLR § 3121(a)), rather than to Fed. R. Civ. P. 35(a).

25. Report of Proposed Amendments to Rules of Civil Procedure for the United States District Courts 29 (Oct. 1955), quoted in 4 Moore, Federal Practice 35.01 at 2552 (Supp. 1962). See also, for a discussion of the background of the proposed amendment to Rule 35(a), Note, *Physical examination of non-parties under the Federal Rules of Civil Procedure*, 43 Iowa L. Rev. 375 (1958).

26. For a discussion of the Amendments to the Federal Rules which were adopted see Kaplan, *Amendments to the Federal Rules of Civil Procedure, 1961-1963* (pts. I & II), 77 Harv. L. Rev. 601, 801 (1964).

27. Schlagenhauf v. Holder, 321 F.2d 43, 49 (7th Cir. 1963). See also Sibbach v. Wilson & Co., 312 U.S. 1 (1941) and People *ex rel.* Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957).

rule,[28] it is well-nigh impossible for a plaintiff to be in the position of being forced to transfer to a federal court from a state court which does not have a similar provision in its own rules. By reason of a recent United States Court of Appeals decision, however, the question must be squarely faced.

In *Schlagenhauf v. Holder*[29] the question of "whether a federal district court has the power to order a mental or physical examination of a person who is a *defendant* in a tort action" was raised for the first time.[30] The case arose out of a collision in Indiana between a Greyhound bus, driven by Schlagenhauf, and a trailer owned by National Lead Co. and being pulled by Contract Carriers, Inc. The original action was brought by a husband and wife who were passengers on the bus for damages for personal injuries arising out of the accident. The Greyhound Corporation, Schlagenhauf, Contract Carriers, Inc., their driver, and the National Lead Co. were all named as party defendants. Both Greyhound and National Lead cross-claimed for damages to their respective vehicles.[31] In National Lead's cross-claim, which named Greyhound and Schlagenhauf as defendants, it was alleged that Greyhound, by and through its agent and employee Schlagenhauf, had acted carelessly and negligently by permitting the bus to be operated upon a public highway when both Greyhound and Schlagenhauf knew that the eyes and vision of Schlagenhauf were impaired and deficient.[32] A petition for an order requiring Schlagenhauf to submit to a series of medical and physical examinations was filed. The reasons for the request were that Schlagenhauf had been involved in a similar type accident in the past; that the lights on the trailer were clearly visible for a considerable distance; and that Schlagenhauf had admitted to seeing the lights some ten to fifteen seconds before the collision but had failed to slow down or apply the brakes or make any effort whatsoever to avoid the collision.[33] The District Court granted the petition and ordered Schlagenhauf to submit to examination by nine named specialists,[34] whereupon Schlagenhauf instituted the present petition to the Seventh Circuit for a writ of mandamus against the district judge. The Court of Appeals, with one judge dissenting, held that the order of the district judge was within his discretionary power and denied the petition for mandamus.

After observing that a writ of mandamus could only be issued upon a showing of a clear case of abuse of discretion,[35] Circuit Judge Swygert, speaking for the court, proceeded to give a brief background of Rule 35(a) concluding that the Rule, or similar rules, have a sound and established place

28. See 8 Wigmore, Evidence § 2220 (McNaughton rev. 1961).
29. 321 F.2d 43 (7th Cir. 1963), *cert. granted*, 375 U.S. 983 (1964).
30. Schlagenhauf v. Holder, 321 F.2d 43, 45 (7th Cir. 1963).
31. The complicated procedural framework is outlined in the opinion, *id.* at 46.
32. *Id.* at 47.
33. *Id.* at 51.
34. *Id.* at 47 (Two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists. Note that only four examinations were requested).
35. *Id.* at 47, citing Labuy v. Howes Leather, 352 U.S. 249 (1957).

in the discovery provisions of both the state and federal courts.[36] Turning to the requirements of Rule 35(a), the Court determined that since Schlagenhauf was "the only human element utilized in the operation of the Greyhound bus involved in the accident,"[37] and because of the other related circumstances surrounding the accident, his mental and physical condition were definitely "in controversy." But the "in controversy" requirement alone is not enough. "Good cause" to require defendant to submit to the burden of the examinations must be weighed against the need of this type of discovery. The Court concluded on this point that the district judge did not abuse his discretion.

The dissent, per Circuit Judge Kiley, takes issue with the majority's determination of "good cause." Judge Kiley is unable to see how "good cause" for the examinations ordered can be determined absent at least a brief hearing which would have indicated either an alternative route to determine Schlagenhauf's condition, or would have substantiated the merit in the request for the examinations. "In either event, the inquiry would establish an adequate basis for exercising the court's discretion as to whether or not the order ought to issue."[38] Rule 35(a) says nothing about a hearing, although it may be possible to argue that it is implied under the "good cause *shown*" language. Also, as the dissent points out, there is a greater standard of "good cause" recognized for Rule 35(a) than under the other discovery rules.[39] Certainly it can be argued that this greater standard impliedly required some sort of pre-trial hearing under Rule 35(a). The fact of the matter is, however, that most cases do not utilize hearings, leaving "good cause" entirely within the court's sound discretion.[40]

Regardless of the results of such a hearing, the dissent definitely concluded that the order for *nine* mental and physical examinations was a clear and flagrant abuse of discretion and need not await review on appeal from a final judgment—long after the privacy and dignity of the person have been violated—as the majority suggests. The question of whether more than one examination is authorized under Rule 35(a) has been decided affirmatively by looking to the language of the rule—viz.: "the person or *persons* by whom it [the examination] is to be made."[41] "A reading of Rule 35(a) does not indicate an intent to establish a single examination limitation, and where alleged injuries fall into two entirely separate areas of medical specialization, examina-

36. Schlagenhauf v. Holder, 321 F.2d 43, 48 (7th Cir. 1963).

37. *Id.* at 51.

38. *Id.* at 52 (Kiley, J. dissenting).

39. *Id.* at 51 (Kiley, J. dissenting), citing Guilford Nat'l Bank v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962).

40. See, *e.g.*, Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952); Leach v. Grief Bros. Cooperage Corp., 2 F.R.D. 444 (S.D. Miss. 1942). *But cf.* Dinsel v. Penn. R.R. Co., 144 F. Supp. 880 (W.D. Pa. 1956) and Klein v. Yellow Cab Co., 7 F.R.D. 169 (N.D. Ohio 1944, 1945) where extensive pre-trial conferences were used to determine whether there was sufficient "good cause."

41. Fed. R. Civ. P. 35(a). (Emphasis added.)

tion by practitioners in such fields are to be authorized under the Rule."[42] The argument here is not against allowing more than one physician or specialist to examine the defendant; rather it is a question of the extent to which such a power may be exercised. Nine examinations—five more than requested—might appear to be overdoing things a bit, even where there clearly is "good cause" for examination.

The main interest of the case, however, lies not in its treatment of the "in controversy" and "good cause" requirements, but rather in its treatment of the "party" requirement. Although recognizing that "this type of discovery has most frequently been applied in situations in which the moving party is a defendant asking for a mental or physical examination of a plaintiff so as to ascertain the extent of the latter's injuries . . ."[43] the Court was faced with the undeniable fact that the Rule uses the term "party" and that "obviously those drafting the rules, the Supreme Court, which adopted them, and the Congress that tacitly approved them . . . were all cognizant of the fact that 'party' means both plaintiffs and defendants in civil litigation."[44] On that basis, therefore, the Court conceded that Schlagenhauf was a proper person to be examined under Rule 35(a). No further reason or rationale was given, or seemed necessary, to determine that defendants are as vulnerable as plaintiffs to physical or mental examination under the Federal Rules. Judge Kiley, in his dissent, exclaims that "petitioner did not put his physical and mental condition in issue;"[45] but uses this argument only to show that the authorities used by the majority do not preclude granting the writ of mandamus.[46] Thus, although the Court opened its opinion by stating that the question of the case was "whether a federal district court has the power to order a mental or physical examination of a person who is a defendant,"[47] it proceeds to pass over that question and expand the applicability of Rule 35(a) to defendants, simply by stating that everyone from the Supreme Court to Congress knows that "party" means both plaintiffs and defendants.

The problem goes much deeper. The term "party," as found constitutional in *Countee v. United States*,[48] as approved in *Sibbach*, and as applied in the cases following those decisions, was actually the term "party-plaintiff."[49] The approval of the inclusion of defendants under the term "party" has heretofore been purely dicta. This is not to say that defendants should not be subject to examination the same as plaintiffs; rather it is here proposed that if defendants

42. Marshall v. Peters, 31 F.R.D. 238, 239 (S.D. Ohio 1962). See also Little v. Howey, 32 F.R.D. 322 (W.D. Mo. 1963).
43. Schlagenhauf v. Holder, 321 F.2d 43, 48-49 (7th Cir. 1963).
44. *Id.* at 49.
45. *Id.* at 52 (Kiley, J., dissenting).
46. *Ibid.*
47. *Id.* at 45.
48. 112 F.2d 447 (7th Cir. 1940).
49. For typical cases applying the Rule to plaintiffs, see Gale v. Nat'l Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946); Randolph v. McCoy, 29 F. Supp. 978 (S.D. Tex. 1939); Strasser v. Prudential Ins. Co., 1 F.R.D. 125 (W.D. Ky. 1939). See also Note, 25 Va. L. Rev. 73 (1938); Annot., 25 A.L.R.2d 1407 (1952).

are to be included under the Rule as approved and held constitutional, some reason or rationale should be given for such inclusion. So far no such justification has been forthcoming. It cannot be said that a defendant "waives" his right of privacy of the person by being sued—an act which certainly is not voluntary on his part. Nor can it be argued that he has "waived" his right through the act of being negligent, since that assumes the conclusion before the contest. Furthermore, the argument that plaintiffs cannot put their physical or mental condition in controversy and then prevent disclosure of that condition does not apply to defendants since they do not put their condition in controversy. Thus, the waiver rationale applied to parties who voluntarily come into court seeking redress for their injuries cannot be applied to defendants in the same spirit.

In an early article on the Federal Rules of Civil Procedure it was said of Rule 35(a) that

> this provision . . . should prove an effective barrier to much malingering and fraudulent testimony (heretofore so difficult to rebut) as to the real physical or mental condition of parties to civil actions. When such a condition is vital in actual litigation, specious considerations of the oft asserted sanctity of the body or mind and outmoded feelings of false modesty must yield to expediency and the practical administration of justice in the courts.[50]

If the inclusion of defendants within that class of persons who may be examined under Rule 35(a) is to be justified, it must be done within the purpose and spirit permeating the Federal Rules. In expressing their scope, Rule 1 states that "they shall be construed to secure the just, speedy, and inexpensive determination of every action."[51] The Rules were designed to simplify the procedures in determining the issues of all civil actions brought in the federal courts, and to provide for an extensive and liberalized method of disclosing all the facts material to those issues.[52] To allow physical and mental examinations of all defendants as well as plaintiffs certainly comes within that spirit.[53] But if the free disclosure principle behind Rule 35(a) is the justification for including all parties—defendants and plaintiffs—under that Rule, why aren't agents of a party, blood relationships of a party or persons under the legal control of a party also included? The failure of the Supreme Court to adopt the recommended changes to the Rule raises the question[54]—which cannot be avoided in discussing defendants under the Rule. To illustrate, note the district court case of *Krop v. General Dynamics Corp.*[55] In that case the plaintiff sued the owner of a truck for damages for injuries sustained when struck by

50. Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 280 (1939).
51. Fed. R. Civ. P. 1.
52. See generally *Developments in the Law—Discovery*, 74 Harv. L. Rev. 942 (1961).
53. See generally King, *Study of Rule 35 of the Federal Rules of Civil Procedure*, 11 S.C.L.Q. 183 (1959).
54. See authorities cited note 25 *supra*.
55. 202 F. Supp. 207 (E.D. Mich. 1962).

the truck. The plaintiff sought to have the driver of the truck—who was not made a party to the suit against the owner—submit to a physical examination to determine his qualifications for driving a truck. The Court held that since the driver was not a party, the Court had no jurisdiction to compel him to submit to a physical examination. The case is strikingly similar to the *Schlagenhauf* case, except that in *Schlagenhauf* the party seeking the examination did not make the mistake of not naming the driver of the bus as a party defendant. The distinction appears to be a weak and artificial one, especially when considering the intended scope of the Rule.[56] If the theory behind the Rule is to be fulfilled, then all persons whose physical or mental condition are reasonably related to the lawsuit should come within the scope of the Rule and the proposed amendments should be adopted. If, however, the Supreme Court cannot justify the breach of "the inviolability of the person" policy to that extent, then only those persons who "waive" the protection of that policy by putting their mental or physical condition in issue (*i.e.*, plaintiffs or defendants on their counterclaims) should be compelled to submit to examination under the Federal Rules. The middle ground taken by Rule 35(a) is unsound and inexplicable.

III

State legislatures and state courts have taken a variety of approaches to this particular discovery problem. Long before Rule 35(a) gave the federal district courts the power to order physical and mental examinations of parties, the constitutionality of state legislation providing for such examinations had been sustained by the courts.[57] Even in states where there was no legislation on the topic, the inherent power to order physical and mental examinations was often found in the state courts.[58] Therefore, the United States Supreme Court decision denying the inherent power to order physical and mental examinations is generally restricted in applicability to the federal courts alone.[59] Since many state courts had recognized that similar examinations had always been allowed when necessary,[60] Rule 35(a) was by no means a revolutionary advancement in the field of discovery—except for the federal courts. Just as

56. Under some sort of implied waiver idea it would seem even more logical to allow examination of a plaintiff's agent than of a defendant. Note how minor permutations of the facts lead to wholly different conclusions in applying the Rule to Schlagenhauf and point up the Rule's specious reasoning. For example, he is a plaintiff's agent under Greyhound's cross-claim and not subject to the Rule. But if he cross-claimed himself he would be a party and subject to the Rule. If Schlagenhauf owned the bus he was driving would he be the type of party subject to the Rule? What if he were a major stockholder of the bus company?

57. McGovern v. Hope, 63 N.J.L. 76, 42 Atl. 830 (1899); Lyon v. Manhattan Ry. Co., 142 N.Y. 298, 37 N.E. 113 (1894). See also Camden & Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900).

58. See People *ex rel.* Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957). *But cf.* King, *supra* note 53, at 189, where the author indicates that since there is no South Carolina Court Rule authorizing physical or mental examinations there probably is no power in the courts to order such examinations.

59. See Camden & Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900).

60. See 8 Wigmore, Evidence § 2220 (McNaughton rev. 1961).

the Federal Rules as a whole are the basis for the court rules of many states,[61] Rule 35(a) is the basis for most of the state court rules authorizing physical and mental examinations in civil actions. Many states have adopted Rule 35(a) exactly, or a substantially similar rule allowing examination of all parties.[62] Many other states have expanded their rules to include all parties and their agents, blood relationships, and other persons under the legal control of parties, as recommended by the Advisory Committee on the Federal Rules in 1955.[63] Although only a few states have restricted their physical and mental examination rules to include only plaintiffs in personal injury suits,[64] the highest court in at least one state has held that the purpose of its rule—which is substantially similar to the Federal Rule 35(a)—is to secure or preserve to a defendant the right, in a proper case, to have the *injured party* examined.[65]

Generally speaking, the state courts have been much less hesitant to require examinations when it appears necessary to obtain justice or for the public welfare. For instance, in New York there are no fewer than fifty-eight separate statutory provisions for mental or physical examinations of some sort.[66] As for physical and mental examinations in personal injury suits, the old and the new statutes in New York provide an interesting study of both ends of the spectrum of rules of civil procedure.

Prior to September 1, 1963, the New York Civil Practice Act, section 306, gave defendant the right to a physical examination before trial of the person of the plaintiff, where he could show that he was ignorant of the nature and extent of the plaintiff's injuries.[67] The purpose of such examination was "to enable the defendant to discover the truth in regard to the injuries claimed to have been received."[68] Thus, prior to the effective date of the new Civil Practice Law and Rules in 1963, New York strictly followed the "waiver" rationale indicated in the *Sibbach* case.

---

61. Some states which have adopted the Federal Rules substantially are: Arizona, Colorado, Delaware, Kentucky, Nevada, New Mexico, Utah and West Virginia.

62. Ariz. R. Civ. P. 35(a); Ark. Stat. Ann. § 28-357 (1962); Colo. R. Civ. P. 35(a); Dela. Chancery R. 35(a) and Superior Ct. Civ. R. 35(a); Fla. R. Civ. P. 1.29; Iowa R. Civ. P. 132; Ky. R. Civ. P. 35.01; Mo. Ann. Stat. § 510.040 (1952); Mont. R. Civ. P. 35(a); Nev. R. Civ. P. 35(a); N.M. Stat. Ann. § 21-1-1, Rule 35(a) (1953); Pa. R. Civ. P. 4010; Utah R. Civ. P 35(a); Vt. Stat. Ann. tit. 10, § 1263 (1963 Supp.); Va. R. Sup. Ct. of Appeals 3:23(d); W. Va. R. Civ. P. 35(a).

63. Cal. Civ. Proc. Code § 2032; Idaho R. Civ. P. 35(a); Ill. Ann. Stat. ch. 110, § 101.17-1 (Smith-Hurd Supp. 1963); Md. R. Civ. P. 420; Minn. R. Civ. P. 35.01; N.D.R. Civ. P. 35(a); S.D. Code § 36.0602 (Supp. 1960); Wyo. R. Civ. P. 35(a).

64. Hawaii Rev. Laws § 225-2 (1955); Wis. Stat. Ann. § 269.57 (1957).

65. Virginia Linen Service, Inc. v. Allen, 198 Va. 700, 96 S.E.2d 86, 88 (1957).

66. See Table of New York Statutory Provisions *infra*.

67. N.Y. Civ. Prac. Act § 306 read, in part, as follows:

> Physical examination. In an action to recover damages for personal injuries, if the defendant shall present to the court satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court, by order, shall direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper . . . .

68. 5 Carmody-Wait, Cyclopedia of New York Practice 632 (1953).

A complete about-face occurs in New York, however, with the advent of New York's new practice act. In effect, New York Civil Practice Law and Rules section 3121(a) has completely adopted the liberal approach which was refused by the Supreme Court. Now in New York, any party, or agent, employee or person in custody or under the legal control of a party may be subject to physical or mental examination.[69] But the new rule goes even further. Such examination no longer requires an order of the court. "[A]ny party may serve notice on another party to submit" to a physical or mental examination. Actually, however, the court still has the final determination of the propriety of one party ordering another to submit to examination through the use of a protective order:

> The court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.[70]

---

69. N.Y. CPLR § 3121(a) reads, in part, as follows:
After commencement of an action in which the mental or physical condition of the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control . . . .

70. N.Y. CPLR § 3103(a).

NEW YORK STATUTORY PROVISIONS FOR MENTAL AND PHYSICAL EXAMINATIONS

N.Y. CPLR § 3121 (General provision);
N.Y. Civ. Serv. Law § 50(6) (Authority to examine applicants for Civil Service employment);
N.Y. Civ. Serv. Law § 71 (Examination as requirement for reinstatement after separation for disability);
N.Y. Code Crim. Proc. § 482 (Examination before pronouncing judgment);
N.Y. Code Crim. Proc. § 931 (Examination by probation officers);
N.Y. Code Crim. Proc. § 939 (Authorization of physical and mental examinations in probation matters);
N.Y. Code Crim. Proc. § 943 (Authorization for fingerprints);
N.Y. Correc. Law § 214 (Examination required for consideration by parole board);
N.Y. Correc. Law § 384 (Examination at expiration of sentence in State Hospital);
N.Y. Correc. Law § 408 (Examination for transfer to State Hospital);
N.Y. Correc. Law §§ 438, 440 (Examination of mentally defective delinquents);
N.Y. Dom. Rel. Law § 13(a) (Physical examination and serological test of applicants for marriage license);
N.Y. Dom. Rel. Law § 141(3) (Examination of defendant in suit to annul marriage on grounds of incurable insanity);
N.Y. Educ. Law § 511 (Examination required under teacher's disability retirement plan);
N.Y. Educ. Law §§ 901, 904 (Medical examinations of pupils of public schools);
N.Y. Educ. Law § 913 (Medical examinations of teachers and other employees);
N.Y. Educ. Law § 3222 (Physical examination of minor applying for an employment certificate);
N.Y. Educ. Law § 3624 (Examination of school bus drivers);
N.Y. Educ. Law § 4810 (Quarantine and examination of pupils committed to a home school);
N.Y. Emp. Liab. Law § 10 (Physical examination of claimant under compensation plan);
N.Y. Executive Law § 215(2) (Examination of State Police applicants);
N.Y. Executive Law § 242(2) (Examination of prisoners considered for pardon or communication of sentence);
N.Y. Family Ct. Act § 251 (Power in Family Court to order any person within its juris-

The last sentence quoted above is strikingly similar to the stated scope of the Federal Rules of Civil Procedure, yet the New York rule now affords much broader discovery power in this area to be used by the parties themselves. At the same time, however, ample protective power is retained by the courts of New York to avoid any abuse of this sweeping discovery power. Just how this new approach will work will be interesting to observe.

IV

In conclusion, where a federal court was given to opportunity to justify or explain the inclusion of defendants under the examination rule for the first time, it failed to do so. Yet treatment of defendants the same as plaintiffs under the Rule can be, and should have been, given a sound basis. That basis is found in the spirit of the Federal Rules themselves—viz.: free, liberal and dependable provisions for the speedy and efficient discovery of all the facts of an action. The fault with the Federal Rule—and the only reason for raising the question of defendants under the Rule—is that it is not broad enough. It

---

diction, or any parent or other person legally responsible for the care of any child within its jurisdiction to be examined);
N.Y. Gen. Bus. Law §§ 403(3), 409(1) (Physical examination required for license to practice hairdressing and cosmetology);
N.Y. Gen. Bus. Law §§ 433(3), 441(1) (Physical examination required for barber's license);
N.Y. Munic. Law § 50(h) (Examination of claimants against municipal corporations);
N.Y. Munic. Law § 129(6) (Examination upon admission to a hospital);
N.Y. Munic. Law §§ 205(2), 207-a, 207-c (Examination of injured firemen or policemen as requirement to payment for such injury);
N.Y. Ins. Law §§ 162(1)(k), 164(3)(A) (Medical examination of claimant under insurance policy);
N.Y. Lab. Law § 139 (Power of Department of Labor to examine employed minors);
N.Y. Lab. Law § 206(a) (Physical examination of females by employer governed by certain rules);
N.Y. Lab. Law § 428 (Physical examination of workers in compressed air);
N.Y. Mental Hygiene Law § 210 (Examination of suspected narcotics addict);
N.Y. Mil. Law § 71 (Physical examination before promotion or appointment as commissioned officer in Militia);
N.Y. Mil. Law § 216(3) (Examination of militiamen when injured or disabled in service);
N.Y. Pen. Law § 817 (Production and examination of child to determine its age);
N.Y. Pen. Law § 2188 (Examination required before probation);
N.Y. Pen. Law § 2189-a (Psychiatric examination before imposing sentence of one day to life);
N.Y. Pub. Health Law §§ 2300, 2301 (Examination and isolation of one suspected of having a venereal disease);
N.Y. Pub. Health Law § 2302 (Examination for venereal disease of all persons arrested for vagrancy);
N.Y. Pub. Health Law § 2308 (Blood test for syphilis of pregnant woman);
N.Y. Pub. Health Law § 2571 (Examination of all children before admission to a state hospital);
N.Y. R.R. Law § 63 (Examination of prospective railroad employees);
N.Y. Rapid Transit Law § 16-a(3) (Examination of employees requesting sick leave);
N.Y. Vehicle & Traffic Law § 1194 (Presumed consent to chemical test of breath, blood, urine or saliva to determine alcohol content);
N.Y. Village Law § 194 (Examination of policemen to qualify for pension);
N.Y. Workmen's Comp. Law §§ 13, 19 (Physical examination of injured employee) (See also Workman's Comp. Rules & Regulations, Rule 11);
N.Y. Unconsol. Laws § 8925 (McKinney 1961) (Examination of boxers);
N.Y.C. Crim. Ct. Act § 86 (Examination of women convicted of certain immoral offenses).

is not logical to include defendants and not agents, employees, etc., of parties. If a restricted rule is deemed desirable under the inviolability of the person policy, then it should be applicable to plaintiffs alone, since the reason for the strict approach—the sanctity of the body and mind—allows for the examination of plaintiffs alone via the "waiver" theory. The Supreme Court, therefore, should have either accepted the recommendations of the Advisory Committee, or it should have removed defendants from the coverage of the Rule.

PETER H. BICKFORD

TAXATION—BAD DEBTS: LIMITATIONS OF THE "PROMOTER DOCTRINE"

A stockholder will often advance loans to his corporation in order to facilitate its expansion or in order to maintain its operation. Although it is not a very frequent occurrence in the case of large, widely held corporations, such advances are very common among shareholders of closely held corporations. The shareholder-creditor is usually a small entrepreneur, operating his business in the corporate form. As is often the case, ensuing financial difficulties prevent the corporation from paying these loans. Subsequently, the shareholder-creditor will seek a business bad debt deduction from his gross income. He can, however, take an ordinary deduction, as distinguished from a capital loss deduction, only if he can show that his advances to the corporation were genuine loans within the context of section 166(a) of the Code, i.e., that the debt became worthless during the taxable year, and that the debt was incurred in his trade or business.[1] The latter requirement has been the subject of substantial litigation and is the subject now under consideration.

During the ten year period prior to his establishment of the Mission Orange Bottling Co. of Lubbock, Inc., Whipple, the taxpayer in instant case,[2] was instrumental in the organization of numerous partnerships and corporations.[3] In 1951, shortly before he established Mission Orange, Whipple secured

1. Int. Rev. Code of 1954, § 166: Bad Debts.
(a) General Rule.—
(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.
. . . .
(d) Nonbusiness Debts.—
(1) General Rule.—In the case of a taxpayer other than a corporation—. . .
(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months.
(2) Nonbusiness Debt Defined.—For purposes of paragraph (1), the term "nonbusiness debt" means a debt other than—
(A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer; or
(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.
2. Whipple v. Commissioner, 373 U.S. 193 (1963).
3. In 1941 Whipple was a member of a series of partnerships engaged in either the