

# FIRST-YEAR COURSES

## THE ELDERLY AND CIVIL PROCEDURE: SERVICE AND DEFAULT, CAPACITY ISSUES, PRESERVING AND GIVING TESTIMONY, AND COMPULSORY PHYSICAL OR MENTAL EXAMINATIONS

Larry L. Teply\*

### I. INTRODUCTION

Many elder law issues first become legally apparent during the course of civil litigation, such as when an elderly person is served with process, but fails to respond because of mental difficulties. In addition, many procedural rules directly affect the elderly, especially those rules concerned with preserving and taking testimony from persons who are ill or infirm. Likewise, because of the physical and mental deterioration associated with aging, the elderly are affected directly by procedural rules providing for compulsory physical and mental examinations. Furthermore, aging may affect one's capacity to sue or be sued. Specialized procedural issues also arise. For example, when and how, if at all, can a guardian change an incapacitated elderly person's domicile for purposes of diversity jurisdiction? A beginning course in civil procedure presents several opportunities to examine these and other elder law issues. This Article illustrates how they can be raised and addressed during the course of discussion in a civil procedure class.

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\* © Larry L. Teply, 2001. All rights reserved. Professor of Law, Creighton University School of Law. B.A., University of Nebraska, 1969; J.D., University of Florida, 1972; LL.M., Harvard University, 1973.

Professor Teply is an experienced civil procedure teacher. He also is the coauthor of a casebook, Larry L. Teply & Ralph U. Whitten, *Cases and Materials on Civil Procedure: Basic and Advanced* (Fred B. Rothman & Co. 1997), and a hornbook, Larry L. Teply & Ralph U. Whitten, *Civil Procedure* (2d ed., Found. Press 2000), on this subject.

## II. SERVICE AND DEFAULT

*Assume that a potential defendant is an elderly person who is in poor physical and mental health. Should service of process on such an individual be accomplished in the same way as it is on an individual who is in good physical and mental condition? Should it make any difference if the potential defendant is in a nursing home or in another's care?*

Service of process is a subject covered in virtually all basic civil procedure courses.<sup>1</sup> Students readily learn that service of process on an individual sued in federal or state court normally is accomplished by handing the summons and complaint to the defendant or leaving them with a responsible person residing at the defendant's normal place of abode.<sup>2</sup> However, with some effort, students can find that Rule 4(g) of the Federal Rules of Civil Procedure provides that when the defendant is "incompetent," service must be effectuated by referring to the applicable state procedures for service on such individuals.<sup>3</sup> Sometimes state law provides that such persons shall

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1. *E.g.* Richard D. Freer & Wendy Collins Perdue, *Civil Procedure: Cases, Materials, and Questions* 158–167 (2d ed., Anderson Publ. Co. 1997) (covering the statutory requirements for service of process with notes and a case); Geoffrey C. Hazard, Jr. et al., *Pleading and Procedure: State and Federal Cases and Materials* 329–339 (8th ed., Found. Press 1999) (containing notes and an excerpt from a *Washington Post* newspaper article about process servers); A. Leo Levin et al., *Civil Procedure: Cases and Materials* 12–80 (2d ed., Found. Press 2000) (opening chapter devoted to service of process).

2. Federal Rule 4(e) provides that service may be made on an individual "by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . ." Fed. R. Civ. P. 4(e)(2) (2001). State rules typically provide for service in this manner. *E.g.* Fla. Stat. § 48.031(1)(a) (2001) ("Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents").

3. Rule 4(g) provides that "[s]ervice upon . . . an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." Fed. R. Civ. P. 4(g). However, if no controlling provision of state or local law governs service on an incompetent individual, the methods prescribed in the federal rules for service on an individual may be followed. *See First Natl. City Bank v. Gonzalez & Co. Sucr. Corp.*, 308 F. Supp. 596, 599 (D.P.R. 1970) (special service provisions of Puerto Rican law applied only to those defendants (1) who had been judicially declared incompetent or (2) who were confined in an institution for the treatment of mental diseases; incompetent persons outside these two

be served in the same manner as competent or sane persons as long as a guardian has not been appointed.<sup>4</sup> Other states more wisely provide that, even if no guardian has been appointed, service should be made both on the incompetent defendant and on a person with whom the incompetent lives or a person who cares for the incompetent.<sup>5</sup> For persons declared to be mentally incompetent or who are institutionalized patients, some states take into account whether service would be injurious to the incompetent's health.<sup>6</sup>

*Assume that an elderly person fails to understand the significance of service of process because of a mental disability. What special protections for such persons, if any, are built into the default process?*

Rule 55(b)(1) prohibits the clerk of the court from entering default judgments against incompetent people,<sup>7</sup> which "ensures that judicial consideration will be given to any attempt to enter a default judgment against an incapacitated party."<sup>8</sup> Furthermore, Rule

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categories could be served properly by reverting to the general provisions of the applicable federal rule for service on individuals.).

4. *E.g.* N.M. Stat. Ann. § 38-1-12 (2001) (providing that "[i]n all other cases process shall be served upon the ward in the same manner as upon competent or sane persons").

5. *E.g.* Ala. R. Civ. P. 4(c)(3) (2001) (providing that "if no guardian has been appointed, [one can serve an incompetent] by serving the incompetent and a person with whom the incompetent lives or a person who cares for the incompetent"). In the past, some states imposed unusual requirements of service on incompetent individuals, such as reading the contents of the papers served to them. For example, a Florida statute provided that "[p]rocess against . . . [an] incompetent [person] shall be served . . . [b]y reading the process to the . . . incompetent [person] to be served and to the person in whose care or custody the . . . incompetent is and by delivery of a copy thereof to such person in whose care or custody the . . . incompetent is and by further serving said process on the guardian ad litem or other person, if one is appointed by the court to represent the . . . incompetent." Fla. Stat. § 48.041(1) (1983) (repealed 1984). Failure to be aware of such requirements can be a trap for the unwary. *E.g. Drake v. Wimbourne*, 112 S.2d 27, 29 (Fla. Dist. App. 2d 1959) (holding that delivery of summons to the father of an incompetent residing in the same residence as the incompetent was not good service on the incompetent; the court insisted on strict compliance with a Florida statute requiring service by reading the summons to the incompetent person or by delivering a copy to the incompetent person and further service on the guardian ad litem thereafter appointed by the court to represent the incompetent person.).

6. *E.g.* S.D. Codified Laws § 15-6-4(d)(6) (Supp. 2001) (providing that "the administrator or superintendent [of a mental institution] . . . shall certify in writing that service upon such person personally would be unavailing or injurious to his physical or mental well-being, and such certificate be filed, service upon such individual may be dispensed with by order of court").

7. Fed. R. Civ. P. 55(b)(1) (2001).

8. Charles Alan Wright et al., *Federal Practice and Procedure: Civil* vol. 10A, § 2689, 71 (West 1998).

55(b)(2) prohibits the court from entering default judgments against incompetent defendants unless they are represented by appropriate legal representatives who have appeared in the action.<sup>9</sup> The representatives must be served with written notice of the application for judgment by default.<sup>10</sup>

*Assume that the clerk of the court or the court itself does not know about an elderly defendant's incapacity. What should happen when a responsible person later discovers the resulting default judgment? Is this situation one in which default will be set aside easily? Should it make any difference whether the plaintiff knew or should have known the defendant was incompetent? Should it make any difference how much time has elapsed since the entry of the default judgment?*

When the clerk has entered a default judgment against an incompetent person or the court has done so without appointing a special representative, the resulting judgment may be set aside pursuant to Rule 60(b).<sup>11</sup> Rule 60(b)(3) provides that a party or a party's representative may be relieved from a final judgment on several grounds, including "fraud[,] . . . misrepresentation, or other misconduct of an adverse party," provided the grounds are brought to the court's attention within a reasonable time, not to exceed one year after the judgment was entered.<sup>12</sup>

Thus, when the plaintiff knowingly fails to disclose that the defendant is insane or incompetent, this provision would appear to apply. However, even if the plaintiff did not know and could not reasonably have known that the defendant was incompetent, students can be made to see the argument that the judgment still may be set aside on the ground that it is "void,"<sup>13</sup> because the

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9. Fed. R. Civ. P. 55(b)(2) (stating that "no judgment by default shall be entered against an . . . incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein"). When no such representation exists, an appointment of a guardian ad litem for the incompetent person first should be obtained pursuant to Rule 17(c). Fed. R. Civ. P. 17(c) (2001); Wright et al., *supra* n. 8, § 2689, 71; *infra* nn. 41, 45–46 and accompanying text.

10. Fed. R. Civ. P. 55(b)(2).

11. *Id.* R. 55(c) (setting aside default).

12. Fed. R. Civ. P. 60(b)(3) (2001).

13. *Id.* R. 60(b)(4). This provision is not subject to the one-year limitation that applies to challenges to a judgment based on an adverse party's fraud, misrepresentation, or other misconduct. *Id.* R. 60(b). Note that some courts describe the failure to appoint a guardian ad litem to represent incompetent defendants as making the judgment voidable rather than void. *E.g. Savage v. Rowell Distrib. Corp.*, 95 S.2d 415, 418 (Fla. 1957). In such cases, the courts

specific requirements of Rule 55(b)(2) have been violated.<sup>14</sup> In addition, this situation might fall within the catchall provision of Rule 60(b), which covers “any other reason justifying relief from the operation of the judgment.”<sup>15</sup> It also may be possible to commence an independent action seeking to relieve the incompetent person from the judgment.<sup>16</sup>

### III. CAPACITY ISSUES

#### A. Diversity of Citizenship

*Assume that an elderly person becomes permanently mentally incompetent and his or her guardian then moves that person to another state for care or treatment. Does that move establish “citizenship” in the new location for “diversity” purposes? Whose intent counts — the intent of the incompetent person or that of the guardian?*

A common topic in civil procedure courses<sup>17</sup> is the “diversity” jurisdiction of the federal district courts over actions between citizens of different states and with amounts in controversy in excess of \$75,000, exclusive of interests and costs.<sup>18</sup> In *Strawbridge*

require incompetent defendants to show that they had a meritorious defense and that they were not otherwise properly represented in the action. *Id.*

14. For example, *Zaro v. Strauss* involved a default judgment against a defendant who had been declared insane in another state. 167 F.2d 218, 220 (5th Cir. 1948). The Fifth Circuit affirmed the lower court’s setting aside of a default judgment when no jurisdiction had been obtained over the defendant’s general guardian and no guardian ad litem had been appointed to protect the defendant’s interests. *Id.* at 220–221. In addition, the court held that Rule 55(b)(2) required notice be given to the defendant or her attorney before a default judgment could be entered. *Id.* at 220.

15. Fed. R. Civ. P. 60(b)(6). This provision is not subject to the one-year limitation that applies to challenges to a judgment based on an adverse party’s fraud, misrepresentation, or other misconduct. *Id.* R. 60(b).

16. *Id.*; see generally Deborah F. Harris, *Independent Actions to Obtain Relief from Judgment, Order, or Proceeding under Rule 60(b) of the Federal Rules of Civil Procedure*, 53 A.L.R. Fed. 558 (1981) (The entire annotation examines federal cases, “which discuss the use of an ‘independent action’ to obtain relief from a judgment, order, or proceeding, as authorized by Rule 60(b).” *Id.* at 559.).

17. E.g. Richard H. Field et al., *Materials for a Basic Course in Civil Procedure* 13, 15, 191–199, 889–894 (7th ed., Found. Press 1997); Hazard et al., *supra* n. 1, at 400–411; Stephen C. Yeazell, *Civil Procedure* 228–236 (5th ed., Aspen L. & Bus. 2000).

18. 28 U.S.C. § 1332(a) (Supp. 2001) (current statutory provision). Article III of the Constitution authorizes the diversity jurisdiction of the federal courts. U.S. Const. art. III, § 2 (“The judicial Power shall extend to all . . . [c]ontroversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or

*v. Curtiss*,<sup>19</sup> students learn that the general diversity statute requires “complete diversity” of citizenship between all parties joined as plaintiffs and all parties joined as defendants.<sup>20</sup> Students also learn that two requirements must be met for a person to be a “citizen of a state” for purposes of diversity jurisdiction. First, a person must be a citizen of the United States, and second, the person must be domiciled within some state.<sup>21</sup> Everyone has a domicile and no one has more than one.<sup>22</sup> To acquire a new domicile, one must be simultaneously physically present within the new state and have the intent to remain in that state indefinitely or permanently or to make that state one’s home.<sup>23</sup> In addition, one’s original domicile continues until a new domicile has been acquired.<sup>24</sup>

The courts are split on what should happen when a person becomes permanently incapacitated and then is moved by his or her guardian to a new location.<sup>25</sup> One point of view is expressed well by the United States Court of Appeals for the Fourth Circuit in *Long*

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Subjects.”).

19. 7 U.S. 267 (1806).

20. *E.g.* John J. Cound et al., *Civil Procedure: Cases and Materials* 249 (7th ed., West 1997) (discussing the complete diversity rule of *Strawbridge*); David Crump et al., *Cases and Materials on Civil Procedure* § 1.03, 12–14 (4th ed., LEXIS L. Publ. 2001) (using *Strawbridge* as an example of how to read and brief a case); Stephen N. Subrin et al., *Civil Procedure: Doctrine, Practice, and Context* 802 (Aspen L. & Bus. 2000) (discussing the limitations of *Strawbridge* in an introduction to diversity jurisdiction).

21. *E.g. Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (“To be a citizen of a State within the meaning of section 1332, a natural person must be both a citizen of the United States, and a domiciliary of that State.” (citations omitted)). *Mas v. Perry* is used as a principal case in several casebooks. *E.g.* Hazard et al., *supra* n. 1, at 400–403; Yeazell, *supra* n. 17, at 229–232.

22. *E.g. Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (stating that if an individual has two domiciles, “it is a doubtful anomaly”). “One acquires a ‘domicile of origin’ at birth, and that domicile continues until a new one (‘domicile of choice’) is acquired.” *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

23. *Walls v. Ahmed*, 832 F. Supp. 940, 942 (E.D. Pa. 1993). *Walls v. Ahmed* is used as a principal case in Larry L. Teply and Ralph U. Whitten’s casebook. Larry L. Teply & Ralph U. Whitten, *Cases and Materials on Civil Procedure: Basic and Advanced* 97–100 (Fred B. Rothman & Co. 1997).

24. *E.g. Walls*, 832 F. Supp. at 943 (“A, having a domicil in state X, decides to make his home in state Y. [A] leaves X and is on his way to Y but has not yet reached Y. [A’s] domicil is in X.” (citing *Restatement (Second) of Conflict of Laws* § 19 cmt. a, illus. 4 (1969))).

25. *See generally* G.B. Crook, *Change of State or National Domicil of Mental Incompetent*, 96 A.L.R.2d 1236 (1964) (The entire annotation discusses those circumstances when a guardian can change a mentally incompetent person’s domicile and how such a change can be made. *Id.* at 1239.).

*v. Sasser*.<sup>26</sup> According to the court, even though a guardian is acting in the “best interests” of an incompetent ward, the guardian’s actions alone will not change the domicile of the ward for diversity purposes. To effectuate such a change, the guardian must establish that the ward acquired sufficient understanding and mental capacity to make an intelligent choice of a domicile after the ward was adjudicated to be incompetent.<sup>27</sup>

The United States Court of Appeals for the Tenth Circuit took an opposing point of view in *Rishell v. Jane Phillips Episcopal Memorial Medical Center*.<sup>28</sup> The court concluded that “when an incompetent person will never regain reason, preserving the

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26. 91 F.3d 645 (4th Cir. 1996). Gilbert Venoy Long was mentally and physically incapacitated by a stroke. *Id.* at 646. Prior to the stroke, Long had been a citizen and resident of South Carolina. *Id.* After the stroke, Long was hospitalized initially in South Carolina. *Id.* Long’s guardian then moved Long to a nursing home in Virginia. *Id.* The guardian filed a medical malpractice action in South Carolina federal district court against two physicians who were treating Long at the time of the stroke. *Id.* The guardian asserted diversity jurisdiction, alleging that the physicians were citizens of South Carolina and that Long was a citizen of Virginia. *Id.* The defendants moved to dismiss on the ground that no diversity existed. *Id.* The federal district court granted the motion. *Id.* The court found that Long had not changed his South Carolina domicile prior to becoming incapacitated and that the parties consequently were all South Carolina citizens for diversity purposes. *Id.* The Fourth Circuit Court of Appeals affirmed. *Id.* Note that for diversity purposes, the legal representative of an incompetent person is considered to be a citizen of the same state as the incompetent person. 28 U.S.C. § 1332(c)(2). As a result, parties can no longer manufacture diversity jurisdiction by naming a diverse representative party. *Singh v. Daimler-Benz AG*, 9 F.3d 303, 307–308 (3d Cir. 1993) (explaining that one of the two provisions in Title II of Section 1482 “altered the citizenship rules for a case involving . . . representative parties – estates, infants, and incompetents (whose citizenship will be determined by reference to the citizenship of the ‘represented’ party)”).

27. *Long*, 91 F.3d at 647 (“One who has been adjudged incompetent may change his domicile if, but only if, he has, since the adjudication of incompetency, acquired sufficient understanding and mental capacity to make an intelligent choice of domicile. After such adjudication, the burden of proving the subsequent acquisition of sufficient mental capacity is plainly on him who alleges it.” (quoting *Foster v. Carlin*, 200 F.2d 943, 946 (4th Cir. 1952))).

28. 12 F.3d 171 (10th Cir. 1993). Kathleen Lacey, while hospitalized in the defendant institution in Oklahoma, failed in her attempt to commit suicide. *Id.* at 172. As a result, however, she fell into a permanent vegetative state. *Id.* Her personal representative then moved her to an institution in Louisiana that was “specially able to care for her.” *Id.* Thus, [i]mprisoned within her own body and deprived of mental capacity to make even the most insignificant decisions for herself, she appears trapped in an artificial time warp between Oklahoma, the state where she lived at the time of her injury, and Louisiana, her current and apparently permanent residence. Her appeal presents the question of whether the district court correctly determined because Ms. Lacey was incapable of forming an intent she is unable to change her domicile from Oklahoma to Louisiana, thus nullifying diversity jurisdiction in this case.

*Id.* The *Rishell* case is presented as a principal case in at least one civil procedure casebook. Tepley & Whitten, *supra* n. 23, at 783–786.

person's right to determine domicile in the future is but a fiction"<sup>29</sup> and held that permanently incompetent persons could change domiciles if their representatives moved them to another state to protect their "best interests."<sup>30</sup> The case was remanded for a full evidentiary hearing and the Tenth Circuit directed the district court to examine whether the incompetent person's domicile had been changed in the incompetent's best interests.<sup>31</sup> The court concluded that

[i]f the best evidence available shows the incompetent likely will never be restored to reason, the law must allow another, vested with legal authority, to determine domicile for the best interests of that person. To prohibit such determinations is to leave the incompetent in a never-ending limbo where the presumption against changing domicile becomes more important than the interests of the person the presumption was designed to protect.<sup>32</sup>

Nevertheless, the considerations raised by the Tenth Circuit have little to do with the policies underlying diversity jurisdiction, and its approach introduces undesirable uncertainties into subject matter determinations.<sup>33</sup>

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29. *Rishell*, 12 F.3d at 173.

30. *Id.* at 173–174.

31. *Id.* at 174. The Tenth Circuit also directed the district court to determine whether Lacey's domicile had been changed by operation of Louisiana law when the Louisiana court appointed a guardian for Lacey. *Id.* However, as the Tenth Circuit observed earlier in its opinion, determining domicile for diversity purposes is controlled by federal principles. *Id.* at 172–173. Thus, it would be "inconsistent to allow the issue to be controlled absolutely by operation of state law. Such an approach would give the persons in control of the incompetent a weapon with which to create diversity illegitimately simply by obtaining a state-court order." Larry L. Teply & Ralph U. Whitten, *Civil Procedure* 637 n. 69 (2d ed., Found. Press 2000).

32. *Rishell*, 12 F.3d at 174.

33. The reasoning and result in *Rishell* specifically were rejected in *Long*. 91 F.3d at 647–648 ("Jurisdictional rules should above all be clear. . . . Inquiring whether the 'best interests' of the ward are served by a guardian's attempt to effect a change in domicile to secure a federal forum strikes us as singularly unproductive. We note, for example, that this case does not raise the primary concern addressed by diversity jurisdiction – fear of local bias against litigants from out of state. This is essentially a local dispute; Long was a resident of South Carolina for many years prior to his stroke, and the doctors who treated him were South Carolina doctors. We see no reason to believe that this case will not receive a fair hearing before a South Carolina court."). For a complete discussion of the *Rishell* and *Long* cases, see Teply & Whitten, *supra* note 31, at 636–638. The authors concluded that

[o]f the two cases, *Long* is the more persuasive. Even if it is necessary for a guardian to change the residence of an incompetent person for purposes of care and medical



## B. Capacity to Sue and Be Sued

*Should an elderly person suffering from Alzheimer's disease have the capacity to sue or be sued? If such a person is incapable of suing or being sued, what should happen?*

In federal court, pursuant to Rule 17(b), the capacity of individuals to sue and be sued is determined by the law of the individual's domicile — typically the law of some state.<sup>34</sup> Civil procedure casebooks do not discuss the specifics of such state laws.<sup>35</sup> However, a professor could point out to the students that courts generally are reluctant to find individuals incompetent to pursue legal actions.<sup>36</sup> The professor also could point out that one cannot assume that individuals are mentally incompetent just because they are institutionalized in mental hospitals or other kinds of care facilities.<sup>37</sup> Under the law in some states, persons who are mentally impaired continue to have the legal capacity to sue or be sued, as long as they have not been adjudicated incompetent.<sup>38</sup> The law in other states provides that legal adjudication of mental incompetency

treatment, there is no reason to allow the change of residence, even if permanent, to affect the determination of domicile for purposes of diversity jurisdiction. No apparent policy of the jurisdictional grant will be served by doing so in cases like *Rishell* and *Long*. Furthermore, as observed in the latter case, the *Rishell* inquiry will simply complicate the jurisdictional question unnecessarily.

*Id.* at 638.

34. Fed. R. Civ. P. 17(b); see generally R.P. Davis, *Capacity of One Who Is Mentally Incompetent but Not So Adjudicated to Sue in His Own Name*, 71 A.L.R.2d 1247 (1960) (The entire annotation discusses when a mentally incompetent person who has not been declared incompetent can “bring suit in his own name.” *Id.* at 1248.).

35. *E.g.* Cound et al., *supra* n. 20, at 611 (pointing out that “[m]any states . . . have special rules to deal with suits by or against . . . mental incompetents”).

36. *E.g. Walker v. Frericks*, 354 S.E.2d 915, 919 (S.C. App. 1987) (stating that “the primary consideration of the courts in ensuring that guardians ad litem are not appointed for competent persons is to avoid depriving competent persons of the *right to control their own litigation.*” *Id.* (emphasis in original).).

37. *E.g. Huebner v. Ochberg*, 87 F.R.D. 449, 456 (E.D. Mich. 1980) (Assuming patients in mental hospitals are legally incompetent is prohibited under Michigan law.).

38. *E.g. Ridgeway v. Ridgeway*, 429 A.2d 801, 805 (Conn. 1980) (holding that an insane person has the “legal capacity to sue or be sued, provided he has not been formally adjudicated an incompetent and placed under the guardianship of another”). In some jurisdictions, before suing adjudicated incompetent persons, plaintiffs must get permission from the court. *E.g. Sinley v. Estco, Inc.*, 200 N.Y.S.2d 939, 941 (1960) (indicating that an incompetent cannot be sued without permission from the court).

does not affect the capacity of individual defendants to be sued in their own name.<sup>39</sup>

When incompetent persons have general guardians, committees, conservators, or some other appropriate legal representatives, Rule 17(c) specifically allows these representatives to sue or defend on behalf of incompetent persons.<sup>40</sup> Rule 17(c) also authorizes a federal court to appoint guardians ad litem for incompetent persons who are not otherwise represented and to make other orders to protect them.<sup>41</sup> However, the authority of the federal courts does not extend to the appointment of general guardians, because such authority would interfere unduly with state guardianship laws.<sup>42</sup>

### C. Pleading

*Assume that the defendant believes the plaintiff is senile and incapable of rationally conducting litigation. When and how should the defendant raise this issue?*

In federal court actions, a pleader is not required to allege the capacity of a party to sue or be sued.<sup>43</sup> Instead, a party desiring to raise this issue must negatively allege the lack of capacity and must support that allegation with any "particulars" that are "peculiarly within the pleader's knowledge."<sup>44</sup> After the issue of incompetency

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39. *E.g. Hudnall v. Sellner*, 800 F.2d 377, 384 (4th Cir. 1986) (providing that "under Maryland law any mental deficiency suffered by [the defendant] at the time of the conduct for which the jury imposed tort liability would not relieve him of that liability").

40. Fed. R. Civ. P. 17(c).

41. *Id.* Indeed, "[e]very court has inherent power to appoint a guardian ad litem to represent an incapacitated person in that court." *In re A.M.K.*, 420 N.W.2d 718, 719 (Neb. 1988). "The decision as to whether to appoint a . . . guardian ad litem rests with the sound discretion of the . . . court and [the court's decision] will not be disturbed unless there has been an abuse of [the court's] authority." *Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989).

42. *U.S. v. Maryans*, 803 F. Supp. 1378, 1379 (N.D. Ind. 1992).

43. Fed. R. Civ. P. 9(a) (2001).

44. *Id.* The phrase "by specific negative averment" means that a party must raise lack of capacity to sue in an appropriate pleading or amendment to avoid waiver. *E.g. MTO Mar. Transp. Overseas, Inc. v. McLendon Forwarding Co.*, 837 F.2d 215, 218 (5th Cir. 1988) (recognizing that "[i]t is settled law that failure specifically to plead capacity waives the right to object" (footnote omitted)). However, a knowing failure to raise incompetency of the opposing party may leave a party open to a showing that the opposing party was incompetent at the time of trial. If it is shown that the opposing counsel refused or neglected to suggest it on the record to the court, a judgment may be set aside for failure to appoint a guardian ad litem. *E.g. Morissette v. Morissette*, 463 A.2d 1384, 1387 (Vt. 1983) (stating that a court will set aside a judgment only when the opposing counsel knew of an incompetency at the time of trial and failed to bring it to the court's attention).

has been raised or is apparent on the record, the court has the duty to determine whether the party is competent and to appoint a guardian ad litem if appropriate.<sup>45</sup> Furthermore, a court should exercise its discretion to appoint a guardian ad litem for a litigant whose mental incompetence becomes manifest during the course of litigation, especially in a pro se context.<sup>46</sup> Due process requires a right to a hearing before such a declaration and appointment, because an individual has a liberty interest in pursuing an action as a principal and may be stigmatized as a result of the incompetency determination.<sup>47</sup>

#### IV. PRESERVING AND GIVING TESTIMONY

##### A. Perpetuating Testimony

*Assume that your client is elderly and it is unlikely that your client will live long enough to testify at trial, either as a plaintiff, defendant, or nonparty witness. What procedural options do you have to preserve your client's testimony? Does it make a difference whether an action has been commenced?*

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45. *E.g. State ex rel. Perman v. Dist. Ct. of the Thirteenth Jud. Dist.*, 690 P.2d 419, 422 (Mont. 1984) (holding that a guardian ad litem will be appointed when necessary to protect the rights of an incompetent party). A judgment may be set aside for failure to appoint a guardian ad litem when it is readily apparent from the record that the party had been previously adjudicated insane or incompetent and had not been discharged at the time of the trial. *Morissette*, 463 A.2d at 1387.

46. *Hudnall*, 800 F.2d at 386. In *Hudnall v. Sellner*, the Fourth Circuit recognized that “[t]he practical problem presented by a case in which a presumably competent party might be thought to be acting oddly, or foolishly, or self-destructively in prosecuting or defending a civil lawsuit, with or without counsel, is a real one.” *Id.* at 385. The Fourth Circuit correctly pointed out that Federal Rule 17(c) envisions “something other than mere foolishness or improvidence, garden-variety or even egregious mendacity, or even various forms of the more common personality disorders.” *Id.* What is necessary under Federal Rule 17(c) is a “mental deficiency which – whether or not accompanied by other forms of personality disorder – affects the person’s practical ability ‘to manage his or her own affairs.’” *Id.* In this particular case, the Fourth Circuit did not find an abuse of discretion when the trial judge failed *sua sponte* to conduct a collateral inquiry into the defendant’s mental competence for the purpose of determining whether a guardian ad litem should have been appointed. *Id.* at 386. However, the Fourth Circuit did suggest that it might “have been a better exercise of discretion” for the trial court judge “to have appointed a guardian ad litem out of an abundance of caution,” especially in light of the defendant’s pro se appearance in the action. *Id.*

47. *Thomas v. Humfield*, 916 F.2d 1032, 1034 (5th Cir. 1990) (Due process requires notice and an opportunity to be heard; however, a full adversary hearing may not be necessary, depending on the circumstances.).

Introductory civil procedure courses typically spend little time dealing with preserving testimony prior to the commencement of an action.<sup>48</sup> If assigned to look into the matter, however, students will find that Rule 27 provides for depositions to perpetuate testimony prior to commencement of a federal court action.<sup>49</sup> Students should be made to realize that Rule 27 places several challenging requirements on the lawyer desiring to take such a deposition.<sup>50</sup> If the requirements are met, then a deposition to perpetuate testimony may be used "in any action involving the same subject matter subsequently brought in a United States district court."<sup>51</sup> In addition, depositions taken under state rules authorizing perpetuation of testimony, even if their requirements differ from Rule 27, are likewise admissible in federal court if the depositions would be admissible in the courts of the state in which they were taken.<sup>52</sup> This latter provision may mean that a lawyer may choose to

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48. At least one casebook mentions the procedure available under Rule 27 and points out that the procedure is not available for the purpose of determining whether a basis for a future action exists. *E.g.* Teply & Whitten, *supra* n. 23, at 50. Other casebooks do not mention the procedure. *E.g.*, Yeazell, *supra* n. 17, at 1030 (no citation to Rule 27).

49. Fed. R. Civ. P. 27 (2001). The procedures authorized by Rule 27(a) are designed to prevent a failure or delay of justice by preserving and registering testimony that would otherwise be lost before the matter to which it relates could be made ripe for judicial determination. *Id.*; see generally Elaine K. Zipp, *Right to Perpetuation of Testimony under Rule 27 of the Federal Rules of Civil Procedure*, 60 A.L.R. Fed. 924 (1982) (The entire "annotation collects and analyzes the federal cases construing and applying Rule 27." *Id.* at 927.).

50. According to Rule 27, the petition must demonstrate the following:

1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

Fed. R. Civ. P. 27(a)(1); see generally Nicholas A. Kronfeld, Student Author, *The Preservation and Discovery of Evidence under Federal Rule of Civil Procedure 27*, 78 Geo. L.J. 593 (1990) (discussing the requirements and operation of Rule 27). In Teply and Whitten's casebook, students are asked to identify situations where a petitioner might be unable to bring a suit or cause it to be brought. Teply & Whitten, *supra* n. 23, at 854. A uniform state action on this subject also exists. Unif. Perpetuation of Test. Act § 1, 14 U.L.A. 175 (1990). The Uniform Act generally parallels Rule 27, but there are some differences. *Id.* at § 1, 177 (Commissioners' Comment to Uniform Perpetuation of Testimony Act).

51. Fed. R. Civ. P. 27(a)(4).

52. *Id.*

perpetuate testimony pursuant to a state provision that provides less rigorous requirements than Rule 27.<sup>53</sup>

Once an action has been commenced, it is quite common to record testimony for possible use at trial by means of an oral deposition. Students will readily find that such a deposition can be used by either party when the “witness is unable to attend or testify because of age, illness, infirmity, or imprisonment.”<sup>54</sup> Furthermore, lawyers should modify their questioning when they know that a deponent is old and infirm in order to make sure that the deposition is suitable for use at trial.<sup>55</sup>

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53. For example, Rule 27 and similar state provisions are not substitutes for discovery. Their purpose is to preserve and perpetuate known testimony, not to provide litigants with a vehicle to ascertain evidence. *E.g. In re Gurnsey*, 223 F. Supp. 359, 360 (D.D.C. 1963) (Rule 27 does not provide a method of discovery to determine whether a cause of action exists and, if so, against whom an action should be instituted.). In contrast, the broad scope of some state provisions providing for the perpetuation of testimony of witnesses when the applicant expects to be a party to an action contemplate discovery as well as perpetuation of testimony and thereby supplement the discovery statutes, which by their terms are limited ordinarily to pending actions. *E.g. Or. R. Civ. P. 37(A)(1)* (2001) (available to persons desiring “to perpetuate testimony or to obtain discovery to perpetuate evidence”); *State ex rel. Allen v. Second Jud. Dist. Ct.*, 245 P.2d 999, 999 (Nev. 1952) (Nevada law does not permit “one injured in an automobile accident . . . to obtain information regarding automobile liability policy of motorist[s] by a proceeding to perpetuate testimony” when as soon as the injured person receives a judgment in the pending personal injury action, the injured person plans to sue the motorist and the insurer.); Eric H. Vance, *Pre-Complaint Discovery in Pennsylvania — Uses and Abuses*, 70 Pa. B. Assn. Q. 139, 139–141 (Oct. 1999) (discussing the more liberal Pennsylvania practice allowing precomplaint discovery and perpetuation of testimony).

54. Fed. R. Civ. P. 32(a)(3)(C) (2001); see generally C.C. Bjorklund, *Foundation for Offering Deposition or Other Former Testimony in Evidence*, 28 Am. Jur.2d *Proof of Facts* § 9, 25–27 (1981) (discussing how the deposition “is admissible if the witness cannot testify at a later proceeding either because he is dead or because he is too physically or mentally ill to do so”).

55. It aptly has been pointed out that “[e]arly in the case, lawyers usually focus on uncovering the facts, not conducting a cross-examination to use at trial. But that ‘discovery’ deposition you took a month after you got the complaint can come back to haunt you at trial.” Thomas J. McNamara & Paul T. Sorensen, *Deposition Traps and Tactics*, 12 Litig. 48, 50–51 (Fall 1985). When the witness is, *inter alia*,

elderly or very ill, you should be aware that your opponent could wind up using the deposition transcript against you at trial.

Then your standard discovery deposition technique should give way to a more structured, formal interrogation designed not only to elicit facts but also to score points as you would at trial. In this situation, you should consider taking the deposition later in the discovery period, after you have armed yourself with the facts and documents you need to cross-examine rather than just explore with the witness.

It is equally important to stay on the alert when your opponent notices the deposition of your elderly, infirm, foreign, or fleet-footed witness. If it is likely that either you will be unable to produce the witness at trial or that you will need the witness’s testimony but might choose not to call him live, you should consider questioning him thoroughly at deposition. Your examination serves two purposes: to

## B. Protecting Elderly Clients from Inconvenient or Potentially Harmful Depositions

*Assume that an elderly client is in very poor health. That client receives a subpoena ordering the client to appear for an oral deposition at the offices of the attorney of the party seeking the deposition. What steps can be taken to move the deposition to a more convenient location, such as the client's home? What kind of showing must the attorney make in order to prevent the deposition from ever taking place?*

A nonparty witness who is subpoenaed for the taking of an oral deposition may be required to attend a deposition at any place within 100 miles "from the place where [the witness] resides, is employed or regularly transacts business in person."<sup>56</sup> If the subpoena is outside the zone of permissible locations, the court issuing the subpoena will quash or modify it.<sup>57</sup> In addition, pursuant to Rule 26(c), a federal district court can issue a protective order that the requested discovery not be had or that the discovery be had only on specified terms and conditions, including a designation of a new time or place.<sup>58</sup> In general, it is relatively easy to make an

defuse any unfavorable testimony that your opponent elicits and to develop a coherent record to introduce as evidence at trial.

*Id.* at 51.

56. Fed. R. Civ. P. 45(c)(3)(A)(ii) (2001). In addition, Rule 45(c)(1) imposes upon the party issuing a subpoena a duty to avoid imposing an undue burden or expense on the person subject to the subpoena. *Id.* R. 45(c)(1). If an elderly client is a party, however, all that is necessary to take the client's deposition is a notice of the deposition. Fed. R. Civ. P. 30(a) (2001); *Bourne, Inc. v. Romero*, 23 F.R.D. 292, 295–296 (E.D. La. 1959) ("[I]t is not necessary to serve a subpoena on a party to a suit in order to take [the party's] deposition"; failure of the party to appear before the officer taking the deposition may result in striking the disobedient party's pleadings and consequently a default judgment.). In such circumstances, a protective order can be used to assure a more convenient and less burdensome location. *Pinkham v. Paul*, 91 F.R.D. 613, 614 (D. Me. 1981).

57. Fed. R. Civ. P. 45(c)(3)(A)(ii).

58. Rule 26(c) provides that

[u]pon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden . . . , including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and

appropriate showing that a new location and setting should be set by the court to accommodate an elderly client's physical infirmities.<sup>59</sup> On the other hand, it would take an extraordinary showing to prohibit the deposition entirely.<sup>60</sup> However, such a showing can sometimes be made, such as when the taking of the deposition might be life threatening to an elderly client.<sup>61</sup> These matters can be raised during a discussion of deposition practice, a topic often covered in basic civil procedure courses.<sup>62</sup>

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conditions, including a designation of the time or place . . . .

Fed. R. Civ. P. 26(c) (2001).

59. *E.g. Haviland & Co. v. Montgomery Ward & Co.*, 31 F.R.D. 578, 580 (S.D.N.Y. 1962) (allowing an eighty-year-old witness in an extremely fragile state of health the option of having his deposition taken at his residence in light of his age and physical ailments and ordering that the deposition take place for only limited periods each day until completed).

60. It is often said that courts rarely will issue protective orders that completely preclude the taking of a deposition. *E.g. Frideres v. Schiltz*, 150 F.R.D. 153, 156 (S.D. Iowa 1993) (stating that "[p]rotective orders prohibiting depositions are rarely granted"); *In re Tutu Water Wells Contamination CERCLA Litig.*, 189 F.R.D. 153, 155 (D.V.I. 1999) (asserting that courts rarely issue protective orders that entirely prevent depositions).

61. *E.g. In re McCorhill Publ., Inc.*, 91 B.R. 223, 225 (S.D.N.Y. 1988) (granting a protective order because the oral deposition posed a threat not only to the witness' health, but his life as well). The court in *In re McCorhill Publishing, Incorporated* stated,

This court is not prepared to assume the responsibility of subjecting [the chairman of the board of the debtor] to a life-threatening deposition simply on the statement of [creditor's] attorney that he has no intention of pressuring [the chairman of the board] with questions if it appears that [the chairman of the board] is incapable of furnishing any information. In the event that [the chairman] suffers a heart attack or other life-threatening seizure as a result of an oral deposition, no amount of subsequent apologies or statements of sorrow will compensate for the known risk, especially since the only medical testimony in this case reflects the fact that [the chairman's] life will be placed in jeopardy by exposing this infirm and senile 80 year old man to a pre-trial deposition. [The chairman] is in constant pain and has reached a vegetative state of senile dementia. [The chairman's doctor] testified that during such a deposition [the chairman's] borderline compensation may be catapulted into heart failure as a result of the pain and aggravated artery disease which [the chairman] achieves when he cannot remember incidents in his life. At this point in [the chairman's] life, the issue for the court is not his competency to testify, but his ability to survive an oral deposition.

Accordingly, [the creditor's] motion for a protective order precluding the pre-trial oral deposition of [the chairman] is granted.

*Id.*; *U.S. v. Mariani*, 178 F.R.D. 447, 451 (M.D. Pa. 1998) (granting a protective order prohibiting the deposition warranted when the witness was an eighty-three-year-old man suffering from severe coronary artery disease and congestive heart failure); *cf. In re Tutu*, 189 F.R.D. at 157 (not allowing an additional deposition of an elderly fact witness who was in frail health).

62. *E.g. Field et al., supra n. 17*, at 604-607 (discussing the location of depositions).

### C. Presenting Testimony at Trial

*Assume that a witness is elderly and was recently confined to a nursing home. Assume that it would be physically difficult for such a witness to appear and testify in court. Do the Federal Rules of Civil Procedure provide any means of presenting live testimony in court from a remote location, such as a nursing home?*

In 1996 Rule 43 was amended to permit presentation of testimony in open court by contemporaneous transmission from a different source.<sup>63</sup> To do so, Rule 43 requires a showing of good cause demonstrating “compelling circumstances.”<sup>64</sup> In addition, the court can impose “appropriate safeguards.”<sup>65</sup>

### V. COMPULSORY PHYSICAL OR MENTAL EXAMINATIONS

*Assume that a bus driver near retirement age rear-ends a tractor-trailer. Several of the injured bus passengers sue the bus owner, the bus driver, the tractor owner, the tractor driver, and*

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63. Fed. R. Civ. P. 43(a) (2001). The 1996 amendment removed the word “orally” from the initial sentence of the rule. As amended, the rule recognizes that special circumstances may make it appropriate to transmit testimony from a location other than the courtroom. *Id.* advisory comm. n. 1996 amend.

64. *Id.* The Advisory Committee pointed out that transmission from a remote location cannot be justified merely by showing that it would be inconvenient for the witness to attend the trial. According to the Advisory Committee notes, “Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses.” The Committee noted that “[d]eposition procedures ensure the opportunity of all parties to be represented while the witness is testifying.” What kind of showings does the Advisory Committee envision as meeting the requirements of good cause and compelling circumstances? This procedure would seem particularly appropriate “when a witness is unable to attend [the] trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.” Another example would be “an unforeseen need for the testimony of a remote witness that arises during [the] trial,” especially “if the need arises from the interjection of new issues during [the] trial or from the unexpected inability to present testimony as planned from a different witness.” The Committee also recognized that “[g]ood cause and compelling circumstances [are likely to] be established with relative ease if all parties agree that testimony should be presented by transmission.” However, the “court is not bound by a stipulation . . . and can insist on live testimony.” The Advisory Committee also pointed out that a “party who could reasonably foresee the circumstances offered to justify transmission of testimony will have [a] special difficulty in showing good cause and the compelling nature of the circumstances.” *Id.*

65. *Id.* R. 43(a).



*the trailer owner. Each defendant denies negligence. Assume that the bus owner then cross-claims against the tractor and trailer owners for damage to the bus. The bus owner asserts that the collision was due solely to the tractor and trailer owners' negligence in that the tractor-trailer was driven at an unreasonably low speed, had not remained in its lane, and was not equipped with proper rear lights. Assume that the tractor owner serves an answer to this cross-claim, denying negligence and asserting that the bus driver's negligence proximately caused and contributed to the bus owner's damages and that the bus driver was "not mentally or physically capable" of driving a bus at the time of the accident. The trailer owner also asserts in a cross-claim that the bus company and the bus driver had been negligent by permitting the bus to be operated when both the bus company and the bus driver knew that the bus driver's vision was impaired.*

*Assume that the tractor and trailer owners then seek an order directing the bus driver to submit to several mental and physical examinations by specialists in the following fields: (1) internal medicine; (2) ophthalmology; (3) neurology; and (4) psychiatry. The tractor and trailer owners support their request with an affidavit stating that the bus driver had seen red lights ten to fifteen seconds before the accident, another witness had seen the rear lights of the trailer from a distance of three-quarters to one-half mile, and the bus driver had been involved in a similar prior accident. The bus driver objects. Should the court order the examinations?*

Rule 35 permits federal district courts to order a physical or mental examination of a party or a person in the custody or control of a party when his or her mental or physical condition is "in controversy" and "good cause" has been shown.<sup>66</sup> Most civil procedure casebooks<sup>67</sup> use *Schlagenhauf v. Holder*<sup>68</sup> as the principal case

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66. Fed. R. Civ. P. 35(a) (2001).

67. *E.g.* Robert C. Casad et al., *Civil Procedure: Cases and Materials* 706–714 (2d ed., Michie Co. 1989); Cound et al., *supra* n. 20, at 802–807; Crump et al., *supra* n. 20, at § 7.03[5], 432–435; Levin et al., *supra* n. 1, at 489–496; Teply & Whitten, *supra* n. 23, at 865–877; Yeazell, *supra* n. 17, at 516–524.

68. 379 U.S. 104 (1964).

for discussing the propriety of compulsory physical or mental examinations pursuant to Rule 35.<sup>69</sup>

In *Schlagenhauf*, which involved facts similar to the hypothetical above, the United States Supreme Court indicated that the requirements of Rule 35 cannot be “met by mere conclusory allegations of the pleadings — nor by mere relevance to the case.”<sup>70</sup> Instead, the moving party must make “an affirmative showing . . . that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.”<sup>71</sup> According to the Court, that burden can sometimes be met by the pleadings alone, such as when the plaintiff asserts the plaintiff’s own mental or physical injuries as the basis for recovery in a negligence action or when the defendant asserts the defendant’s own mental or physical condition as a defense.<sup>72</sup> Emphasizing that the defendant driver had not asserted his mental or physical condition as a defense and the lack of justification offered by the parties, the Court concluded the proper showing had not been made for the internal medicine, neurological, and psychiatric examinations.<sup>73</sup> However, the Court left open the possibility that the ophthalmological examination could be ordered.<sup>74</sup>

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69. Even when *Schlagenhauf* is not used as a principal case, it is often cited, quoted, and discussed. For example, in Richard H. Field, Benjamin Kaplan, and Kevin M. Clermont’s casebook, the basic facts of the *Schlagenhauf* case are digested textually and followed by the question: “How should the case be decided?” Field et al., *supra* n. 17, at 81. Similarly, in Richard L. Marcus, Martin H. Redish, and Edward F. Sherman’s casebook, Justice Arthur J. Goldberg’s majority opinion and Justice Hugo L. Black’s dissenting opinion are summarized, each followed respectively by probing questions. Richard L. Marcus et al., *Civil Procedure: A Modern Approach* 338–339 (3d ed., West 2000). In Richard D. Freer and Wendy Collins Perdue’s casebook, the majority opinion in the *Schlagenhauf* case is quoted concerning the application of the “good cause” and “in controversy” requirements of Rule 35, followed by basic questions concerning the operation of Rule 35 and simple hypotheticals. Freer & Perdue, *supra* n. 1, at 437–438. Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, and Thomas O. Main’s casebook quotes language from the majority opinion in *Schlagenhauf*, but the authors do not set out the facts of the case. Subrin et al., *supra* n. 20, at 353. In Geoffrey C. Hazard, Jr., Colin C. Tait, and William A. Fletcher’s casebook, the authors choose to discuss the more recent case of *Sacramona v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 428 (D. Mass. 1993), rather than the *Schlagenhauf* case. Hazard et al., *supra* n. 1, at 910.

70. 379 U.S. at 118.

71. *Id.* at 118–119 (emphasis added).

72. *Id.* at 119.

73. *Id.* at 120–121.

74. The Court stated,

The only specific allegation made in support of the four examinations ordered was that the “eyes and vision” of *Schlagenhauf* were impaired. Considering this in conjunction with the affidavit, we would be hesitant to set aside a visual examination if it had been

*Assume that a plaintiff commences an action for slander and for "interference with advantageous relationships." The plaintiff alleges as damages the fact that she had been disinherited by her parents. The defendant seeks to depose the plaintiff's elderly father, who has become incompetent as a result of a series of heart attacks and strokes and has been placed under the guardianship of the plaintiff. The plaintiff then seeks a protective order under Rule 26(c) on the ground that her father is physically and mentally incapable of giving a deposition. Assume that the court stays the deposition, but orders the father to undergo a medical examination for the purpose of determining whether he could be deposed. Does the wording of Rule 35 permit this examination? If not, does the court have the inherent authority to order the examination?*

The hypothetical fact pattern above is based on *Lewin v. Jackson*,<sup>75</sup> which is digested in John J. Cound, Jack H. Friedenthal, Arthur R. Miller, and John E. Sexton's casebook.<sup>76</sup> *Lewin* allows the students to explore the meaning of the provision in Rule 35(a) that applies compulsory examinations not only to the physical and mental condition "of a party," but also to "person[s] in the custody or under the legal control of a party."<sup>77</sup> On these facts, the Arizona Supreme Court, perhaps erroneously, concluded that Rule 35 was inapplicable, because it was intended to apply to medical examinations for discovery purposes, not for the purpose of determining whether a person could be deposed.<sup>78</sup> Instead, the Arizona Supreme Court relied on its inherent power to "take all steps necessary to assure itself not only that a witness' testimony will be accurate and lucid, but also that the act of testifying will not endanger the health of the proposed witness."<sup>79</sup> Obviously, this latter approach raises interesting policy questions.

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the only one ordered. However, as the case must be remanded to the [federal] District Court because of the other examinations ordered, it would be appropriate for the District Judge to reconsider also this order in light of the guidelines set forth in this opinion.

*Id.* at 121 (footnote omitted).

75. 492 P.2d 406 (Ariz. 1972).

76. Cound et al., *supra* n. 20, at 809-810.

77. Fed. R. Civ. P. 35(a).

78. *Lewin*, 492 P.2d at 408.

79. *Id.* at 409.

## VI. CONCLUSION

Many elder law issues arise in a procedural context and easily lend themselves to discussion in a basic course on civil procedure. As discussed above, the principal issues focus on the following four distinct subject areas: (1) service and default; (2) capacity-related issues; (3) preserving and giving testimony; and (4) compulsory physical or mental examinations. Civil procedure professors have ample opportunities to heighten the students' awareness of and sensitivity to these issues. In addition, they can heighten the students' insight into strategic considerations, such as choosing to use a more advantageous state procedure rather than a federal one or shaping one's approach to meet the particular needs of elderly clients. Furthermore, they can address broader policy concerns as time and interest permit.