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A STUDY OF RULE 35 OF THE FEDERAL RULES OF CIVIL PROCEDURE

KERMIT S. KING*

The portion of Rule 35 with which this article is concerned reads as follows:

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 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 shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

It is the purpose of this article first to define the scope of Rule 35 by showing how it has been applied in the cases arising since its adoption. Several cases from states having a rule similar to Rule 35 will be mentioned since they may be persuasive on points not yet specifically covered by cases arising in the federal courts. Secondly, the status of mental and physical examination in civil cases in South Carolina will be mentioned, together with comments as to the desirability of having such a procedural rule in South Carolina and how such an end may be achieved.

HISTORY OF MENTAL AND PHYSICAL EXAMINATION IN FEDERAL PRACTICE

In the case of *Union Pacific Ry. v. Botsford*,¹ the Supreme Court held that in a civil action for injury to the person the federal court had no inherent legal right or power to order the plaintiff, on application of the defendant in advance of trial, without the consent of the plaintiff, to submit to a surgical examination for the purpose of determining the extent of the injuries sued for.

Nine years later, in the case of *Camden & Surburban Ry. v. Stetson*,² the Supreme Court held that a federal trial court might have ordered a physical examination if there was a statute on the point in the state where the court sat. The *Botsford* case was dis-

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1. 141 U. S. 250 (1891).
2. 177 U. S. 172 (1900).

tinguished on the ground that there was no such statute in the state wherein the court sat in the former case.

To repeat a well-known story, with a view towards the modernization of procedure in the federal courts, Congress passed the Act of June 19, 1934,³ authorizing the Supreme Court to promulgate Rules of Civil Procedure. In 1937 Rule 35 became effective pursuant to the enabling act.

The validity of Rule 35 was challenged in the case of *Sibbach v. Wilson & Co., Inc.*⁴ It was contended that the nature of Rule 35 marked its promulgation as a violation of the enabling act, which had expressly stated that the rules promulgated thereunder should "neither abridge, enlarge, nor modify the substantive rights of any litigant." The Supreme Court held that the rule was procedural in character and did not affect substantive rights in violation of the Act of June 19, 1934.

The constitutionality of Rule 35 was upheld in the case of *Countee v. U. S.*⁵

We are thus brought face to face with Rule 35. Possessing as it does apparently unimpeachable validity, we must reckon with its effect upon our day in court, which we may do best by understanding what may be *enjoyed* in terms of court-ordered mental or physical examination of a party (or what must be *suffered* if one is on the "other side").

SCOPE OF RULE 35

One might think that Rule 35 could be used to subject to mental or physical examination any party to any civil litigation under any and all circumstances. This, however, is not the case. Federal cases will be cited which have considered the question of the application of Rule 35, and cases from states having a similar rule will be cited where appropriate. It will be observed that the cases in many instances have rendered Rule 35, or one comparable thereto, unobjectionable by narrowing the rule with regard to its application.

A. Rule 35 is not limited to any particular type of action.

The language of Rule 35 is "in an action." The application of the Rule is not limited to any particular type of action, e. g., personal injury suits.⁶

3. 48 STAT. 1064, 28 U. S. C. § 723 (b) (1934).

4. 312 U. S. 1 (1941).

5. 112 F. 2d 447 (7th Cir. 1940).

6. *Beach v. Beach*, 114 F. 2d 479 (D. C. Cir. 1940).

B. Rule 35 is limited in its application to the examination of those who are parties.

The language of the Rule is "a party." Either a plaintiff or a defendant may be examined under Rule 35. However, the Rule does not contemplate the examination of persons who are not parties to the litigation, not even the brothers and sisters or parents of the nominal party where relationship between them and the nominal party is the crucial issue;⁷ but the word "parties" as used in the Rule must be liberally, rather than technically, interpreted.⁸ In one case where the conduct of defendant's employee, not a party, was largely determinative of defendant's liability, the court indicated that it might order an eye examination given to the employee.⁹ It is not certain from the opinion that the court looked to Rule 35 for its authority. To the contrary, the opinion seems to imply that the court considered the authority to spring from the necessity, if such proved to be the case, to order the examination for the purpose of providing the jury with essential information.

C. Rule 35 is limited to those situations where the mental or physical condition of a party is in controversy.

Where defendant moved to have plaintiff examined for the purpose of establishing the truth of certain statements alleged to be libelous, the District Court for the Western District of Missouri denied the motion on the ground that the physical condition of the plaintiff was not "immediately and directly" in controversy as it must be in order for such motion to be granted.¹⁰

In a later case, however, the Court of Appeals for the District of Columbia gave Rule 35 a much wider application and disapproved of the case above. An infant wife (suing by next friend) and a child (born during the pendency of the suit) were ordered to submit to a blood grouping test in order to determine the paternity, if possible, where the wife sued the husband for maintenance and alleged that she was pregnant, the husband denying fatherhood and counterclaiming for divorce.¹¹

In one case it was suggested by a dissenting opinion that Rule 35 "provides for . . . a physical examination, and does not limit it to

7. Dulles v. Quan Yoke Fong, 237 F. 2d 496 (9th Cir. 1956).

8. Beach v. Beach, 114 F. 2d 479 (D. C. Cir. 1940).

9. Dinsel v. Pennsylvania R. R., 144 F. Supp. 880 (W. D. Pa. 1956).

10. Wadlow v. Humbert, 27 F. Supp. 210 (W. D. Mo. 1939).

11. Beach v. Beach, 114 F. 2d 479 (D. C. Cir. 1940).

the purposes of the main trial. It can be had whenever it is important to ascertain the truth."¹²

D. Rule 35 is limited in its application in that the granting of a motion made pursuant thereto is discretionary with the court.

The issuance of an order requiring a party to submit to an examination is left to the sound discretion of the court and is not of right.¹³

In one case the party sought to be examined contended that cystoscopic examination would be painful to him. The court, before ruling finally on the motion, suggested that the plaintiff submit all reports of examinations by his doctors, hospital records, and statements of what his doctors would testify to in respect of these alleged injuries or that the plaintiff stipulate that no medical evidence obtained through cystoscopic examination would be introduced by him. In a Supplemental Opinion, the court ordered the examination or a dismissal of the plaintiff's cause of action.¹⁴ It is suggested by the writer that this case may be unique in that the court had concluded that *no legal defense existed*, thus leaving only the question of damages to be litigated, and in that this type of examination was *essential* to a determination of the extent of the plaintiff's peculiar injuries.

On the other hand, where the examination is likely to impair the health of the party examined or injure such party, it has been held that the motion may be properly denied.¹⁵

Where the examination sought is unusual in nature, either the moving party should show that the examination can be given to the other party without any dangerous effects or the court should be able to so conclude by taking judicial notice of the nature of the examination and its past history.¹⁶

Within its discretion, the court need not designate a physician suggested by either party; however, the court may designate a physician recommended by one of the parties. The court may, in its discretion, appoint a physician chosen by defendant for physical examination of plaintiff if the interest of justice will best be served in such manner and no serious objection arises; but, where plaintiff strenuous-

12. *Teche Lines, Inc. v. Boyette*, 111 F. 2d 579, 582 (5th Cir. 1940).

13. *Bucher v. Krause*, 200 F. 2d 576 (7th Cir. 1952).

14. *Klein v. Yellow Cab Co.*, 7 F. R. D. 169 (N. D. Ohio 1944, 1945).

15. *Belt Electric Co. v. Allen*, 102 Ky. 551, 44 S. W. 89 (1898); *O'Brien v. City of La Crosse*, 99 Wis. 421, 75 N. W. 81 (1898).

16. *Grill v. Mathieson Alkali Works*, 243 App. Div. 853, 278 N. Y. Supp. 775 (1935).

ly objected to defendant's choice of a physician, appointment of some other physician mutually agreeable was deemed advisable.¹⁷

It is not error for the court to refuse to appoint a doctor who is a witness for the defendant to examine the plaintiff.¹⁸

Furthermore, certain considerations may be given to the convenience of the party sought to be examined. The court may require the examination to be given at a time and place most convenient to the party concerned.¹⁹

On the other hand, the court may in its discretion order a party to submit to examination in the district where the action is pending, even though this may be inconvenient for the party, so that the examining physician may be conveniently available to testify,²⁰ or for the reason that the party sought to be examined has chosen the forum of his own volition.²¹

Motion to order plaintiff to submit to repeat examinations may be denied. Where plaintiff submitted to physical examination (including x-rays) by physician selected by defendant and where plaintiff furnished defendant with reports of plaintiff's own physician (including x-ray reports), defendant's motion to require plaintiff to submit to another examination was denied.²²

The motion has been denied where it appeared that the examination was not necessary, as where plaintiff had already submitted to examination by defendant's doctor.²³

Whether a female party is entitled to be examined by a physician of her own sex or in the presence of her personal physician, relatives, or other persons is within the discretion of the court.²⁴

Wigmore²⁵ indicates that examination need not be ordered if the disadvantages outweigh the advantages. Factors to be considered are such things as the nature of the injury, the availability of other evidence, the inconvenience, the shame, and the risk to the health of the party sought to be examined.

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17. *The Italia*, 27 F. Supp. 785 (E. D. N. Y. 1939).
 18. *Faasch v. Karney*, 145 Wash. 390, 260 Pac. 255 (1927).
 19. *Randolph v. McCoy*, 29 F. Supp. 978 (S. D. Tex. 1939).
 20. *Warren v. Weber & Heidenthaler*, 21 F. R. Serv. 35a. 43, Case 1. (D. C. Mass. 1955).
 21. *Pierce v. Brovig*, 16 F. R. D. 569 (S. D. N. Y. 1954).
 22. *Rutherford v. Alben*, 1 F. R. D. 277 (S. D. W. Va. 1940).
 23. *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145 (1887); *Donavan v. Kansas City Elevated Ry.*, 157 Mo. App. 649, 138 S. W. 679 (1911).
 24. *Gale v. National Transp. Co., Inc.*, 7 F. R. D. 237 (S. D. N. Y. 1946).
 25. 4 WIGMORE, EVIDENCE § 2220 (3rd ed. 1940).

E. Rule 35 is not limited to appointment of a physician, as distinguished from a specialist.

The court may name several specialists in one order.²⁶ A dentist has been designated where facial injuries, including damage to teeth and mouth, have been alleged.²⁷

F. Rule 35 is limited in its application in that the granting of a motion made pursuant thereto depends upon a showing of good cause.

A showing by affidavit that the condition of the party is "in controversy" in that the defendant has good reason to believe that the plaintiff's estimates of the extent of his physical injuries are exaggerated may be a sufficient showing of good cause.²⁸

In another case, the court refused to order the examination in the absence of showing by affidavit or otherwise that the examination was necessary because of failure to complete a prior examination and that the plaintiff's physical condition was such that it was possible for him to go to the doctor's office and submit to the examination.²⁹

The motion for examination of a party has been denied where the court believed the injury to be patent and clearly seen without examination.³⁰

Examination of a party may be refused where only cumulative evidence would be gotten thereby. Furthermore, the motion must be based on affidavit showing that material evidence can be obtained only by resorting to an examination of the party.³¹

G. Rule 35 is not limited in terms of time, place, manner, conditions, and scope of examination.

An order has been granted, without discussion, requiring a party to submit to x-ray examination.³²

The Rule does not say whether or not a party may be interrogated by the physician during the examination. The Rule does indicate that the order may specify the manner, conditions, and scope of the examination. This would seem to give the court latitude, within its sound

26. *McCabe v. Brooklyn & Queens Transit Corp.*, 298 N. Y. Supp. 861 (1937).

27. *Jewell Tea Co. v. Ransdell*, 180 Okla. 203, 69 P. 2d 69 (1937).

28. *Leach v. Greif Bros. Cooperage Corp.*, 2 F. R. D. 444 (S. D. Miss. 1942).

29. *Strasser v. Prudential Ins. Co.*, 1 F. R. D. 125 (W. D. Ky. 1939).

30. *Lexington Ry. Co. v. Cropper*, 142 Ky. 39, 133 S. W. 968 (1911).

31. *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031 (1915).

32. *Gale v. National Transp. Co.*, 7 F. R. D. 237 (S. D. N. Y. 1946).

discretion, to order that the party answer pertinent inquiries as to symptoms, etc.

HISTORY OF MENTAL AND PHYSICAL EXAMINATION IN SOUTH CAROLINA PRACTICE

The earliest case found by the writer wherein the question of court-ordered physical examination came before the South Carolina Supreme Court is *Easler v. Southern Ry. Co.*³³ The Court, speaking through Mr. Justice Gary, held that the provisions of the South Carolina Code (currently found in Title 26) relating to pre-trial examination of a party were adequate as a legal remedy and were therefore exclusive in that such provisions superseded any remedy in the nature of a bill of discovery which might have existed in equity theretofore by reason of the want of such legal remedy. Furthermore, the Court noted the exact language of the code provision³⁴ which read as follows:

No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party except in the manner prescribed by this chapter.

The chapter did not (and does not now) provide for mental and physical examination of a party by court-appointed physician. Accordingly, it was concluded that the courts of this State had no power to grant relief in the nature of pre-trial physical examination. Mr. Justice Jones dissented.

The next case in point coming before the Court was *Best v. Columbia Street Railway, Light & Power Co.*³⁵ The Court quoted from the *Easler* case without adding anything to the reasoning underlying that earlier case. Mr. Justice Jones concurred, expressing a willingness to overrule the *Easler* case but realizing that said case was controlling until overruled. Mr. Justice Woods, in dissent, expressed the opinion that the earlier case should be overruled in that "it is manifest that nothing can be more helpful to the jury in reaching a just estimate of the damages than knowledge of the true nature of the injury" and in order that this State might be brought in line with the "great weight of authority."³⁶ Mr. Justice Woods did not deal particularly with the point upon which the *Easler* case turned: the statutory provisions and the effects thereof.

33. 60 S. C. 117, 38 S. E. 258 (1901).

34. Now CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-501.

35. 85 S. C. 422, 67 S. E. 1 (1910).

36. *Id.* at 428, 429.

By the time of the case of *Brackett v. Southern Ry. Co.*,³⁷ Mr. Justice Woods either had changed his mind or had given up the crusade, for he delivered the opinion of the Court, disposing of the question of court-ordered physical examination with these words: "The assignment of error in the refusal of the Circuit Court to require the plaintiff to submit to physical examination by disinterested physicians is without merit. The point has been settled by *Best v. Columbia S. Ry. Co.*, 85 S. C. 422."³⁸

In 1934, the case of *Deery v. Jefferson Standard Life Ins. Co.*³⁹ reaffirmed the position of the South Carolina Supreme Court on the subject of a physical examination of a party in a personal injury suit. Furthermore, the Court stated: ". . . in principle the rule must apply as well to *any case* which demands an examination of the person of another without his consent."⁴⁰ [emphasis added]

The last case found by the writer on the subject is *Welsh v. Gibbons*.⁴¹ This case involved a motion by defendant that it be allowed to make a chemical analysis of the contents of a bottle of beverage alleged to have been contaminated and to have caused injury to the plaintiff when he drank from the bottle. In reaching the conclusion that the defendant was not entitled to examine the bottle of liquid in the possession of the plaintiff — because of the South Carolina statute authorizing inspection of "books, papers and documents"⁴² but *denying* the right of discovery *except as prescribed by the statute*⁴³ — the Court referred to the fact that the same reasoning governed the question of physical examination of the person of a party.

No other cases having been found, it is presumed that on every occasion when the question has come up, court-ordered physical examination of a party has been denied.

CONCLUSION

The courts of some states have power to order a party to submit to mental or physical examination by reason of statutes similar to Rule 35.⁴⁴ The courts of other states have held that they have in-

37. 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C 1212 (1911).

38. *Id.* at 449.

39. 174 S. C. 63, 176 S. E. 876 (1934).

40. *Id.* at 66.

41. 211 S. C. 516, 46 S. E. 2d 147 (1948).

42. NOW CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-502.

43. *Id.*, § 26-501.

44. Note, 25 VA. L. REV. 73 (1938) lists these states: Arizona, Delaware, Florida, New Jersey, New York, Rhode Island, South Dakota and Washington.

herent power to order such examination.⁴⁵ The courts of still other states apparently have not passed on the question. The courts of a minority of the states hold that there is no power in the courts *in the absence* of statute.⁴⁶ The Supreme Court of South Carolina may be the only court in the strange position of holding that there is no power in the court *in the presence* of statutory provisions.

In the light of the explicit wording of section 26-501 of the South Carolina Code, "nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter,"⁴⁷ the correctness of the position taken by our Supreme Court can hardly be doubted.

Mr. Justice Gary, in the *Easler* case found unnecessary "the consideration of the question of whether the Court would have the power, in the absence of statutory provisions, to order the physical examination of a party to the action in behalf of the adverse party before the trial of the case."⁴⁸ We do not know, therefore, what the attitude of the Court might be on the question of inherent power. Accordingly, it would appear that the only sure way to confer upon the courts of this State the power to order mental and physical examination of a party, if such power in the courts is deemed desirable, is by positive and affirmative legislative enactment.

As to the question of whether or not such power in the courts is desirable, surely it is true that the probability of a just verdict at the hands of a jury increases in direct proportion to the accurate and informative testimony and evidence available for the consideration of the jury. In respect to the matter of how much, if any, damages should be awarded to a plaintiff on account of alleged physical or mental injury of a certain alleged seriousness, it seems that the present system is more inducive of fraudulent claims than conducive to accurate and just appraisals of the extent of the present and potential injury sustained by a plaintiff.

Conceding for the sake of argument that all plaintiffs and all plaintiffs' witnesses speak the truth, the whole truth, and nothing but the truth, the fact remains that under the present system a jury may be called upon to make a determination of a highly technical nature

45. *Ibid.*: Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Washington and Wisconsin.

46. *Id.* at 74: Illinois, Massachusetts, Mississippi, Montana, Oklahoma, Texas and Utah.

47. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-501.

48. *Easler v. Southern Ry.*, 60 S. C. 117, 122, 38 S. E. 258 (1901).

on the basis of the personal testimony of the plaintiff, who in most cases is not qualified to evaluate the seriousness of his own physical state. In the opinion of the writer, one who objects to court-ordered physical examination (under circumstances where such examination would be ordered under Rule 35 as applied in the cases cited herein) is akin in attitude to the Grecian philosophers who expelled from their midst the neophyte because he suggested looking into the horse's mouth to determine the number of teeth therein rather than making that determination by philosophical speculation.

Perhaps these further considerations will commend themselves to the reader: (1) a party to an action should have a right to all of the material and relevant evidence within the reach of the court;⁴⁹ (2) where one brings an action he should not object to the disclosure of whatever information may be needed in order to insure a just result⁵⁰ (unless the party is seeking to utilize the court as an agency for the redistribution of defendant's wealth); and (3) a plaintiff may exhibit his injuries to the court for the purpose of proving his claim or he may present expert testimony for this purpose — justice would seem to demand that substantially equal privilege and opportunity be given to the defendant in order that he may protect himself against unjustified claims.⁵¹

At this point it is suggested that a reconsideration of the authorities cited in the section of this article entitled SCOPE OF RULE 35 will demonstrate that Rule 35 and similar rules are applied only in those instances where the interest of justice under the facts peculiar to the case demands it. Perhaps most important, the application of Rule 35 is left to the discretion of the court. It would be to indict the judiciary of this State without basis to suggest that such discretion would be abused.

It should be remembered also that under the status quo the refusal of a party to submit to physical examination suggested by his adversary can be mentioned to the jury. In fact, testimony as to the refusal can be gotten into evidence.⁵² To some degree, this makes it necessary for the party to submit, for to do otherwise would allow

49. *Schroeder v. Chicago, R. I., & Pac. R. R.*, 47 Iowa 375 (1877).

"We are often compelled to accept approximate justice as the best that courts can do . . . [b]ut, while the law is satisfied with approximate justice when exact justice cannot be attained, the courts should recognize no rule which stops at the first when the second is in reach."

50. *Graves v. City of Battle Creek*, 95 Mich. 266, 54 N. W. 757 (1893).

51. *Schroeder v. Chicago, R. I., & Pac. R. R.*, 47 Iowa 375 (1877).

52. *Welsh v. Gibbons*, 211 S. C. 516, 46 S. E. 2d 147 (1948).

the adversary to arouse the suspicions of the jury by reference to the refusal.

Of course, when considering the question of whether or not to adopt such a rule for our state courts, the "acid test" to be applied is an analysis of the results which would follow from the adoption of such a rule. Logically there are but three possible results:

First, the doctor's examination will lead him to a conclusion completely consonant with the true facts. In this event, neither the plaintiff nor the defendant should have any complaint.

Secondly, the doctor's examination will lead him to a conclusion not in accord with the true facts and will result in testimony favorable to the plaintiff. In this event, the plaintiff will have no complaint. The defendant at least would have been given every opportunity to protect himself against false claims.

Thirdly, the doctor's examination will lead him to a conclusion not in accord with the true facts and will result in testimony favorable to the defendant. In this event, the defendant will have no complaint. The plaintiff, on the other hand, can rely upon his right of cross-examination to combat the erroneous testimony of the expert witness. To those who say this is not adequate protection for the plaintiff in this situation, it should be pointed out by way of reply that the right of cross-examination is the only protection available to a defendant under the status quo. Furthermore, if we are to choose between alternatives: (1) the status quo, which leaves the defendant *in all events* with only the protection afforded by the right of cross-examination; and (2) the alternative of adopting a rule for state courts like Rule 35, which would *occasionally* leave the plaintiff with only the protection afforded by cross-examination, it is more reasonable to choose the alternative rather than the status quo. If one of the two parties must be at a disadvantage while the other enjoys a privileged position, it would seem more appropriate that the defendant occupy the privileged position — the plaintiff should bear the burden of proof and should succeed only by proving his case, rather than succeeding by the defendant's failure to disprove plaintiff's case because of a procedural disadvantage suffered by the defendant. In addition, the plaintiff has a protection in this third type situation which is not available to the defendant under the status quo: the plaintiff has his own body readily available for examination by his own expert witness whose testimony can be used to counteract the testimony of defendant's expert witness who will, we have assumed for the purpose of discussing this third possibility, give testimony favorable to the defend-

ant. Presently, when the defendant is faced with unfavorable testimony by plaintiff's expert witness, the defendant does not have access to the body of the plaintiff so that he may have his own expert witness examine and testify.

Thus, we see that under the status quo the defendant is always left unprotected except for the right of cross-examination. Under the alternative of a "Rule 35 situation," neither party is deprived of any protection now enjoyed, since both would still have the right of cross-examination, and the defendant is given fairer treatment, since he would have equal opportunity to avail himself of material and relevant expert testimony.

In conclusion, the two most popular arguments advanced by the opponents of the proposal to adopt a procedural rule for the courts of South Carolina which would allow for court-ordered examination of a party to a civil suit should be noted. First, it is said that it is unreasonable to require a plaintiff who has already been injured, allegedly at the hands of the defendant, to submit to further pain in the form of a physical examination. The writer would remind the proponents of this argument that not all physical examinations are painful and that the authorities indicate that the court may, in its discretion, refuse to order such examination where it will be painful, unless it is essential to the interest of justice. Secondly, it is said that the "country lawyer" of this State and his client should not be harassed by demands in every little case that the plaintiff submit to a physical examination. Once again the writer would suggest that the exercise of sound discretion by the judiciary of this State would solve the problem. Or, perhaps, the problem should be solved by the inclusion of a provision that the amount in controversy must exceed some certain amount in order for the rule to apply.