Discovery in Kentucky: An Overview

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Discovery in Kentucky: An Overview

By Richard H. Underwood*

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Introduction

Discovery receives short shrift in the law school curriculum. Although students are introduced to the subject in a first year course on Civil Procedure, the "bathtub effect" usually takes its toll by graduation day. That is, after the first year, the plug is pulled and the student's knowledge drains away.

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Moreover, it is difficult to teach discovery in third year programs on trial advocacy. Too much emphasis on discovery and pretrial would leave too little time for instruction on the mechanics of the actual trial. Even the experienced practitioner may not remember all the intricacies of discovery and may find it helpful to have a practical source of authority which is sufficiently concise to be carried in a briefcase for easy reference.

This Article is intended to serve the needs of both the beginning student and the experienced practitioner. It was written to serve as both an introduction to and a refresher on discovery in Kentucky. With this goal in mind, the author has deliberately drawn on cases that are of practical and tactical significance.

The reader will find that many federal cases have been cited throughout the Article. Amendments to the Kentucky Civil Rules (CR)\(^1\) have brought discovery in state courts largely in line with that available in federal courts.\(^2\) Thus, federal case law provides helpful guidance to the Kentucky practitioner in selecting and using discovery devices.

However, while this Article primarily discusses those areas where Kentucky and federal law are similar with respect to discovery, some significant differences in the two bodies of law still exist. For example, Kentucky courts have taken a conservative approach in interpreting the Kentucky Civil Rule regarding the scope of permissible discovery.\(^3\) As a result, a Kentucky judge may be more likely than a federal judge to rely upon the pleadings as a starting point to determine the permissible bounds of discovery.\(^4\)

In addition, the Kentucky rules governing the use and taking of depositions contain several peculiarities. One is that the deponent’s signature is automatically waived in Kentucky

\(^1\) See generally Ky. R. Civ. P. 26.01-37.05 [hereinafter cited as CR] (Kentucky's discovery rules).


\(^3\) CR 26.02 describes the scope of permissible discovery in Kentucky.

state courts in the absence of a request for the signature.\(^5\) Similarly, the Civil Rules provide a trap for the unwary by stipulating that if a party could have subpoenaed and deposed a nonparty witness and offered the deposition in lieu of his testimony, but failed to do so, then it might not be possible to compel the witness's personal attendance at the trial.\(^6\)

In September of 1982, the Kentucky Supreme Court launched an experimental program involving a wide variety of new rules to be applied in designated circuit courts.\(^7\) The experience gleaned from this program may eventually lead to additional amendments in the Kentucky Civil Rules. The Court has already adopted a new rule limiting the number of interrogatories and requests to admit which may be served without permission from the court.\(^8\) The practitioner all too frequently discovers these and other differences the "hard way."

I. GENERAL RULES REGARDING DISCOVERY

A. Types and Purposes of Discovery

The formal discovery devices available in civil cases include:

[a] depositions upon oral examination or written questions;
[b] written interrogatories;
[c] production of documents or things or permission to enter upon land or other property, for inspection and other purposes;
[d] physical or mental examinations; and

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\(^5\) See CR 30.05. Contra FRCP 30(e) (witness and parties must waive requirement that deposition be submitted to witness for his or her signature). For a discussion of the Kentucky rule, see text accompanying notes 128, 158-59 infra.

\(^6\) See CR 45.05. For a discussion of this rule, see text accompanying note 117 infra.

\(^7\) See Special Rules of the Circuit Court for the Economical Litigation Docket, CR 88-97 (known as the "fast track rules" because of their potential to speed up the discovery process). For a discussion of these rules, see text accompanying notes 346-70 infra. See also Note, Economical Litigation: Kentucky's Answer to High Costs and Delay in Civil Litigation, 71 Ky. L.J. 647 (1982-83).

\(^8\) See CR 33.01(3) (effective Jan. 1, 1984). See also CR 93.02.
[e] requests for admissions.\textsuperscript{9}
However, counsel should always remember that discovery in a
less formal sense can be obtained at the various stages of a
proceeding by the following devices:
(i) the motion for summary judgment;
(ii) the motion for a preliminary injunction;
(iii) proceedings to attach property;
(iv) the subpoena power; and
(v) early pretrial conferences to enlarge their discovery.\textsuperscript{10}

B. Scope of Discovery or Examination

CR 26.02, like its federal counterpart, provides that dis-
covery may be had of "any matter, not privileged, which is
relevant to the subject matter involved in the pending ac-
tion."\textsuperscript{11} A second sentence provides: "it is not ground for ob-
jection that the information sought will be inadmissible at the
trial if the information sought appears reasonably calculated
to lead to the discovery of admissible evidence."\textsuperscript{12}

As one commentator has noted, many courts fail to sepa-
rate these two sentences, and allow wide ranging discovery of
anything that "might arguably lead to the discovery of admis-
sible evidence."\textsuperscript{13} However, a more logical reading of the rule
is that "relevancy to the subject matter of the litigation"\textsuperscript{14}
is the threshold test of permissible discovery.\textsuperscript{15} In other words,
the second sentence deals only with objections to the discov-
ery of evidence that would be inadmissible at trial. Inadmissi-
bility of the "stepping-stone" information sought should not
block an inquiry if the party seeking the information can show

\textsuperscript{9} CR 26.01.
\textsuperscript{10} G. BELLOW & B. MOULTON, THE LAWYERING PROCESS 361 (1978); See also W. BARTHOULD, ATTORNEY'S GUIDE TO EFFECTIVE DISCOVERY TECHNIQUES 32-33 (1975) (dis-
cussing summary judgment as a method of discovery).
\textsuperscript{11} CR 26.02(1). See FRCP 26(b)(1) for the analogous federal provision.
\textsuperscript{12} CR 26.02(1).
\textsuperscript{13} See G. VETTER, SUCCESSFUL CIVIL LITIGATION 110 (1977).
\textsuperscript{14} Admittedly, relevancy to the "subject matter" allows for greater discovery
than relevancy to the "issues raised in the pleadings." See J. Moore, W. Taggart &
J. Wicker, MOORE'S FEDERAL PRACTICE § 26.56(1) (2d ed. 1983) [hereinafter cited as
MOORE'S FEDERAL PRACTICE].
\textsuperscript{15} G. VETTER, supra note 13, at 110.
that discovery of the inadmissible matter "appears reasonably calculated to lead to" the discovery of other relevant and admissible evidence.\textsuperscript{16} One item which is discoverable even though it is inadmissible at trial is the existence and contents of any insurance agreement that might satisfy part or all of a judgment.\textsuperscript{17}

Kentucky courts appear to favor the more conservative reading of the rule. While discovery is not limited to the precise issues as drawn in the pleadings,\textsuperscript{18} the pleadings are a good starting point for a determination of relevancy. Wide ranging inquiries should not be permitted solely on a claim that the information sought might possibly lead to the discovery of admissible evidence.\textsuperscript{19}

Evidence that is privileged in the evidentiary sense is not discoverable.\textsuperscript{20} However, while a claim of privilege may justify an instruction to a witness not to answer a specific question or interrogatory,\textsuperscript{21} such a claim will not ordinarily justify a refusal to participate in discovery.\textsuperscript{22} For example, a party to a civil action may rely upon the privilege against self-incrimination, and refuse to answer specific questions propounded to him. However, the party invoking the privilege must invoke it in response to specific interrogatories or deposition questions, and may not, for example, simply refuse to attend a deposition.\textsuperscript{23}


\textsuperscript{17} CR 26.02(2). Insurance agreements are now expressly discoverable under CR 26.02(2). However, Kentucky courts permitted their discovery even before the rule was amended to provide expressly for such discovery. See Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954).

\textsuperscript{18} See Maddox v. Grauman, 265 S.W.2d at 939. See also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

\textsuperscript{19} See Carpenter v. Wells, 358 S.W.2d 524 (Ky. 1962) (inquiry must be sensibly relevant to investigation).

\textsuperscript{20} See United States v. Reynolds, 345 U.S. 1 (1953).

\textsuperscript{21} See CR 26.02(1).


\textsuperscript{23} See Quinn v. Petto, 84 F.R.D. at 104; Guy v. Abdulla, 58 F.R.D. at 1. Many
C. **Sequence and Timing of Discovery**

Civil Rule 26.04, like Federal Rule (FRCP) 26(d), does not impose any order of priority in the sequence and timing of discovery, either as to which party may proceed first, or as to which method of discovery must be employed first. A party is permitted to utilize the various discovery devices in any order, and discovery need not be delayed merely because the opposing party is already conducting discovery. However, the court has the power under CR 26.04 to intervene on motion and then structure the discovery of a case "for the convenience of parties and witnesses, and in the interests of justice." This flexible rule allows discovery to proceed extrajudicially, while providing for judicial intervention and control in appropriate cases.

Whether counsel should strike first or await the adversary's discovery will, of course, depend on the facts of the given case. Many counsel will opt for an early deposition of the opposing party to pin down that party to a particular version of the facts before the testimony of other witnesses is disclosed. On the other hand, some counsel believe that much can be learned from the other party's discovery, and that one should "make haste slowly." The important point is that the question of timing should be taken seriously in each case.

With respect to the order in which specific discovery devices should be employed, the sequence of discovery must be tailored to the individual needs of the case. Typically, interrogatories are employed to discover the existence of documents, witnesses, and other evidence in the possession of the

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lawyers are unaware of the fact that in civil cases, an adverse inference may be drawn from the invocation of this particular privilege. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); Henricksen v. Henricksen, 486 F. Supp. 622, 628-29 (E.D. Wis. 1980).

24 See CR 26.04. But see CR 95 (creating both a sequence and a time limitation for certain discovery methods for those circuits subject to the Special Rules for the Economical Litigation Docket).


26 Id.

27 Similarly, many attorneys argue that a motion for summary judgment may provide a measure of early discovery, and they recommend deferring the deposition of the adverse party until such a motion has been resolved. See W. Barthold, supra note 10, at 53-54.
adverse party, followed by a request for production of any tangible evidence revealed by the responses to the interrogatories. After examining the relevant documents and tangible evidence, counsel may then depose the adverse party and witnesses, or proceed to contact third party witnesses informally.

Counsel may, however, choose to depose the adverse party before using interrogatories in order to catch that party unprepared, and pin the party down to a favorable version of the facts. Because the adverse party may be more candid in the course of a deposition than in response to interrogatories, counsel may also use this opportunity to discover the existence of other witnesses and tangible evidence. Much sage advice for particular types of cases is available in the literature of discovery, and counsel should consider all the available options rather than proceeding in a mechanical fashion.

D. Protective Orders and the Work Product Doctrine

CR 26.03 (protective orders) and CR 26.02(3) (trial preparation materials) are general provisions relating to legitimate resistance to discovery. CR 26.03 tempers the liberal right of discovery given by CR 26.02. Either a party or the person to be examined may move "seasonably" after being served with a notice of deposition, or other discovery device, and show "good cause" for a protective order. The motion may be made in the court in which the action is pending or in the court in which the deposition is to be taken. In the author's view, the mere filing of a motion should not stay the examination. The movant should be required to obtain the protective order or an order postponing

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28 See, e.g., id.; G. Vetter, supra note 13.
29 CR 26.03 provides for protective orders after a notice for discovery has been made, but before discovery has begun. CR 30.04, which provides for the termination and limitation of examinations at oral depositions, is discussed at notes 139-44 infra and accompanying text. CR 93.04 of the Special Rules appears to modify the protective order system, and make some inroads into the "work product" doctrine.
30 A motion may be seasonable almost any time up to the date set for the examination. Dictograph Prods. v. Kentworth Corp., 7 F.R.D. 543 (W.D. Ky. 1947).
31 CR 26.03.
32 Id.
the deposition pending a hearing on the motion.\textsuperscript{33} Otherwise, a party could unilaterally and willfully delay or evade discovery.\textsuperscript{34} The trial court may exercise wide discretion to protect litigants and witnesses from discovery abuse;\textsuperscript{35} hence what constitutes “good cause” will vary, depending upon “the nature and character of the information sought . . . weighed in the balance of the factual issues involved in each action.”\textsuperscript{36}

Under the protective order system, the court may protect a party or other person from “annoyance, embarrassment, oppression, or undue burden or expense”\textsuperscript{37} by ordering:

(a) that discovery not be had;

(b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(e) that discovery be conducted with no one present except persons designated by the court;

(f) that a deposition after being sealed be opened only by order of the court;

(g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; [or]

(h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.\textsuperscript{38} If a motion for a protective order is denied, the court may order the moving party or person to provide or permit the discovery sought, and may award

\textsuperscript{33} Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257, 269 (9th Cir. 1964).

\textsuperscript{34} Id.

\textsuperscript{35} See Gevedon v. Grigsby, 303 S.W.2d 282, 283 (Ky. 1957); Armstrong v. Biggs, 302 S.W.2d 565, 568-69 (Ky. 1957). See also Annot., 70 A.L.R.2d 685 (1960) (contains a collection of cases dealing with FRCP 30(b) and similar state statutes).


\textsuperscript{37} CR 26.03(1).

\textsuperscript{38} CR 26.03(1)(a)-(h).
expenses pursuant to CR 37.01(4).\(^{39}\)

Although a court may order that "the discovery not be had," there must be a "strong showing" that such a drastic measure is required before discovery will be prohibited or stayed.\(^{40}\) On the other hand, a court will be justified in denying or staying discovery if the process is being used to delay or disrupt a proceeding or the adversary's preparation for trial.\(^{41}\) In addition, discovery may be stayed pending decision on motions under CR 12,\(^{42}\) the resolution of which would moot the need for discovery on the merits of the pending action.\(^{43}\) A claim of undue hardship,\(^{44}\) harassment,\(^{45}\) or a valid claim of privilege\(^{46}\) may also justify an order that discovery not be had, or that discovery be postponed.

Protective orders seeking a change in the time or place for the taking of depositions are frequently necessitated by attorneys who "short-notice" their opponents,\(^{47}\) or attempt to

\(^{39}\) CR 26.03(2).

\(^{40}\) Cf. Britton v. Garland, 335 S.W.2d 329 (Ky. 1960) (depositions taken two weeks prior to trial allowed, absent any attempt to harass). But see Spangler v. Southeastern Greyhound Lines, 10 F.R.D. 591 (E.D. Tenn. 1950) (depositions allowed to be taken even though first notice filed only 10 days prior to trial).

\(^{41}\) See Gevedon v. Grigsby, 303 S.W.2d at 282. See also Wright, Discovery, 35 F.R.D. 39, 60 (1964) (court may stay discovery until jurisdictional challenges solved).

\(^{42}\) Cf. Armstrong v. Biggs, 302 S.W.2d at 565 (trial court abused its discretion in denying a motion for a stay of discovery where a decision on the merits was imminent in a federal action involving the same issues). However, if a motion to dismiss for lack of personal jurisdiction is filed, a court may permit discovery on that issue, and sanction the litigant who fails to permit discovery. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982).

\(^{43}\) See, e.g., Rosanna Knitted Sportswear, Inc. v. Lass O'Scotland, Ltd., 13 F.R.D. 325, 326 (S.D.N.Y. 1952) (request to examine four principal officers, bookkeeper, and sales manager, in addition to "omnibus subpoena duces tecum" abuses discovery process).

\(^{44}\) M.A. Porazzi Co. v. The Mornaclark, 16 F.R.D. 383 (S.D.N.Y. 1951) (deposition of high corporate officer knowing nothing about the transaction disallowed by court under FRCP 30(b)).


\(^{46}\) See, e.g., Stover v. Universal Molded Prods. Corp., 11 F.R.D. 90, 91 (E.D. Pa. 1950) (fixing deposition date two days after service renders notice invalid); Spangler
depose nonparty witnesses at places where they are not required to attend. Moreover, a location that is properly named in a notice of deposition may be changed on motion to suit the convenience of others, although this may be conditioned on the payment of travel expenses by the party seeking the change.

CR 26.03(1)(c), which provides for court orders changing the method of discovery to one other than that selected by the party seeking discovery, gives some measure of relief against "wall street” interrogatories. In addition, a court may order that some alternative to an oral deposition be used based on considerations of health, travel expenses, or distance to be traveled. On motion, the court may use this rule to limit initially the scope of examination to keep the inquiry within reasonable bounds, to that which has "substantial relevancy to a sensible investigation.” However, it seems more appropriate that such a motion be made under CR 30.04, after the deposition has commenced and after a record of bad faith or oppression has been substantiated.

v. Southeastern Greyhound Lines, Inc., 10 F.R.D. at 591 (time between notice date and deposition not reasonable); Crowley v. North British & Mercantile Ins. Co., 70 F. Supp. 547, 552-53 (W.D.S.C. 1947) (defendant not allowed to examine plaintiff two days before trial); Adams v. Letcher County, 184 S.W.2d 801, 803 (Ky. 1944) (three days not adequate when deponent resides 267 miles away).


While CR 26.03(1)(e) provides for the exclusion of persons from the taking of a deposition on a showing of "good cause," it should not be understood as authorizing the court routinely to exclude the parties or their officers or counsel, or others whose presence is necessary for a proper interrogation.

Courts are necessarily careful to protect the interests of litigants and others in access to and the dissemination of relevant information discovered in the course of litigation. CR 26.03 provides for the sealing of depositions to be opened only upon order of the court, nondisclosure of trade secrets, and simultaneous filing of documents in sealed envelopes. In some cases, confidential business information or sensitive personal information has been protected by such expedients. However, courts have occasionally displayed considerable deference to competing first amendment interests. With respect to trade secrets the court will usually order disclosure subject to a protective order against unnecessary use or dissemination.

CR 26.03(1) is intended to protect parties or other per-

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72 4 Moore's Federal Practice, supra note 14, at ¶ 26.75.
sons from unreasonable "annoyance, embarrassment, oppression, or undue burden or expense;" but requiring a witness's absence from work, even for a substantial period of time, has not been viewed as unreasonable. A nonparty must usually be content with statutory witness fees and mileage allowances, although several recent cases have required more significant compensation in exceptional cases. In one case the United States Court of Appeals for the Tenth Circuit affirmed a protective order conditioning discovery on payment of production expenses.

CR 26.03(3)(a), like FRCP 26(b)(3), codifies the work product doctrine first announced in *Hickman v. Taylor*. The work product rule provides a limited privilege of nondisclosure to avoid the "'demoralizing' effects on the adversary function of lawyers" that might result if a party could "sit back and secure . . . the fruits of his opponent's . . . preparation." In order for the work product privilege to apply, it is

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64 In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 669 F.2d 620 (10th Cir. 1982); United States v. CBS, 666 F.2d 364 (9th Cir.), cert. denied, 457 U.S. 1118 (1982).


66 329 U.S. 495 (1947). CR 26.02(3)(a) provides:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(emphasis added).


68 Id. For collected cases see annot., 41 A.L.R. FED. 123 (1979); Annot., 35 A.L.R. 3d 412 (1971).
not always necessary that a lawsuit have been filed. Moreover, once the rule has come into play, protection is afforded to any document or thing, and some courts have stretched the doctrine beyond the language of the rule to prevent disclosure of oral communications between the attorney and his witnesses relating to trial preparation.

Assuming that a party is seeking the production of documents and things prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative, it must be remembered that the rule only protects the documents or things themselves, and not the facts contained therein. In other words, a party seeking discovery is not precluded from securing the facts contained in the protected documents by way of independent discovery. For example, assume a party's counsel or agent has secured witness statements from the available witnesses. The opposing party seeking discovery then may examine such witnesses as to any facts the witnesses know, including facts contained in the witnesses' statements, even though production of the statements may not be obtained absent the showing required by the rule.

Although such "work product" is privileged, the privilege is qualified. If the party seeking discovery demonstrates that he has "substantial need" of the privileged matter, and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means," then he may

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72 See CR 26.02(3)(a).

73 Id. (emphasis added).
have at least some of the material sought. The qualification "at least some of the material" must be added due to the language of the rule requiring the protection of the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative." A recent opinion of the United States Supreme Court dealing with work product left unanswered the question of whether the special protection of "mental impressions" is absolute. Presumably, redaction would be a feasible alternative in many cases.

There are exceptions to the work product rule. Specifically, a party may obtain a copy of his own statement without a showing of need and hardship. Similarly, a nonparty may obtain his statement on request. It has been held that the work product privilege is not lost by a sharing between clients with common interests. However, work product protection may be waived at trial where counsel attempts to make testimonial use of the materials.

E. Discovery of Facts and Opinions of Experts

Prior to the amendment of the Civil Rules on October 1, 1971, Kentucky courts severely limited pretrial discovery of the "impressions, opinions or conclusions" of experts. However, CR 26.02(4)(a)(i), as amended, now tracks the language of FRCP 26(b)(4), and presumably provides the same discov-

74 Id.
76 See Xerox Corp. v. IBM, 64 F.R.D. 387 (S.D.N.Y. 1974). But see Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974) (the protection was held to be absolute).
77 CR 26.02(3)(b).
78 The request must be made by the witness. For example, there is no requirement that a party's counsel give a deponent his prior statement at the request of opposing counsel. C. Wright, FEDERAL COURTS § 82, at 559 (4th ed. 1983).
81 See, e.g., Ford Motor Co. v. Zipper, 502 S.W.2d 74, 80 (Ky. 1973). Counsel should note that CR 89-97 have greatly expanded the scope of discovery relating to experts for those circuits using the special rule.
ery that is available in federal practice. Because of the dearth of case law interpreting this amendment, the Kentucky practitioner must, for the time being, rely primarily on federal cases construing the federal counterpart of the Civil Rule.

Discovery may be sought from an expert either because he was personally involved in a particular event, or because he has acquired facts or developed opinions about the event, "in anticipation of litigation or for trial." Any information an expert holds by virtue of his being an actor in, or witness to, the events underlying the litigation may be obtained by deposition without the permission of the court. However, CR 26.02(4)(a)-(b) establishes certain guidelines governing discovery from experts who develop opinions in anticipation of litigation. Discovery of these opinions is limited regardless of whether the expert is expected to testify at trial, but the extent of the limitation is related to this expectation. If the expert will be called as a witness at trial, CR 26.02(4)(a)(i)-(ii) establishes a two step discovery process. First, the party seeking information may inquire by way of interrogatories as to the identity of such an expert and the subject matter on which the expert is expected to testify. Such interrogatories may require a statement of "the substance of the facts and opinions to which the expert is expected to testify."

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82 CR 26.02(4). In some instances, the expert may have acquired some information as a "mere witness" and other information as "an expert . . . in anticipation of litigation or for trial." See, e.g., Sochanchak v. Marine Transp. Lines, Inc., 28 F.R. Serv. 2d (Callaghan) 362 (E.D. Pa. 1979).


84 CR 26.02(4)(b).


86 See CR 26.02(4)(a)(i).

87 Id.
be deposed as a matter of course.\textsuperscript{88} When this procedure is exhausted, an expert may be deposed only with the permission of the court, subject to the payment of fees or expenses, as appropriate,\textsuperscript{89} unless the parties agree to a different procedure.\textsuperscript{90}

A party is under a duty to seasonably supplement responses to interrogatories requesting the identity of experts to be called as witnesses at trial, and the subject matters and substance of the expert's expected testimony.\textsuperscript{91} Accordingly, a party may not "sandbag" his opponent by failing to identify an expert until just before trial.\textsuperscript{92} Although further discovery may be granted on motion,\textsuperscript{93} there are no hard and fast rules for judges and litigants to use in determining when such a motion should be granted.

The purpose of the two step procedure is to prevent a party from avoiding the cost of retaining his own expert,\textsuperscript{94} while recognizing that in some cases, at least, a deposition of the opponent's expert, or other discovery, may be a prerequisite to effective cross-examination.\textsuperscript{95} Moreover, the court should ordinarily condition discovery on the payment of such fees and expenses of the opponent as the court deems appropriate.\textsuperscript{96} Because of this, the courts need not take an overly restrictive view of the availability of other discovery, if the initial interrogatories provide insufficient discovery in a given

\textsuperscript{91} CR 26.05.
\textsuperscript{92} See Weiss v. Chrysler Motors Corp., 515 F.2d 449 (2d Cir. 1975). Hicks v. Cole, 566 S.W.2d 169 (Ky. Ct. App. 1977), should not be read to the contrary.
\textsuperscript{93} CR 26.02(4)(a)(ii).
\textsuperscript{95} Quadrini v. Sikorsky Aircraft Div., 74 F.R.D. 594, 595 (D. Conn. 1977).
\textsuperscript{96} CR 26.02(4)(a)(ii), (c).
If an expert has been retained or specially employed by another party in anticipation of litigation or preparation for trial, but is not expected to be called as a witness at trial, CR 26.02(4)(b) mandates that discovery may not be had except "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means," or as provided in CR 35.02 (relating to examining physicians). Discovery in these cases is not limited to interrogatories, and the two step procedure governing discovery from experts who are expected to testify is inapplicable. These protections are unnecessary because CR 26.02(4)(b) has its own prophylactic character. The philosophy of the rule is that discovery from such experts is "unfair," absent "a showing of exceptional circumstances" and some provision for the sharing of fees and expenses.

Similarly, the federal counterpart to CR 26.02(4)(b) was adopted to abolish the notion that an expert's information is always protected as "privileged" or "work product," and to insert in its place a doctrine of "fairness." A number of federal courts have held that the name, address and other identifying information relating to a nontestifying, consulting expert may be obtained by interrogatories, as a matter of course. However, further discovery would require a showing of exceptional circumstances. If the party can obtain comparable information in other ways, or does not make a sufficient showing of the need for further discovery or its value in resolving the issues of the case, the courts will deny further discovery.

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98 CR 26.02(4)(b).
99 For a recent Kentucky case on "exceptional circumstances," see Big Sandy Wholesale, Inc. v. Conley, 639 S.W.2d 778 (Ky. 1982).
100 See Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. at 1122.
II. DEPOSITIONS

A. Taking Depositions

Because depositions play a critical role in the preparation of lawsuits it is appropriate that deposition procedures be discussed in some detail. The procedural steps for the taking of depositions are set forth in CR 27.01 through CR 31.02. The mechanics for setting up and taking an ordinary deposition upon oral examination are straightforward, but are nonetheless frequently honored in the breach.

"A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action."

This requirement has some "teeth," because a deposition can ordinarily be used only against a party who knew of the deposition and had an opportunity to attend. A notice to a party deponent may be accompanied by a Rule 34 document request, while a non-party deponent may be required to produce documents by way of a subpoena duces tecum. Leave of court is not re-


103 For additional guidance, see W. BARTHOld, supra note 10; D. DANNER, PATTERN DEPOSITION CHECKLISTS (1973); G. VETTER, supra note 13; Blumenkopf, DEPOSITION STRATEGY AND TACTICS, 5 AM. J. TRIAL ADVOC. 231 (1981). Counsel should note that the Special Rules severely restrict depositions of non-party witnesses. See text accompanying notes 347-49, infra.

104 CR 27.01-.02 relate to pre-action discovery by deposition, and depositions pending appeal. CR 28.01-.03 state the persons before whom depositions may be taken. CR 29 sets out the stipulations regarding discovery procedure. Rules 30.01-.07 concern depositions by oral examination, and CR 31.01-.02 relate to the taking of depositions upon written questions.

105 CR 30.02(1).

106 See text accompanying note 153 infra. Similarly, CR 30.02(2)(b) provides that if a party shows that he was unable through the exercise of diligence to obtain counsel to represent him at the deposition, then it may not be used against him.

107 CR 30.02(5).

108 CR 30.02(1).
quired, unless a plaintiff seeks to depose a party prior to the expiration of thirty days after service of the summons upon any defendant.\textsuperscript{109} Even in such instance, the plaintiff need not obtain leave of court if a defendant has already sought discovery\textsuperscript{110} or if the notice states (and the facts stated support the proposition) that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the thirty day period.\textsuperscript{111}

"Reasonable notice" suggests that a party be given a reasonable opportunity to prepare for, travel to, and participate in the deposition. Due regard must be given to the convenience and prior engagements of counsel.\textsuperscript{112} Although depositions may be set up informally, it is prudent to confirm such arrangements with a written notice.\textsuperscript{113}

The notice of deposition is sufficient to compel attendance of a party or an officer, director, or managing agent of a corporate party.\textsuperscript{114} However, a nonparty must be subpoenaed pursuant to CR 45.04.\textsuperscript{115} A subpoena should be served on a nonparty witness even if the witness has agreed to appear at a deposition without such compulsion. If the witness fails to appear and no subpoena was served, the opposing party may be

\textsuperscript{109} CR 30.01.
\textsuperscript{110} CR 30.01(b).
\textsuperscript{111} CR 30.02(2)(a)(i)-(ii). A false statement is punishable under CR 11.
\textsuperscript{112} Armstrong v. Biggs, 275 S.W.2d 60, 62 (Ky. 1955). \textit{See also} Adams v. Letcher County, 184 S.W.2d 801, 803 (Ky. 1944) (pre-rules case). The court may, for cause, enlarge or shorten the time for taking the deposition. CR 30.02(3).
\textsuperscript{113} \textit{Cf.} Thomas v. Thomas, 497 S.W.2d 717 (Ky. 1973) (where an oral agreement is disputed, the court need not resolve the dispute but should instead require compliance with the rule).
\textsuperscript{114} CR 37.04(1). \textit{See} Collins v. Wayland, 139 F.2d 677, 678 (9th Cir. 1944). If a party fails to respond to such notice, a court may order him to appear and may impose sanctions. Sublett v. Hall, 589 S.W.2d 888, 891 (Ky. 1979). "[S]ervice of notice on an attorney for a party is sufficient to make it incumbent upon that party to appear for a deposition." Marriott Homes, Inc. v. Hanson, 50 F.R.D. 396, 399-400 (W.D. Mo. 1970).
\textsuperscript{115} Mere employees or stockholders of a corporation likewise must be served with a subpoena. Park & Tilford Distillers Corp. v. Distillers Co., 19 F.R.D. 169 (S.D.N.Y. 1956); Krause v. Erie R.R., 16 F.R.D. 126 (S.D.N.Y. 1954). Counsel should note that "[a] resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court." CR 45.04(3).
awarded fees and expenses incurred in attending the aborted deposition.\textsuperscript{116} Counsel should also note that CR 45.05 contains a trap for the unwary. Specifically, if a party could have subpoenaed and deposed a nonparty witness and offered his deposition in lieu of live testimony under CR 32.01(c), but failed to do so, then it may not be possible to compel the witness's personal attendance at trial.\textsuperscript{117} This rule theoretically provides some measure of consideration for witnesses.

CR 30.02(6) provides a mechanism that is favorable to both sides. If a party names, in his notice and subpoena, as a deponent, a public or private corporation, a partnership, association, or government agency, the matters on which the examination is requested may be described with reasonable particularity.\textsuperscript{118} The burden of designating which person or persons will testify then shifts to the deponent-entity, who may also set forth the matters upon which each such designee will testify.\textsuperscript{119} This provision should curb the abusive practice of producing corporate officers and employees who disclaim knowledge of facts that are available or known to some person in the organization.\textsuperscript{120} At the same time it provides the employer with some relief from the burden of an excessive number of pointless depositions.\textsuperscript{121}

Deposition testimony may be recorded by other than stenographic means, such as by tape recorder or videotape, but only on motion and order.\textsuperscript{122} Assuming that a party obtains such an order, either party may nonetheless arrange for the presence of a shorthand reporter. The author recommends that a court reporter be present and transcribe all testimony in the traditional way even though the proceedings are videotaped. A stenographic transcript not only insures that the

\textsuperscript{116} See CR 30.07(2). CR 30.07(1) provides for the imposition of a similar sanction when the party who has noticed a deposition fails to attend.

\textsuperscript{117} CR 45.05(2).

\textsuperscript{118} CR 30.02(6).

\textsuperscript{119} See id.

\textsuperscript{120} See, e.g., Haney v. Woodward & Lothrop, Inc., 330 F.2d 940, 942-44 (4th Cir. 1964), for an example of this ploy.

\textsuperscript{121} However, CR 30.02(6) does nothing to preclude other types of discovery.

\textsuperscript{122} CR 30.02(4). See also FRCP 30, which provides that the parties may stipulate in writing to non-stenographic means, and also provides for depositions by telephone.
deposition will be saved in the case of mechanical failure, but also provides a more convenient tool for briefing and presenting disputes to the court for rulings.\textsuperscript{123}

Two aspects of the actual taking of depositions deserve some extended comment—stipulations and objections. The parties may, by written stipulation, provide that the deposition be taken "before any person, at any time or place, upon any notice, and in any manner."\textsuperscript{124} The parties may also modify the procedures provided in the discovery rules, except the times provided for responses to discovery in CR 33.01, 34.02, and 36.01, which may be extended only with the approval of the court.\textsuperscript{125} However, in connection with depositions, counsel all too often enter into "the usual stipulations" without thinking about them.\textsuperscript{126} The "usual stipulations" in Kentucky may embrace a waiver of filing requirements and an agreement that all objections except as to form shall be preserved until trial. Waiver of filing seems unwise, because counsel may wish to refer to a filed transcript in motions or at other stages in the proceeding. The usual stipulation with respect to objections is unnecessary, inasmuch as it generally restates the law contained in CR 32.04(a)-(b). In addition, legitimate substantive objections should be interposed at the deposition if for no other reason than to protect one's witness.\textsuperscript{127}

CR 30.05 in effect provides for an automatic waiver of signature, so a stipulation to that effect is also unnecessary. Moreover, there may be no advantage to anyone in waiving signature. A witness ordinarily ought to have the opportunity to read and correct any errors in the transcript. By the same token, the attorney who has taken the deposition has an interest in cutting off belated claims of a witness that he was misquoted.\textsuperscript{128} If it is inconvenient for the witness to travel to the

\textsuperscript{123} See W. Barthold, supra note 10, at 81-85; A. Morrill, Trial Diplomacy § 15.7 (2d ed. 1972).
\textsuperscript{124} CR 29.
\textsuperscript{125} Id.
\textsuperscript{126} Blumenkopf, supra note 103, at 238-41.
\textsuperscript{127} W. Barthold, supra note 10, at 87. On the other hand, there is a point at which such "protection" may become obstruction. See Detective Comics v. Fawcett Publications, 4 F.R.D. 237, 239-40 (S.D.N.Y. 1944).
\textsuperscript{128} Impeachment by prior inconsistent statements in a deposition is much more
officer who took the deposition, the better practice would be to obtain a stipulation at the outset that the deponent be permitted to review, change, and sign the deposition before any notary.\textsuperscript{129}

It was stated earlier that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant . . . [or which] appears reasonably calculated to lead to the discovery of admissible evidence."\textsuperscript{130} Accordingly, the rules do not authorize instructing witnesses not to answer,\textsuperscript{131} unless the matter inquired into is privileged, is protected by the work product doctrine, involves trade secrets, or is patently irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.\textsuperscript{132} In this regard, a rule of reason will probably be applied by any judge who is later called upon to assess the conduct of counsel.\textsuperscript{133}

If the party opposing the questioning believes that the proceeding is being conducted in bad faith or is being abused, he may make a motion to terminate or limit the examination.\textsuperscript{134} If the party conducting the deposition is faced with improper and obstructive objections, or instructions not to answer, he should have the stenographer's notes marked at the appropriate point and either proceed with the balance of the examination, or suspend it and move for a court order compelling answers.\textsuperscript{135}

\footnotesize{
\textsuperscript{129} W. BARThOLD, supra note 10, at 88; Blumenkopf, supra note 103, at 239.

\textsuperscript{130} CR 26.02(1) (emphasis added). For a discussion of this rule, see text accompanying notes 11-23 supra.

\textsuperscript{131} CR 30.03(2).


\textsuperscript{133} See Kamens v. Horizon Corp., 81 F.R.D. 444, 445-46 (S.D.N.Y. 1979) (questions about plaintiff's financial resources and participation in other class action litigation were not relevant to the issue at hand so her counsel's instruction not to answer such questions was not improper).

\textsuperscript{134} CR 30.04.

\textsuperscript{135} Kamens v. Horizon Corp., 81 F.R.D. at 445. A request that the reporter's notes be marked immediately after an objection, instruction, or colloquy has been interposed will assist the reporter in preparing a text to accompany such a motion.
}
Objections to the form of questions are waived unless made when the questions are asked. All other objections are preserved, and may be asserted at trial, even though not interposed at the deposition, unless the ground for objection might have been obviated or removed if presented at that time. Unfortunately, there is no unanimity on what objections are "obviable" or "waivable" within the meaning of CR 32.04(3)(b). Prudent counsel will take care to lay all appropriate evidentiary foundations in the deposition, on the assumption that such objections may be raised for the first time at trial.

Just as CR 26.03 provides for protective orders prior to the taking of a deposition, CR 30.04 provides for protection after the examination has begun. Specifically, if a party or the deponent can establish that the examination is being conducted "in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party," the objecting party may demand that the deposition be suspended for the time necessary to move for an order of the court directing that the examination cease or imposing limitations on continued examination. This provision gives the court considerable discretion to control the deposition to prevent abusive tactics, and specifically provides for an award of expenses pursuant to CR 37.01(d). Generally, there must be a clear showing of either bad faith or unreasonableness before significant relief will be forthcoming, which suggests that

W. Barthold, supra note 10, at 100.

136 CR 32.04(3)(b).
137 CR 32.04(3)(a).
138 Blumenkopf, supra note 103, at 244. For the same reason all exhibits should be handled, authenticated and made part of the record as if counsel were proceeding at trial. W. Barthold, supra note 10, at 90-92.
139 For a collection of cases concerning the construction and effect of the federal rules and similar state rules relating to preventing, limiting or terminating the taking of depositions, see Annot., supra note 35.
140 CR 30.04.
141 Id.
142 But cf. Armstrong v. Biggs, 302 S.W.2d 565, 569 (Ky. 1957) (because decision on merits of similar action was imminent in federal court, state trial court abused its discretion in overruling plaintiff's motion to defer deposition until after federal court decision).
counsel must carefully make a record of abuse to support a motion for a protective order.\textsuperscript{145} However, relief has been granted where the witness has been subjected to repetitious questioning, cumulative and unnecessary proceedings, or abusive questioning.\textsuperscript{144}

The rules provide an alternative to oral examination by providing for depositions of parties and nonparties upon written questions (not to be confused with interrogatories).\textsuperscript{145} Leave of court is usually not required.\textsuperscript{146} Basically, questions are served, with notice, to all parties, after commencement of the action. Within thirty days of notice and service of the written questions, “cross” questions may be served; within ten days of such service, redirect questions may be served, and so on.\textsuperscript{147} The questions are answered by the witness before the officer designated in the notice, and neither the parties nor their agents or attorneys may be present.\textsuperscript{148} This technique may appear to be a good compromise between the expensive but more flexible deposition on oral examination and inexpensive but inflexible written interrogatories. However, the deposition upon written questions is rarely used.

On occasion depositions may be taken before the filing of an action, or pending an appeal.\textsuperscript{149} The primary purpose of such depositions is to preserve or perpetuate testimony that may become unavailable with the passage of time.\textsuperscript{150} Leave

\begin{footnotes}
\textsuperscript{145} See DeWagenknecht v. Stinnes, 243 F.2d 413, 418 (D.C. Cir. 1957). See text accompanying notes 134-38 supra for a discussion of taking time to make a reviewable record.

\textsuperscript{144} See, e.g., Eggleston v. Chicago Journeymen Plumbers, at 895-904 (questions were racially offensive, repetitious and irrelevant); Pittsburgh Plate Glass Co. v. Allied Chem. Alkalai Workers, 11 F.R.D. 518, 518-19 (N.D. Ohio 1951) (plaintiff had already examined 23 witnesses, obtaining over 1,000 pages of information).

\textsuperscript{146} CR 31.01-.02.

\textsuperscript{147} CR 31.01(3).

\textsuperscript{148} However, “[t]he deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.” CR 31.01(1).

\textsuperscript{149} CR 31.02.

\textsuperscript{150} See, e.g., Meredith v. Wilson, 423 S.W.2d 519 (Ky. 1968) (depositions taken to preserve testimony when proceedings were suspended, pending outcome of appeal in another case). See also Martin v. Reynolds Metal Corp., 297 F.2d 49, 55 (9th Cir. 1961) (pre-action discovery and inspection).
\end{footnotes}
must be obtained from the court in both instances.\(^\text{151}\)

B. \textit{Suppression of Depositions}

"All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice."\(^\text{152}\) Likewise, a party who has received no notice of the deposition may object to its use against him, if the absence of notice deprived him of the opportunity of appearing at the deposition and cross-examining the deponent.\(^\text{153}\) An exception to this rule may arise when another party with identical interests and motive for cross-examining appeared and participated at the deposition.\(^\text{154}\) "Errors and irregularities" regarding the way in which a deposition is transcribed, "prepared, certified, sealed, indorsed, transmitted, filed or otherwise dealt with . . . under Rules 30 and 31 are waived unless a motion to suppress . . . is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained."\(^\text{155}\) Objections to the proponent’s failure to file,\(^\text{156}\) or give notice of the filing of the

\(^{151}\) CR 27.01(1) (before action—obtain leave of court by verified petition); CR 27.02 (pending appeal—obtain leave of court by motion).

CR 27, which mirrors FRCP 27, does not specifically authorize discovery as an aid to finding a lawsuit and framing a complaint. Such an action has been held to be improper use of the Federal Rule. See \textit{In re Boland}, 26 F.R. Serv.2d (Callaghan) 598 (D.D.C. 1978) (FRCP 27(a) is not a method of determining whether and against whom a cause of action exists).

\(^{152}\) CR 32.04(1).

\(^{153}\) See CR 32.07. Might it be argued that "day in the life" films are analogous to deposition, and ought to be admitted only after a showing that the opponent was given notice and an opportunity to monitor the making of the film? \textit{Cf.} Balian v. General Motors, 296 A.2d 317, 323-24 (N.J. Super. Ct. App. Div. 1972) (defendant prepared a film of an experiment and presented the film at trial. Plaintiff had no prior knowledge of the experiment or the film prior to trial. The court held that fundamental fairness required that plaintiff should have received notice and opportunity to monitor the experiment and the making of the film.) \textit{But see,} Grimes v. Employers Mutual Liability Insurance Co., 73 F.R.D. 607 (D. Ala. 1977) ("Day in the life" film admitted under F.R. Ev. 803(24)).

\(^{154}\) Ikerd v. Lapworth, 435 F.2d 197, 205 (7th Cir. 1970).

\(^{155}\) CR 32.04(4).

\(^{156}\) If the deposition has not been filed, counsel may argue that the opposing counsel knows the content of the deposition or has a copy, and cannot claim prejudice. \textit{C. Holley, Trial of a Civil Lawsuit (Nuts and Bolts) \S 4.13 (1978).} The court has some discretion with respect to admitting unfiled depositions. \textit{Cf.} Gish v.
deposition, may also be waived.\textsuperscript{167}

Any party may make a written request before the officer taking the deposition that the transcribed testimony be submitted to the witness for examination and signature.\textsuperscript{158} However, a deposition need not be signed absent a written request, and unsigned depositions may therefore be used for any purpose.\textsuperscript{159} If a request for signature has been made, a party may object to the admission of the unsigned deposition, but such objection must be advanced by way of a timely motion to suppress.\textsuperscript{160} In addition, death, illness or other excuses may justify use of an unsigned deposition if the testimony is relevant and important and no substantial showing of prejudice can be demonstrated.\textsuperscript{161}

In complying with a request to sign, the deponent will read the transcript and may request the officer to note changes to his testimony and his reasons for such changes; the deponent will then sign the deposition.\textsuperscript{162} In making changes to the transcript, the deponent may not cause the original testimony to be obliterated or rendered unreadable because both versions are admissible.\textsuperscript{163} Moreover, if further cross-examination is necessitated by the changes, it would seem logical that the opponent may reopen the deposition,\textsuperscript{164} or move to suppress.

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\textsuperscript{157} See Houser v. Snap-On Tools Corp., 202 F. Supp. 181, 188 (D. Md. 1962) (failure to notify plaintiff of filing of depositions was harmless because plaintiff's counsel saw depositions prior to trial.)

\textsuperscript{158} CR 30.05.

\textsuperscript{159} Id. If the deposition is not signed, the officer shall sign it and state the fact of the illness or absence of the witness or the refusal to sign together with the reason given. CR 30.05. The deposition may then be used unless, on a motion to suppress, the court holds that the reason for refusal requires rejection of the deposition. Id.


\textsuperscript{161} Bernstein v. Brenner, 51 F.R.D. at 11-13. See also CR 30.05.

\textsuperscript{162} CR 30.05.


\textsuperscript{164} Colin v. Thompson, 16 F.R.D. 194 (W.D. Mo. 1954); DeSeversky v. Republic Aviation Corp., 2 F.R.D. 113 (E.D.N.Y. 1941). Reporting costs may be ordered paid by deponent whose changes necessitated the additional session. Cf. 16 F.R.D. at 195.
press it.\textsuperscript{165}

It has been suggested in many cases that the opposing party may suppress a deposition if the witness dies or becomes incapacitated before his direct testimony has been tested by cross-examination.\textsuperscript{166} However, the modern view seems to be that, in civil cases, "the half-loaf of direct testimony is better than no bread at all."\textsuperscript{167} Accordingly, such deposition testimony has been admitted in a number of cases.\textsuperscript{168} In addition, the opponent's consent to an adjournment or suspension of the deposition prior to cross-examination may constitute a waiver in the event that the witness subsequently becomes disabled from testifying.\textsuperscript{169} That a party or witness reviewed and rehearsed the deposition questions and answers with counsel is, of course, no ground for suppression.\textsuperscript{170}

III. INTERROGATORIES TO PARTIES

Any party may serve written interrogatories on any other party; there is no restriction to "adverse" parties.\textsuperscript{171} "Interrogatories may . . . be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party."\textsuperscript{172} If interrogatories are served upon a corporation, partnership, association, or governmental agency they must be answered by an officer or an agent of such entity.\textsuperscript{173}

\textsuperscript{165} But see Allen & Co. v. Occidental Petroleum Corp., 49 F.R.D. at 340-41 (motion to suppress witness's changes or to conduct further cross-examination denied because changes were not in direct contradiction of vital point).

\textsuperscript{166} See, e.g., Continental Can Co. v. Crow Cork & Seal, Inc., 39 F.R.D. 354, 356 (E.D. Pa. 1965). But if the party who moves for suppression consented to a postponement of questioning there will be no suppression. \textit{Id}.


\textsuperscript{170} Hamdi & Ibrahim Mango Co. v. Fire Ass'n, 20 F.R.D. 181 (S.D.N.Y. 1957).

\textsuperscript{171} CR 33.01. Cf. Schlagenhauf v. Holder, 379 U.S. 104, 115 (1964) (rejecting a contention that examinations under FRCP 35 could be had only against an opposing party).

\textsuperscript{172} CR 33.01(1).

\textsuperscript{173} \textit{Id}. The entity selects the particular officer or agent who will respond to the
Interrogatories may relate to any matter within the scope of CR 26.02, and answers to interrogatories may be used to the extent permitted by the rules of evidence. In addition, interrogatories may request opinions or contentions calling for the application of law to fact, which should greatly increase the utility of interrogatories in narrowing the issues for trial.

Each interrogatory served on a party must be answered or objected to within thirty days, while a defendant has forty-five days after service of the summons and complaint upon him to serve his answers or objections. Objections must be specific; broad or general objections to groups of interrogatories are improper. Misleading and evasive answers "justify the court's viewing with suspicion the contentions of the party so answering," and answers such as "N/A" or "Don't recall" may lead to the imposition of sanctions. In addition unsigned or unsworn answers may be rejected by the court.

The prudent lawyer will attempt to answer interrogatories as fairly and completely as he or she can, and interpose timely and specific objections, rather than waiting for opposing counsel to institute enforcement proceedings. The Kentucky courts have held that pleadings may be stricken, or judgment entered, where a party fails to respond to interrogatories without seeking a protective order.

A party asked to respond to interrogatories has some options. He may answer on information and belief and state the


174 CR 33.02. Answers to interrogatories are not admissible on behalf of the answering party. Haskell Plumbing & Heating Co. v. Weeks, 237 F.2d 263, 267 (9th Cir. 1956). However, they may constitute admissions of a party opponent or declarations against interest, and may also be used for impeachment. See text accompanying notes 331-35 infra.


176 CR 33.01(2).


information upon which the answer is based.\textsuperscript{182} He may also deny any knowledge concerning a particular interrogatory, if he states the efforts made to acquire the knowledge.\textsuperscript{183} Finally, a party also has the option to produce business records in lieu of answers.\textsuperscript{184} Courts, however, must take care to insure that this device is not abused by parties who would dump a large number of documents on an opponent to avoid answering. In addition, this rule should not be relied on as a matter of course, since production of records may give an opponent more information than answers to the interrogatories.\textsuperscript{185}

Interrogatories are an excellent means of discovering the existence of documents and the identity of witnesses known to the answering party at the time the answers are served.\textsuperscript{186} However, the use of burdensome "form" interrogatories and irrelevant interrogatories has led to a number of reform proposals limiting the number that may be served in a given case.\textsuperscript{187} Kentucky now has a limit on the number of interrogatories which may be served without leave of court.\textsuperscript{188} It re-

\textsuperscript{182} Tinker & Rasor v. Pipeline Inspection Co., 16 F.R.D. 465, 467 (W.D. Mo. 1954).
\textsuperscript{183} Breeland v. Bethlehem Steel Co., 179 F. Supp. 464, 467 (S.D.N.Y. 1959). If the answering party is a corporation or other entity, it must submit all information available to the entity and its agents and employees. See Wycoff v. Nichols, 32 F.R.D. 370 (W.D. Mo. 1963). The current rule appears to require that a reasonable burden be imposed on the answering party to secure information that is readily available to him in answering interrogatories.
\textsuperscript{184} CR 33.03.
\textsuperscript{185} The responding party should always carefully screen documents produced under CR 34 or CR 33.03. See Ranney-Brown Distrib., Inc. v. E.T. Barwick Indus., 75 F.R.D. 3, 5-6 (S.D. Ohio 1977).
\textsuperscript{186} Cf. Thompson v. Mills, 432 S.W.2d 448 (Ky. 1968) (failure to include name of eye witness who would have given testimony adverse to that of witness called by the answering party led to grant of a new trial). But compare Fernandez v. United Fruit Co., 60 F.R.D. 82 (D. Md. 1970) (concerning "work product").
\textsuperscript{188} CR 33.01(3) reads:

(3) Each party may propound to a maximum of thirty (30) interrogatories
mains to be seen whether such an artificial limitation will prove to be "workable." Counsel should keep these concerns in mind when employing interrogatories, and insure that all questions are concise and pertinent to the subject matter of the litigation.

IV. PRODUCTION OF DOCUMENTS AND THINGS—ENTRY UPON LAND FOR INSPECTION

The Civil Rules provide for the discovery of documents, tangible things, and other real evidence. The 1971 amendments to the Civil Rules eliminated the requirement of "good cause" and brought Kentucky practice into conformity with federal procedure, so that this discovery device might operate extrajudicially. Basically, the rules now provide for discovery from a party upon service of a request to produce. These particular discovery rules do not govern discovery from non-parties, but discovery of documents and things from a non-party can be had by way of a subpoena duces tecum. While

and thirty requests for admission to each other party; for purposes of this Rule, each subpart of an interrogatory or request shall be counted as a separate interrogatory or request. The following shall not be included in the maximum allowed: interrogatories requesting (a) the name and address of the person answering; (b) the names and addresses of the witnesses; and (c) whether the person answering is willing to supplement his answers if information subsequently becomes available. Any party may move the Court for permission to propound either interrogatories or requests for admission in excess of the limit of thirty (30).


For assistance in the preparation of interrogatories see D. Danner, Pattern Interrogatories (1970). This five-volume set should be used for guidance, and not as a substitute for independent thought.


CR 34.03 suggests that an independent action may be brought against a nonparty for permission to enter land, or for other discovery, one is hard pressed to find any English or American authority for such discovery in the absence of a statute or rule, and it is doubtful that an implied right can be derived from the Civil Rule.

The Civil Rule now "authorizes the broadest sweep of access, inspection, examination, testing, copying, and photographing of documents or objects in the possession or control of another party" so long as the materials requested are within the scope of CR 26.02(2). If care has been taken to demand categories of documents or things that indicate on their face some relationship to at least one issue raised in the pleadings, and counsel has not demanded "too much," the "relevancy" requirement of the Civil Rules will be met.

Assuming that counsel has in mind the discovery of relevant and useful documents and things, he must determine if those items are in the "possession, custody, or control of an adverse party." "Control" has been construed broadly. For example, a party may be required to produce documents and things in the possession of the party's attorney (absent a legitimate objection on grounds of work product or privilege); an expert expected to be called at trial; liability insurer; 

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200 See W. BARTHOLOD, supra note 10, at 171. See Blatt v. Casa Blanca Cigar Co., 51 F.R.D. 312 (M.D. Pa. 1970). This is only a point of departure, however, since the Civil Rules require only relevancy to the "subject matter" of the action. See In re Folding Carton Antitrust Litig., 76 F.R.D. 420, 423 (N.D. Ill. 1977).
201 CR 34.01. Some cases have stressed that a "mere" witness should not be burdened with a subpoena demanding the production of documents which are also available from a party. See, e.g., Bada Co. v. Montgomery Ward & Co., 32 F.R.D. 208 (E.D. Tenn. 1963).
202 In re Ruppert, 309 F.2d 97 (6th Cir. 1962).

sister corporation;\textsuperscript{204} physician;\textsuperscript{205} or other nonparty, if the party has a legal right to obtain the documents.\textsuperscript{206}

The procedure for obtaining documents is as follows: "The request may . . . be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party."\textsuperscript{207} The most common procedure is for a party to employ interrogatories to locate and identify discoverable matter, followed by CR 34.02 requests for production.\textsuperscript{208} It is also possible for counsel to include a request for production in the notice of deposition sent to a party.\textsuperscript{208} Some courts have also permitted counsel to combine Rule 34 requests in the same document with Rule 33 interrogatories.\textsuperscript{210}

A request for production must set forth what is sought with "reasonable particularity," a flexible standard\textsuperscript{212} which will be met if the judge can say that a reasonable person would know what was desired.\textsuperscript{213} The items sought may be designated by individual item or by category.\textsuperscript{214} The request must also "specify a reasonable time, place, and manner of

\textsuperscript{206} See In re Folding Carton Antitrust Litig., 76 F.R.D. at 420 (holding that a "right" to withhold benefits still being received by former employees is an indicia of "control"). It has also been held that a party has control over income tax returns available from the Internal Revenue Service. Tollefson v. Phillips, 16 F.R.D. 348 (D. Mass. 1954); Reeves v. Pennsylvania R.R., 80 F. Supp. 107, 109 (D. Del. 1948). However, the request for production must be timely. Hedges v. Neace, 307 S.W.2d 564, 567-68 (Ky. 1957). As to bank account records, see Paramount Film Distrib. Co. v. Ram, 91 F. Supp. 778 (E.D.S.C. 1950).
\textsuperscript{207} CR 34.02(1).
\textsuperscript{208} See W. BARTHOLD, supra note 10, at 55-57.
\textsuperscript{209} CR 30.02(5).
\textsuperscript{210} Compare Haydock & Herr, supra note 193, at 260-61 and 4 Moore's Federal Practice at § 33.22, with F. James, Jr., Civil Procedure 194 (1965) (noting "fairly uniform judicial disapproval" of this technique) and C. Wright, Law of Federal Courts 580 (4th ed. 1983). For an example of this technique see S. Speiser, Lawsuit 178-79 (1980).
\textsuperscript{211} CR 34.02(1).
\textsuperscript{213} 8 C. Wright & A. Miller, supra note 197, at § 2211.
\textsuperscript{214} CR 34.02(1). For useful drafting techniques see W. BARTHOLD, supra note 10, at 165-76; Haydock & Herr, supra note 193, at 253.
making the inspection" and copying, which will ordinarily be the place where the documents are located.

The party served with a request must serve a written response within thirty days after service of the request, although a defendant may serve a response within forty-five days after service of the summons upon that defendant. The response must state that the inspection will be permitted as requested, or state an objection specifying both the questionable item or category and the reasons for the objection. If an objection is interposed, or if there is no response, or if inspection is otherwise impeded, the party seeking production may move the court for an order to compel pursuant to CR 37.01. The granting of such a motion is discretionary.

CR 34.01 was amended in 1971 to allow discovery of "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices," which suggests that the court may require the production of a data bank, or require production of input data for computers, in appropriate cases. The new rule also states that such data must be delivered in a "reasonably useful form," meaning that an opponent may not circumvent a production order by adopting business methods or indexing systems which hide relevant information and defeat

215 CR 34.02(1).
217 CR 34.02(2). "The court may allow a shorter or longer time." Id.
218 Id. A useful checklist of 14 common objections, with supporting authorities, may be found in Haydock & Herr, supra note 193, at 265-67. For an interesting opinion dealing with waiver of privileges by inadvertent production, see Ranney-Brown Distribs. Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3 (S.D. Ohio 1977).
219 CR 34.02(2).
220 But see Perkins v. Trailco Mfg. & Sales Co., 613 S.W.2d 855 (Ky. 1981) (since plaintiff produced circumstantial evidence to show that accident could have been caused by a defective trailer, it was error to deny a motion compelling manufacturer to produce certain specified documents for copying).

Failures to produce often result in preclusion orders. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897-98 (8th Cir. 1978). Failures to produce may also justify dismissal or default judgment. See CR 37.02(2)(c).

discovery.\textsuperscript{222}

CR 34.01 also provides for the sampling and testing of tangible things discoverable under CR 26.02. If the particular testing sought might result in the destruction of an item, prudent counsel will only proceed pursuant to a court order, with notice to all parties and other safeguards, to insure that any evidence gained thereby will be admissible at trial.\textsuperscript{223}

V. PHYSICAL AND MENTAL EXAMINATIONS

The procedures governing physical and mental examinations in Kentucky are contained in CR 35.01 and CR 35.02. These rules are similar to FRCP 35, although the absence of a statutory physician-patient privilege in Kentucky\textsuperscript{224} makes the waiver provision of FRCP 35(b)(2) unnecessary. CR 35.01 provides for a physical or mental examination, or examinations,\textsuperscript{225} "only on motion and for good cause shown."\textsuperscript{226} The examinee must be a party, or "a person in the custody or under the legal control of a party," whose physical or mental condition is "in controversy."\textsuperscript{227} The words, "in controversy" have broader meaning than the words "in issue,"\textsuperscript{228} but the scope of discovery allowed by CR 35.01 is much narrower than


FRCP 34(b) has also been amended to require production "as [the records] are kept in the usual course of business" or in an organized fashion corresponding to the categories of the request. This eliminates the abusive practice of "shuffling." Compare Underwood, supra note 50, at 657-58, n.156.

\textsuperscript{223} An excellent collection of state authorities on the subject of destructive testing can be found in Haydock & Herr, supra note 193, at 269-72.


\textsuperscript{225} In some situations it may be necessary for the party to undergo multiple examinations. See Vopelak v. Williams, 42 F.R.D. 387 (N.D. Ohio 1967) (change in condition after a prior examination); Marshall v. Peters, 31 F.R.D. 238 (S.D. Ohio 1962) (need for examinations by different specialists).

\textsuperscript{226} CR 35.01.

\textsuperscript{227} Id.

that allowed generally in CR 26.02. The author would recommend that counsel try to be present with his client when an examining physician takes the patient’s history, and note the time taken to perform any tests and the type of tests administered.

CR 35.02 contains the same rules regarding access to reports of examination as FRCP 35(b). Specifically, the party examined may request and obtain the reports of the examination, and of all earlier examinations of the same condition. However, by making this request, counsel gives the examining party an equal right to any reports of prior and subsequent examinations for the same condition. If counsel for the examinee has prior harmful reports that have not been discovered by the party requesting and conducting the examination, good strategy may dictate that he not request a report from the examining physician. CR 35.02 applies to examinations made by agreement of the parties, as well as to those made under court order, unless the agreement expressly provides otherwise.

Any time counsel deals with a physician he should refresh his recollection as to the applicability of the Interprofessional Code for Physicians and Attorneys. This Code provides guidelines for “professional courtesy” relating to discovery from physicians.

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230 Cf. Warrick v. Brode, 46 F.R.D. 427 (D. Del. 1969) (the court may allow a party’s personal physician to be present during the examination, although counsel may be excluded); Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D.C. Md. 1960); Whanger v. American Family Mut. Ins. Co., 207 N.W.2d 74 (Wis. 1973) (special circumstances such as hostility, reluctance or fear may create a situation where attendance of counsel at the examination may expedite the process).
231 CR 35.02. It should be noted that the party requiring an examination cannot shield the examining physician’s report by requesting only an oral report. Salvatore v. American Cyanamid Co., 94 F.R.D. 158 (D.R.I. 1982).
232 G. Vetter, supra note 13, at 191.
233 CR 35.02(2).
234 See National Interprofessional Code for Physicians & Attorneys (1975). See also Interprofessional Code (Fayette County Medical Society and Fayette County Bar Association) (governing discovery, court appearances, medical reports, subpoenas and compensation).
VI. REQUESTS FOR ADMISSIONS

Requests to admit are not, strictly speaking, discovery devices. Their real purpose is to obtain admissions that will remove issues from the litigation. As one court put it, their purpose is to "circumscribe contested factual issues in a case, either basic or ultimate facts" and not "to make discovery of the existence of facts, as such," although they may incidentally result in some discovery. The Kentucky Rules and Federal Rules are virtually identical.

Requests to admit may run only from one party to another party, and may not be served on nonparty witnesses. These requests must be written, and each one should be limited to a single matter so as to preclude an evasive response. The request should permit (and require) a "yes" or "no" answer, because any verbose, lengthy, or compound request may be stricken. Formerly, there was no limit on the number of requests or sets of requests that could be submitted, although excessive or burdensome requests could give rise to a valid objection in a proper case. However, the Rules have now been amended to limit the number of requests to thirty.

Generally, a party may serve a request on any other party at any time after the action is commenced; a defendant must

[235] Ironically, the request to admit is hardly ever used. See J. Levine, supra note 67, at 51.
[237] See CR 36.01.
[239] CR 36.01.
[240] Many tips for drafting requests and responses thereto may be found in W. Barthold, supra note 10, at 234-44; G. Vetter, supra note 13, at 151-59.
[244] See CR 33.01(3).
first be served with process, but the admission request may accompany the process. A party has thirty days to respond unless the court has ordered a longer or shorter time, but a defendant is given forty-five days after service of the summons upon him. Either an answer or objection must be filed within the time specified by the Rules, and failure to do so is automatically deemed an admission. Because court enforcement may be sought if a party seeks to avoid admission by frivolous or inadequate answers or denials, counsel must take care in responding to these requests.

A request to admit may be made as to any matters within the scope of CR 26.02 "that relate to statements or opinions of fact or of the application of law to fact." Clearly then, a request is not objectionable merely because it seeks admission of such information. Moreover, a request may run to disputed and crucial facts. Since CR 36.01(2) provides that a party may not object solely on the ground that the matter referred to presents a genuine issue for trial, he should be required to answer or concede the matter. Additionally, a party may not simply respond that he is unable to admit or deny, nor may he state that he does not know the answer, if such information is within his knowledge or he could inform

245 See CR 36.01(1).
246 CR 36.01(2).
248 CR 36.01(3).
249 CR 36.01(1). As to relevance, see Rogers v. Winchester Bldg. & Sav. Assoc., 293 S.W.2d 463 (Ky. 1956).
250 For the difficulty of determining the meaning of "admissible fact" under the rule before this clarifying language was added, see Lyons v. Sponcil, 343 S.W.2d 836 (Ky. 1961).
251 See McGonigle v. Baxter, 27 F.R.D. 504 (E.D. Pa. 1961) (requested admission not objectionable on ground that it sought admission of disputed issue of fact); United States v. Ehbauer, 13 F.R.D. 462 (W.D. Mo. 1952) (not valid objection that request was for admission of controversial fact). But cf. Lyons v. Sponcil, 343 S.W.2d at 836 (expressing some uncertainty on this point).
252 See FRCP 36 advisory committee notes to 1970 amendment.
himself with reasonable effort.\textsuperscript{253}

The party requesting admissions may move to determine the sufficiency of answers and objections.\textsuperscript{254} Accordingly, although requests to admit are not self-enforcing, a party may obtain an early resolution of the issues raised by his requests. The court may make appropriate determinations on motion, or defer decision until the pre-trial conference or a designated time prior to trial.\textsuperscript{255} If the court finds that the opponent has provided frivolous or evasive answers, it has several options. It may strike the answers or deem them admissions, order new answers, or order the answers to be taken as denials\textsuperscript{256} thus subjecting the party to potential sanctions under CR 37.03.\textsuperscript{257}

Admissions, failures to respond and evasive answers that are deemed admissions may be used as the basis for summary judgment or dispositive motions at trial.\textsuperscript{258} By the better view, an item actually admitted is conclusively established in the pending action, and the admission is not subject to contradiction\textsuperscript{259} unless the court permits withdrawal or amendment of

\textsuperscript{254}CR 36.01(3).
\textsuperscript{255}Id.
\textsuperscript{257}See CR 36.01(3). Theoretically, substantial sanctions are available for a wrongful denial of a request to admit. CR 37.03 provides that the court shall order the party who made a wrongful denial to pay the reasonable expenses and attorney fees incurred in proving the denied matter, unless the matter was unimportant or subject to denial in good faith. However, experience suggests that the party requesting an award of costs will find that this sanctioning mechanism is impractical if only a general verdict has been returned. See J. Levine, supra note 67, at 51 (suggesting that the requesting party will ordinarily fail to obtain costs in the absence of a special verdict or interrogatories as to specific facts and documents).
\textsuperscript{258}See Commonwealth ex rel. Matthews v. Rice, 415 S.W.2d 619-20.
the answer. In jury trials, requests must be formally offered into evidence to be considered; in non-jury cases no formal admission is required if the parties know the court is going to consider the requests and answers, and they have an opportunity to object.

VII. SUPPLEMENTATION OF RESPONSES

CR 26.05, which is identical to FRCP 26(e), provides that there is no duty to supplemental responses to discovery with after-acquired information, except in certain limited situations. Because the rule now addresses the problem of supplementation with specific exceptions to a "no duty rule," a party should not be able to expand the duty merely by making a unilateral demand for supplemental responses in a pre-amble to his discovery request.

CR 26.05(a)(i)-(ii) list the most common instances in which supplementation is appropriate as a matter of course: where a request calls for the identity and location of persons

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262 CR 26.05 states:
(a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
(b) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.
Counsel should note that CR 93.04(2) has changed the limited duty rule to an across-the-board requirement of supplementation of all prior responses for those circuits using the Special Rules.
263 CR 26.05.
having knowledge of discoverable matter, or where a request seeks information concerning expert trial witnesses. In connection with experts, the rule requires supplementary responses or discovery, where a witness changes his opinion after being deposed.\textsuperscript{265} In other words, the rule is not, by its terms, limited to responses to interrogatories.\textsuperscript{266}

CR 26.05(b) has been held to require, or permit, supplementation only when nondisclosure would amount to knowing concealment.\textsuperscript{267} The duty to supplement responses may be expanded by court order or agreement, and a party may make new requests for supplementation prior to trial.\textsuperscript{268} Pre-trial is an appropriate time to routinely seek supplementation.\textsuperscript{269}

The trial court has inherent power to enforce the provisions of the rule by preclusion orders or other sanctions. Whether or not such sanctions should be imposed rests in the discretion of the court.\textsuperscript{270} Among the factors to be considered are: any explanation for the failure to supplement a prior response; the importance of the evidence or testimony that might otherwise be excluded; the time needed to respond to the surprise evidence (including the possibility of a continuance); and the degree of prejudice to the party entitled to the supplemental response that was not forthcoming.\textsuperscript{271}

**VIII. Failure To Make Discovery—Sanctions**

Much of the recent attention given to “discovery abuse” has focused on unjustified resistance to legitimate discovery requests,\textsuperscript{272} as opposed to the problem created by “too much” discovery.\textsuperscript{273} CR 37.01 through CR 37.06 now provide an array

\textsuperscript{265} See CR 26.05(a)(i).
\textsuperscript{266} Voegeli v. Lewis, 568 F.2d 89, 96-97 (8th Cir. 1977).
\textsuperscript{267} Havenfield Corp. v. H & R Block, Inc., 509 F.2d 1263 (8th Cir.), cert. denied, 421 U.S. 999 (1975).
\textsuperscript{268} CR 26.05(c).
\textsuperscript{269} G. Vetter, supra note 13, at 267.
\textsuperscript{270} See Phil Crowley Steel Corp. v. Macomber, Inc., 601 F.2d 342 (8th Cir. 1979).
\textsuperscript{271} See Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232, 234-35 (5th Cir. 1981).
\textsuperscript{272} For a collection of authorities, see Underwood, supra note 50, at 625.
of sanctions to be imposed on "stone-walling" parties. Ironically, statistical evidence collected in other jurisdictions with similar rules suggest that judges have been reluctant to impose sanctions, and attorneys have been reluctant to invoke them.

Courts and commentators have increasingly come to view the imposition of severe sanctions as a necessary means of deterring "other parties to other lawsuits" from resisting discovery on insubstantial grounds. Following the amendments of the Federal Rules, the Kentucky Civil Rules were amended to eliminate language suggesting that a finding of "wilfulness" must precede the imposition of severe sanctions. Accordingly, it is appropriate to catalog the available sanctions and generally review instances in which severe sanctions may be appropriate.

In practice, the party seeking to compel discovery and invoke sanctions against his opponent will usually proceed in two steps: he will move for an order compelling discovery that has been refused, and then move for sanctions based on disobedience of the order. Such a motion compelling discovery is appropriate if:

1. a deponent fails to answer a question submitted or propounded in a deposition on oral examination, or on written questions;

2. "a corporation or other entity fails to make a designation under Rule 30.02(6) or 31.101(2)"; or


277 For decisions under the prior rule see Armstrong v. Biggs, 275 S.W.2d 60 (Ky. 1955) (old rule 37.05); Naive v. Jones, 353 S.W.2d 365, 366 (Ky. 1961). "Wilfulness" will presumably still play a role in determining the severity of the sanctions imposed in any given case.

278 See CR 37.02(2).
(3) a party fails to answer an interrogatory or a request for production or inspection.\textsuperscript{279}

The party seeking discovery may move for an order compelling the discovery sought in the court in which the action is pending, or on matters relating to a deposition, in "the court of equivalent jurisdiction in the county where the deposition is being taken."\textsuperscript{280} The only downside risk usually faced by either party at this point is the possibility that the expenses of a successful motion, or the expenses of opposing an unsuccessful motion may be asserted against the losing party.\textsuperscript{281} Even though CR 37.01(d) provides that expenses, including attorney's fees, \textit{shall} be assessed unless the losing party demonstrates that his action was substantially justified, the tenor of the rule is all too frequently ignored, at least in the author's experience. While it is true that the language of the rule commits an award of expenses and fees to the discretion of the trial judge,\textsuperscript{282} the language of the rule requires the court to address the issue of abuse.\textsuperscript{283}

In addition to an award of expenses and fees, CR 37.04 provides for other, more substantial measures,

(1) [i]f a party or an officer, director, or managing agent of a party or a person designated under Rule 30.02(6) or Rule 31.01(2) to testify on behalf of a party fails (a) to appear before the officer who is to take his deposition . . . or (b) to serve answers or objections to interrogatories submitted under Rule 33 . . . or (c) to serve a written response to a request for inspection submitted under Rule 34.\textsuperscript{284}

The court in which the action is pending may order that cer-

\begin{footnotesize}
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\item \textsuperscript{279} CR 37.01(b).
\item \textsuperscript{280} CR 37.01(a).
\item \textsuperscript{281} See CR 37.01(d). On awards of attorney fees against counsel, see Roadway Express, Inc. v. Piper, 447 U.S. at 764-67.
\item \textsuperscript{282} See CR 37.01(d)(i)-(ii). \textit{Cf.} E.I.C., Inc. v. Bank of Va., 582 S.W.2d 72, 75-76 (Ky. Ct. App. 1979) (CR 37.02, which includes sanctions for failure to comply with an order pursuant to CR 37.01, allows for trial judge's discretion; however, any expenses awarded must be justified).
\item \textsuperscript{283} See CR 37.01(d). \textit{Cf.} E.I.C., Inc. v. Bank of Va., 582 S.W.2d at 72. As a corollary, the trial judge must state his reasons for imposing sanctions. Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 503-05 (4th Cir. 1977), \textit{cert. denied}, 434 U.S. 1020 (1978).
\item \textsuperscript{284} CR 37.04(1).
\end{itemize}
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tain facts be taken as established in accordance with the claim of the party prevailing on motion; (2) that a party be barred from supporting or opposing designated claims or defenses or introducing evidence thereon; (3) that pleadings or parts thereof be stricken; or (4) that a default be entered against the recalcitrant party.

Severe discovery sanctions are much more likely to be imposed if a party fails to comply with an order obtained pursuant to CR 37.01. CR 37.02 states that a party who fails to obey an order to provide discovery may be held in contempt and may suffer a variety of penalties including the dismissal of the case or a default judgment, and an award of expenses, including attorney's fees. The severe sanction of default judgment is held to be warranted only in rare circumstances, and a party's statements in explanation of his failure to comply will be accepted as true in the absence of contrary evidence. However, courts are utilizing the more extreme sanctions with increasing frequency.

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285 CR 37.02(2)(a)-(c). See Benjamin v. Near E. Rug Co., 535 S.W.2d 848 (Ky. 1976) (striking answer and entering default for failure to answer interrogatories). But cf. Miller v. Watts, 436 S.W.2d 515 (Ky. 1969) (order to answer interrogatories coupled with the grant of a continuance); Armstrong v. Biggs, 275 S.W.2d 60 (Ky. 1955) (abuse of discretion not to allow more time). Counsel should consider the malpractice claims that might arise from such rulings. Barthold, 'Negligence' in Discovery: No Paper Tiger, 6 Litigation, Fall 1979, at 39.

286 CR 37.02(2)(c).

287 See CR 37.02(1) (failure to be sworn or answer a question after being directed to do so by the court); CR 37.02(2)(d) (contempt penalty for failure to obey any discovery orders, except an order to submit to a physical or mental examination). See also Annot., 8 A.L.R. 4th 1181 (1981).


289 CR 37.03 (not just fees for a motion, but for the defense of the entire action). Roadway Express, Inc. v. Piper, 447 U.S. at 764. CR 37.05 provides that expenses and attorney fees may not be awarded against the Commonwealth. However, that does not mean that government counsel are immune from the imposition of sanctions. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1370-71 (9th Cir. 1980).

290 See Nowicke v. Central Bank & Trust Co., 551 S.W.2d at 811.

291 Id.

While this Article was being written, proposals were pending to amend the Federal Rules. Those proposals, which provided a more flexible and objective standard of culpability for the imposition of discovery sanctions against parties and counsel, have now been adopted. It is entirely possible that similar rules may be adopted in Kentucky sometime in the future.

IX. USE OF DEPOSITIONS AND OTHER DISCOVERY PRODUCT AT TRIAL

The rules and mechanics relating to the use of depositions and other discovery product at trial are the subject of frequent misunderstanding. Any discussion of the subject should begin with the use of depositions.

\[2193\] See FRCP 26(g) (effective Aug. 1, 1983), which provides:

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is:

1. consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

\[294\] See generally C. WRIGHT & A. MILLER, supra note 197, at §§ 2141-57.

\[295\] The following chart summarizes the federal and state rules relating to the use of depositions.
A. Substantive Use of a Party's Deposition

A deposition may sometimes be used as substantive evidence, to prove an essential element of a litigant's case at trial. In addition, a deposition may be used to contradict or impeach the trial testimony of a witness. The specific rules relating to these "uses" are set forth in CR 32.01.

A litigant's right to use deposition testimony for substantive purposes is in part dependent upon the status of the deponent. For example, CR 32.01(b) provides that "the deposition of a party . . . may be used by an adverse party for any purpose," that is, for proof of the matter asserted therein or for impeachment. This rule is consistent with the admissibility of party-opponent admissions. If the proponent of the deposition evidence of an adverse party has complied with all the formalities in the taking, completion and return of the deposition, or if any defects have been waived, and if the deposition is not otherwise objectionable under the rules of evi-

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TAKING AND USE OF DEPOSITIONS — STATE AND FEDERAL*

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*Courtesy of Prof. William Fortune, College of Law, University of Kentucky.

296 See CR 32.01.
297 CR 32.01(a).
298 See Blumenkopf, supra note 103, at 248-51.
299 CR 32.01(b) (emphasis added).
300 See White v. Crawford, 346 S.W.2d 308, 310 (Ky. 1961); Schoenbaechler v. Louisville Taxicab & Transfer Co., 328 S.W.2d 514 (Ky. 1959).
The deposition may be read to the jury, in whole or in part, as substantive evidence. This may be done while the adverse party is on the stand, or at some other point in the litigant's case in chief. Counsel might proceed as follows: "Your Honor, at this time I would like to read from Mr. X's deposition which was taken under oath on ___ pursuant to the Civil Rules, with opposing counsel present, beginning at page ___ line ___." [At this point the judge will presumably give a standard jury instruction on deposition testimony.] It must be remembered that the mere filing of a deposition does not make it part of the record. The deposition must be introduced into evidence in the above manner.

B. Substantive Use of a Nonparty's Deposition

If the deposition is that of a nonparty witness, the use of deposition testimony as substantive evidence is more restricted. Specifically, the deposition of a nonparty witness may only be read "for any purpose" if one of twelve conditions has been established. Subsection (i) is by far the most

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301 See CR 32.02-32.03. See also Cox v. Louisville, 439 S.W.2d 51, 55 (Ky. 1969).
302 CR 32.01(b). See White v. Crawford, 346 S.W.2d at 310 (introduction of depositions of an adverse party as substantive evidence has long been recognized).
303 Counsel may read both the questions and answers, or if the adverse party is not on the stand he may read the questions and have co-counsel or a legal assistant take the stand to read the answers. See Blumenkopf, supra note 103, at 250-51.
304 C. Holley, supra note 156, at § 4.16 form C.
305 See C. Wright & A. Miller, supra note 197, at § 2142.
306 See Salsman v. Witt, 466 F.2d 76 (10th Cir. 1972). But see Pfau v. Witcover, 139 F.2d 588 (4th Cir. 1943) (deposition admitted by implied consent). Cf. Mid-Southern Toyota Ltd. v. Bug's Imports, Inc., 453 S.W.2d 544, 550 (Ky. 1970) (formal admission into evidence has no significant purpose in the case of trial by the court, as distinguished from the case of a jury trial, so long as the parties know that the court intends to consider the admissions or answers as evidence, and the parties are given the chance to make objections to its admissibility).
307 Substantive use of a non-party's deposition is allowed if:
   (i) [The witness] is at a greater distance than 100 miles from the place where the court sits in which the action is pending or out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (ii) [The witness] is the Governor, Secretary, Auditor or Treasurer of the State; or (iii) [The witness] is a judge or clerk of court; or (iv) is a postmaster; or (v) a president, cashier, teller or clerk of a bank; or (vi) is a practicing physician, dentist or lawyer; or (vii) is a keeper, officer or guard of a penitentiary; or (viii) is dead; or (ix) is of unsound
important provision of CR 32.01 since it permits a witness’s deposition testimony to be used as substantive evidence if the witness “is at a greater distance than 100 miles from the place where the court sits in which the action is pending, or out of the State.”308 If this condition of admissibility is established, the witness need not have been subpoenaed.309 The only limitation is that the absence of the witness must not have been “procured” by the party offering the deposition. “Procured” has been construed to encompass an unfair and deliberate attempt to cause the witness to absent himself from the trial.310 Assuming that there has been no such collusion, there is no requirement that the witness live more than 100 miles from the place of trial.311 He need only be 100 miles from the place of trial when the deposition is offered.312 However, the court may inquire into the legitimacy of the witness’s absence.313

Under the better view, a party should also be permitted to offer his own deposition testimony under this rule, if, for example, he resides more than 100 miles from the place of trial.314 However, several decisions have held that a party may

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308 The word “is” is italicized to highlight the fact that if the witness is present at trial, then his deposition may not be used as substantive evidence. See Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974). See also Higgs’ Ex’x v. Higgs’ Ex’x, 150 S.W.2d 681 (Ky. 1941); Stevens’ Adm’r v. Watt, 99 S.W.2d 753 (Ky. 1936) (both decisions pre-rule).


311 Neckwear Corp. v. First Nat’l City Bank, 275 F.2d 295 (1st Cir. 1960); State v. Long, 344 So. 2d at 758-59.


313 See, e.g., Vevelstad v. Flynn, 230 F.2d 695 (9th Cir. 1956).

not be allowed to exercise an option between presenting his case by deposition or by oral testimony by the simple expedient of either attending or not attending his trial.\textsuperscript{315}

Because of the ease of transportation in modern times, and in order to avoid trivial disputes as to which are the ordinary, usual, and shortest routes of travel, the better construction of the Rule would be that the 100 mile distance from the courthouse be measured “as the crow flies.”\textsuperscript{316} In addition, the preference for live testimony should demand that the witness appear and testify if the location where the witness is regularly working at the time of trial is less than 100 miles from the courthouse, even though the witness resides more than 100 miles from the place of trial.\textsuperscript{317}

Assuming that a witness’s deposition may be used in lieu of testimony,\textsuperscript{318} the mechanics for its introduction are the same as have been previously set forth for the deposition of an adverse party.\textsuperscript{319} It should be noted that, although the rule states that “any part or all of a deposition, so far as admissible under the rules of evidence . . . may be used,”\textsuperscript{320} it is better practice for trial counsel to specify those portions he deems relevant and to offer only those in evidence.\textsuperscript{321} CR 32.01(d) provides a safeguard to the adverse party by allowing him to require the introduction of other parts of the deposition which ought in fairness to be considered with the party introduced,\textsuperscript{322} or to offer them himself,\textsuperscript{323} assuming that such “other parts” are admissible under the rules of evidence.\textsuperscript{324}

\textsuperscript{317} See SCM Corp. v. Xerox Corp., 77 F.R.D. 16, 18 (D. Conn. 1977).
\textsuperscript{318} Kentucky cases require a specific finding of unavailability under CR 32.01(c). See, e.g., Boehm v. Hismeh, 421 S.W.2d at 838; Commonwealth v. Transamerican Freight Lines, Inc., 388 S.W.2d 574, 576 (Ky. 1965). See also Phelps Roofing Co. v. Johnson, 368 S.W.2d 320, 324 (Ky. 1963) (trial court allowed reasonable discretion).
\textsuperscript{319} See text accompanying notes 304-06 supra.
\textsuperscript{320} CR 32.01.
\textsuperscript{321} See Pursche v. Atlas Scraper & Eng’g Co., 300 F.2d 467, 488 (9th Cir. 1961). To avoid unnecessary interruption, counsel should secure in limine rulings on all objections. Blumenkopf, supra note 106, at 250.
\textsuperscript{322} See Armstrong v. McGuire, 283 S.W.2d 366, 367 (Ky. 1955).
\textsuperscript{323} See Thomas v. Gates, 399 S.W.2d 689, 691 (Ky. 1966).
\textsuperscript{324} See Long v. Scheffer, 316 S.W.2d 375, 377 (Ky. 1958).
C. Use of a Deposition for Impeachment Purposes

The deposition of a witness, including a party, may be used by any party for the purpose of contradicting or impeaching the deponent-witness. The proper technique for using the deposition for this purpose proceeds as follows.

First, the cross-examiner should lock the witness into his testimony on direct by repeating it to him and securing his agreement as to its substance, if not the witness's exact language. Then counsel should accredit the impeaching vehicle (the deposition) by asking the following series of questions:

Q: Your deposition was taken in this case on ____, correct?
Q: [To a party or represented witness] You were represented at your deposition by Mr. ____, correct?
Q: You were given the opportunity to read the deposition, correct?
Q: You were given the opportunity to make corrections to your testimony, correct?
Q: And you read the deposition, correct?
Q: And you made corrections to that testimony, correct?
Q: And you then signed the deposition before a notary public, correct?

After the jury has been suitably impressed with the circumstances under which the witness's prior inconsistent statement was elicited, counsel should then confront the witness with his former testimony by asking him if the "following question was asked and the following answer given." Counsel may read the question and answer himself, or ask the witness to read it. A witness that has been impeached by a prior inconsistent statement must be confronted with the statement, and be given an opportunity to explain the inconsistency. It should

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325 CR 32.01(a).
327 See Blumenkopf, supra note 103, at 249-50. See also C. Holley, supra note 156, at § 4.13. Technically, this catechism need not be followed if the witness is an adverse party, but it is recommended.
328 Some attorneys recommend the latter technique on the theory that the witness cannot read and fabricate an explanation for the inconsistency at the same time.
329 See CR 43.08. See also Sallee v. Ashlock, 438 S.W.2d 538, 542 (Ky. 1969); White v. Piles, 589 S.W.2d 220, 223 (Ky. Ct. App. 1979).
be remembered that in Kentucky, a witness’s prior inconsistent statement is admitted as substantive evidence, as well as for impeachment. 330

D. Use of Other Discovery Product at Trial

"Answers [to interrogatories] may be used to the extent permitted by the rules of evidence." 331 They may, therefore, be admitted against the answering party, 332 but may not be offered by him. 333 They must, in any event, be offered in evidence, in the following manner:

"Your Honor, at this time I wish to publish to the jury [the party’s] sworn responses to interrogatories, served ____, numbers _____. [There being no objection] . . .

Ladies and gentlemen of the jury, on such a date under the Civil Rules under which we operate the following questions were submitted in writing to [the party]. [The party] answered these questions in writing under oath. I will read you the question(s) and then the answer(s)." 334

Answers to interrogatories may, of course, also be used to impeach a party witness. 335

A party’s responses to requests to admit under CR 36.01 336 are admitted into evidence and read to the jury in the same manner as interrogatories. 337

331 CR 53.02(1).
332 See Gridiron Steel Co. v. Jones & Loughlin Steel Corp., 361 F.2d 791, 794 (6th Cir. 1966); Haskell Plumbing & Heating Co. v. Weeks, 237 F.2d 263, 267 (9th Cir. 1956).
333 Haskell Plumbing & Heating Co. v. Weeks, 237 F.2d at 267.
336 For a discussion of requests to admit see text accompanying notes 235-61 supra.
337 See C. HOLLEY, supra note 156, at § 4.16. It has been held that in a nonjury case formal admission is not necessary if both parties know the court intends to consider the admissions or answers as evidence and are afforded an opportunity to object to their admissibility. Mid-Southern Toyota, Ltd. v. Bug’s Imports, Inc., 453 S.W.2d
X. Discovery Reform: Special Rules of the Circuit Court for the Economical Litigation Docket

Dissenting from the adoption of several 1980 amendments to the Federal Rules of Civil Procedure, Justice Powell opined: "Lawyers devote an enormous number of 'chargeable hours' to the practice of discovery . . . . [A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent." Most of the attention given to problems of delay and discovery abuse in federal and state courts in recent years has been generated by instances of outright suppression of discoverable evidence. Many of these abuses can be dealt with adequately by a sanctioning mechanism. The more troublesome problems may be attributed to counsel who use discovery for fishing expeditions, . . . who delay completion of discovery, and who force undue expense on opposing counsel by extensive interrogatories, by requests for production of unnecessarily large numbers of documents, and by production of documents in large, unorganized lots in response to interrogatories and production requests.

As one commentator noted, it is much more difficult to identify and regulate excessive discovery than it is to identify and deter unjustified resistance to discovery.

It is exceedingly difficult to legislate or make effective rules against overkill. Who is to say that two depositions or ten are excessive in the context of a given action? A case involving a relatively small amount may be very important to either of the parties because of its potential as precedent.

544 (Ky. 1970).


339 See generally Underwood, supra note 50, at 625.

340 See id. at 629.


Presumably in response to persistent claims of discovery abuse, the Supreme Court of Kentucky has adopted the experimental Special Rules of the Circuit Court for the Economical Litigation Docket, to be applied “only in those circuits or divisions thereof specified by order of the Supreme Court.” These rules limit the number of depositions and interrogatories that may be employed in a case and emphasize a greater role for the judicial officer in controlling and expediting discovery, thereby introducing preventive as opposed to a wholly sanctions-oriented approach to the problem of “too much” discovery. For convenience of reference, the Special Rules are set forth here in their entirety.

**Special Rules of the Circuit Court for the Economical Litigation Docket**

**Rule 88. Scope of Rules Relating to the Economical Litigation Docket**

Rules 89 through 97 shall apply only in those circuits or divisions thereof specified by order of the Supreme Court.

**Rule 89. Economical Litigation Docket**

(1) The economical litigation docket shall consist of all cases falling substantially within the following categories:

(a) contracts;
(b) personal injury;
(c) property damages;
(d) property rights;
(e) termination of parental rights.

(2) Practice and procedure for cases on the economical litigation docket shall be governed by Rules 1 through 87 and the local rules of the trial court except as modified by Rules 89 through 97 relating to the economical litigation docket.

**Rule 90. Discovery and Status Conference**

(1) A discovery and status conference shall be held in each case for the purpose of scheduling each event in the case and determining the period of time necessary to com-

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343 For a survey of the new rules see Note, Economical Litigation: Kentucky’s Answer to High Costs and Delay in Civil Litigation, 71 Ky. L.J. 647 (1982-83).


345 See CR 90, 93.01-.02.
complete discovery. The conference shall be set within fifteen (15) days after service of the last responsive pleading or the last day a responsive pleading could have been served. A date for pretrial conference shall be set for a date not more than sixty (60) days following the discovery and status conference and a trial date shall be set not more than thirty (30) days after the pretrial conference. However, in the discretion of the trial judge these times may be extended or reduced to meet the needs of the individual case.

(2) Motions for exceptions to the rules of the economical litigation docket relating to discovery must be made at the discovery and status conference.

(3) All parties shall be represented at the discovery and status conference and shall be prepared to have firm dates set for the pretrial conference and the trial.

Official Commentary: The discovery and status conference is essentially a planning conference. It is at this meeting with all the parties and the trial judge that the progress of discovery is planned, the period necessary to complete discovery established and the date for the pretrial conference set.

CR 90 appears to embody the philosophy of new FRCP 26(f), which was adopted in 1980. The discovery conference provides a mechanism for avoiding the "natural weaknesses" of the old "protective order" system ("piecemeal presentation of problems, delay of judicial rulings, and inadequacy of sanctions") by allowing the court to intervene at an early stage and insure that discovery will proceed in an orderly and economical fashion.346

Rule 91. Telephone Conferences
At the discretion of the trial judge, any motion may be heard and any conference may be held by a telephone conference call among the trial judge and counsel for the respective parties.

Rule 92. Motions; Enlargement of Time; Summary Judgment
(1) Except as provided in Rule 91, motions respecting cases on the economical litigation docket shall be heard at the court's regular motion hour.

(2) Motions for enlargement of time or continuances shall state the reasons therefore and will be granted only for good cause. Agreed orders pertaining to such matters will not be accepted.

(3) Motions for summary judgment must be made (10) days prior to the pretrial conference.

Rule 93. Discovery

Rule 93.01. Depositions

Depositions are permitted as a matter of parties only. The plaintiff shall be required to give his deposition before any other discovery takes place unless the defendant elects not to examine the plaintiff or the court otherwise directs. Except as otherwise ordered by the court, a deposition of a witness shall be permitted only if it will be introduced at trial according to the provisions of Rule 32.01.

Official Commentary: The taking of depositions is restricted by this rule. Depositions are to be taken only of parties and of witnesses who will not appear at trial and whose depositions may be introduced under the provisions of Rule 32.01. The plaintiff is required to give his deposition before any other discovery in order to give the defendant the opportunity to examine the plaintiff regarding the merits of the cause of action. Motions for exceptions to Rule 92 must be raised at the discovery and status conference.

CR 93.01 is extraordinary, inasmuch as most claims of discovery abuse have arisen from the use of interrogatories and requests to produce. The rule appears to limit the availability of depositions taken for the sake of facilitating impeachment and cross-examination, contemplating that nonparty depositions be taken only if they will be used in lieu of testimony under CR 32.01(c).Presumably, the rule is aimed at attorneys who depose every witness, whether the deposition is necessary or not, perhaps to wear down an impecunious opponent. In addition, the rule prescribes a new and rigid priority for the taking of depositions. It is submitted that a better approach to "too much" discovery is provided in amended

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347 See CR 93.01. For a different reading of the Rule see Note, supra note 343, at 658-59.

348 See CR 93.01. Compare CR 93.01 with CR 26.02 and FRCP 26(d) (only Special Rule imposes priority rules).
Federal Rule 26(b).\textsuperscript{340}

Rule 93.02 Interrogatories

The scope and manner of discovery by means of interrogatories shall be governed by Rule 33, except that the interrogatories to any party shall not exceed twenty (20) in number, each of which shall be limited to a single question.

The suggestion that abuses of "wall-street interrogatories" be curbed by a rule limiting interrogatories to an artificial number is hardly new.

Rule 93.03 Production of Documents and Things and Entry upon Land for Inspection and Other Purposes

Procedures respecting the production of documents and things and entry upon land for inspection and other purposes shall be as provided in Rule 34, except that notwithstanding the provisions of Rule 34.02(2), the party upon whom the request is served shall permit the inspection or copying of documents or other things or allow the entry upon land as the case might be within fifteen (15) days after service unless an objection is filed within that period. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37.01 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.

Official Commentary: Rules 93.02 and 93.03 are for the purpose of expediting discovery. They provide for the prompt exchange, access and inspection of evidence and for the prompt appearance for examination. Only upon objection is

\textsuperscript{340} FRCP 26(b) provides:
The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

the court called upon to intervene.

Rule 93.04 Exchange of Information

(1) Not later than ten (10) days prior to the pretrial conference each party shall disclose the following material to all other parties with a copy to the court:

(a) Name, address and telephone number of any witness whom the party may call at trial together with a copy of any statement of such person or if there is not such statement, a summary of the testimony the person is expected to give.

(b) A description, drawing or photograph of any physical evidence which is to be presented at trial.

(c) A copy of any document or writing which is to be presented at trial.

(d) A brief summary of the qualifications of any expert witness the party may call at trial together with a report or statement of any such expert witness which sets forth the subject matter of the expert witness' anticipated testimony; the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

(e) A statement summarizing each contention in support of every claim or defense which the party will present at trial and a brief statement of the facts upon which the contentions are based.

(f) Offers of stipulation.

(g) A concise statement of each issue of law and each issue of fact recognized by the party.

(2) Each party is under a continuing duty promptly to supplement all prior discovery or pretrial disclosures rendered pursuant to this Rule 93.04 with any pertinent after-acquired information.

(3) Parties are required to refine issues that are to be tried in the case. If an order of stipulation is rejected and the matter is subsequently proved at trial, the rejecting party shall be subject to sanctions according to Rule 96.

Official Commentary: The Economical Litigation Docket is intended to promote prompt and inexpensive discovery. By the exchange of the information outlined in Rule 93.04, both objectives are attained. The emphasis is on free exchange of information between counsel as opposed to the more expensive and time-consuming adversarial discovery proceedings such as deposition. The exchange of this information prior to the pretrial conference should promote the narrowing of
issues and encourage settlements.

CR 93.03 speeds up the procedures for the production of documents, although it is unclear whether its time limits are workable when a request to produce accompanies or follows close on the heels of the complaint. CR 93.03 and CR 93.04 appear to be aimed at providing a mechanism for automatic, mandatory discovery similar to what has been available in England since 1965.350 In addition, CR 93.04 is consistent with certain proposals that we modify our "adversary" model to provide more (and more "civil") discovery.351 Some of its subdivisions appear sensible. For example, although nonparty witness statements are trial preparation materials that may not be discovered absent a showing of substantial hardship,352 a nonparty witness may obtain his own statement under CR 26.02(3)(b). Since he may do so at the urging of a party, the first clause of CR 93.04(1)(a) is not particularly radical.353 On the other hand, one might question the utility of rules which cut too deeply into "work product"354 and place too great a burden on counsel, by requiring counsel to supplement all discovery responses, and conduct, in essence, a pretrial trial.355 Along the same lines, the new rule may ultimately lead to an increase in collateral "litigation" involving the enforcement of its provisions, unrelated to the merits of the case.356

352 CR 26.02(3)(a).
353 The same may be said of CR 93.04(1)(d). Compare id. with CR 26.02(4)(a)-(b).
354 The second clause of CR 93.04(1)(a), dealing with summary of testimony, is one example of such a rule.
355 See McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (striking down a local rule governing pretrial that was overly complicated and burdensome). CR 93.04(1)(e) not only threatens to swallow the "work-product privilege," but is also unduly burdensome and unenforceable. CR 93.04(2) attempts to sweep aside the balanced approach to supplementation of responses contained in CR 26(e). Similarly, one might ask how, as a practical matter, costs are to be apportioned under subsection CR 93.04(3). See note 257 supra for discussion of this in the context of requests to admit.
356 Cf. Rosenberg, Discovery Abuse, 7 Litigation, Spring 1981, at 8. "What haunts me is the possibility that we are just breeding a lot of lawsuits by trying to enforce the procedural regulations through elaborate sanctioning mechanisms, which themselves breed lawsuits." Id. at 9.
Rule 94. Certificate of Compliance

A certificate of compliance with Rule 93 shall be filed by each party upon the completion of discovery. Official Commentary: This rule merely requires a simple certification (one sentence will suffice) that the special rules have been followed. An AOC form may be obtained from the court.

CR 94 dovetails FRCP 26(g), which provides that counsel's signature on a discovery request or response constitutes a certificate and the basis for sanctions for noncompliance. However, the Kentucky Rule does not provide any test for assessing compliance and attorney "culpability."\(^{387}\)

Rule 95. Pretrial Conference

A pretrial conference shall be scheduled in all cases at the discovery and status conference. The pretrial conference shall be for the purpose of:

(a) Simplifying the issues and agreeing upon the issues of law and upon the issues of fact to be tried.
(b) Exploring the possibility of settlement.
(c) Disposing of all remaining motions.
(d) Considering amendments to pleadings.
(e) Exploring possible admissions of fact and documents that will avoid unnecessary proof.
(f) Limiting the number of expert witnesses.
(g) Any other matter that will aid in disposition of the case.

Official Commentary: The pretrial conference is substantially for the same purpose as in any other case, and the purpose of this rule is to make it mandatory in each case. Additional emphasis is directed toward agreement on the issues to be tried.

CR 95 returns to the notion that pretrials are helpful, and should be mandatory in all cases.

Rule 96. Sanctions

If a party fails to comply with Rules 88 through 97, the trial judge may impose as appropriate any of the sanctions specified in Rule 37.02, in the same manner as if an order of

\(^{387}\) Compare CR 94 with FRCP 26(g). The text of FRCP 26(g) is set out in note 293 supra.
the court had been violated.
Official Commentary: It is anticipated that the sanctions will be principally those prescribed in Rule 37.02(3), which provides, "in lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorneys fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

CR 96 provides a basis for imposing sanctions on parties or their attorneys, or both, for noncompliance, and is consistent with the deterrence-oriented approach to discovery abuse developed in recent cases.358

Rule 97. Presence of Counsel

Trial counsel of record must be present in order to make binding stipulations and set firm hearing dates at all hearings. Alternate counsel may be designated only if that counsel is empowered to stipulate on matters and has counsel of record's office calendar information so that he may firmly bind counsel of record in event-setting and other decisions.

CR 97 is a laudatory rule which prevents trial counsel from aborting otherwise meaningful conferences by sending associates who are unfamiliar with the litigation, or who lack authority to participate effectively, to pretrial or discovery conferences.

Conclusion

This Article is intended to serve as an introduction to, as well as a quick reference to, civil discovery rules and procedures in the Kentucky courts. It not only should prove useful to the practitioner and student, but also should serve to illustrate the fact that although there is a rough parity between federal and state discovery practices, there are "local" rules and procedures that are worthy of attention. Moreover, it can

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358 For a discussion of the potential impact of new and more liberal sanctioning mechanisms see Underwood, supra note 50, at 660-67.
be seen that the Supreme Court of Kentucky has shown a willingness to break free of the federal model, at least on an experimental basis, with a view to bringing about much needed reform of pretrial procedures.