Economical Litigation: Kentucky's Answer to High Costs and Delay in Civil Litigation

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INTRODUCTION

"It is a fearsome thing to contemplate a justice system supported by all taxpayers, practical access to which is out of reach for the great majority of people who need its services." Yet many people do fear that rising costs of civil litigation and delay resulting from protracted discovery processes and overcrowded dockets are turning the American court system into an impractical alternative for dispute resolution.1

The American Bar Association Action Commission to Reduce Court Costs and Delay (the Action Commission) was established in response to this growing concern.2 The Action Commission has been working closely with advisory committees in several states, including Kentucky, to develop and implement several programs specifically designed to reduce the prohibitive costs and unnecessary delay which have recently plagued our court system.3

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1 Epstein, Reducing Litigation Costs for Small Cases, JUDGES J., Spring 1981, at 9, 10.
3 The American Bar Association Action Commission to Reduce Court Costs and Delay (the Action Commission) was established in 1979 by then A.B.A. President Leonard Janofsky. Middleton, Experiments Tackle Trial Delay, Costs, 67 A.B.A. J. 1096 (1981). For a good discussion of the purpose behind the creation of the Action Commission, see Janofsky, supra note 2, at 1324.
4 The Action Commission has been particularly interested in studying the effects of simplified and differentiated discovery procedures, especially when combined with strong case management. See Chapper, Limiting Discovery, JUDGES J., Spring 1980, at 20, 22. The Commission has worked closely with committees from at least three states—California, Colorado and Kentucky—in implementing various fast-tracking procedures and discovery limitations.
In September of 1982, the Kentucky Supreme Court, under the leadership of former Chief Justice John S. Palmore, and with the support of the Action Commission, adopted the Special Rules of the Circuit Court for the Economical Litigation Docket (the Special Rules). The Kentucky Economical Litigation Docket consists of all cases involving contracts, personal injury, property damages, property rights and the termination of parental rights. These actions will be subject to special procedural rules which provide for mandatory discovery and pre-trial conferences, telephone conferences and limited discovery. Thus, the docket brings about a number of substantial changes in Kentucky civil procedures.

Although the Special Rules presently apply only to cases brought in the Seventeenth Circuit (Campbell County), the

In January of 1978, California put the Economical Litigation Pilot Project into effect. The special rules apply to the Fresno Superior and Municipal Courts, the Los Angeles Municipal Court and the Torrance Branch of the Los Angeles Superior Court. See CAL. MUN. CT. R. 1701-51; CAL. SUPER. CT. R. 1801-59. The California project consists mainly of discovery limitations which apply to cases in which the amount in dispute is less than $25,000. For detailed examinations of the program, see Chapper, supra; Epstein, supra note 1; McDermott, Equal Justice at Reduced Rates, 20 Judges' J., Spring 1981, at 16.

The "Special Provisions Regarding Limited and Simplified Discovery" were implemented in Colorado in July of 1981. See COLO. R. CIV. P. 26.1. The rules apply statewide upon request by any party. Like the California rules, the Colorado provisions contain limited discovery procedures.

In December of 1980, Kentucky began an experimental program in the Campbell County Circuit Court. For further discussion of this project, see notes 17-29 infra and accompanying text.

Former Chief Justice John S. Palmore has been the driving force behind the development and implementation of Kentucky's special rules. His involvement in the program is discussed further in notes 17 & 18 infra and accompanying text.

The Action Commission helped to set up the experimental program in Campbell County Circuit Court and monitored the drafting of the Special Rules. See the text accompanying notes 19-29 infra for a discussion and examples of the Commission's involvement in the Kentucky project.

KY. R. CIV. P. 88-97 (hereinafter cited as CR).
CR 89.
CR 90 & 95.
CR 91.
CR 93.

The original version of the special rules was approved for the Seventeenth Circuit in the form of an administrative order which became effective on December 15, 1980. The Special Rules adopted by the Kentucky Supreme Court on September 10, 1982, became effective in Campbell County on that date.
Twenty-first Circuit (Bath, Menifee, Montgomery and Rowan Counties)\textsuperscript{13} and the Sixteenth Division of the Thirtieth Circuit (a portion of Louisville),\textsuperscript{14} the impact of the rules is already being felt statewide. Attorneys whose main practices are in other circuits must follow the Special Rules when trying cases in these three circuits. Furthermore, the Kentucky Supreme Court plans to apply the Economical Litigation Docket to other circuits if the results of this initial experiment continue to be favorable.\textsuperscript{15} Thus, the program may be implemented statewide within the next few years.\textsuperscript{16}

Because of the significant procedural changes brought about by the Special Rules and their potential statewide impact, Kentucky practitioners must become familiar with the Economical Litigation Docket. Consequently, this Note will focus upon the procedural rules making up that docket and their significance to Kentucky practice. In addition, this Note will provide a brief history of the combined efforts of the Action Commission and a Kentucky advisory committee, which resulted in the implementation of the experimental program in Campbell County and the adoption of the Special Rules. It will conclude with an evaluation of the Kentucky Economical Litigation Docket, its strengths and weaknesses and its potential for statewide implementation.

I. THE CAMPBELL COUNTY EXPERIMENT

In the spring of 1978, Chief Justice Palmore attended a conference at which he became interested in the negative effects of high costs and delay upon the court system and the legal profession.\textsuperscript{17} In 1980, after learning about a California experimental

\textsuperscript{13} The Special Rules were implemented in the Twenty-first Circuit on Oct. 1, 1982.

\textsuperscript{14} The Special Rules were implemented in the Sixteenth Division of the Thirtieth Circuit on Nov. 1, 1982.

\textsuperscript{15} Interview with Pat Sims, Manager, Information & Statistics, and Mark Cavitt, Information Analyst, Administrative Office of the Courts, in Frankfort, Kentucky (Oct. 7, 1982) [hereinafter cited as Sims Interview].

\textsuperscript{16} Id. Both Sims and Cavitt indicated that it would be some time before the Special Rules would be applied in circuits other than the Seventeenth, Twenty-first and Thirtieth. Research data from those circuits must be compiled and analyzed before further action is taken.

\textsuperscript{17} In the spring of 1978, Chief Justice Palmore attended the Williamsburg Confer-
program which attacked high court costs and delay by limiting discovery and placing deadlines upon some phases of litigation, Chief Justice Palmore contacted the Action Commission to ask for assistance in implementing a similar program in Kentucky. 18

Kentucky's experimental program began in the Campbell County Circuit Court. 19 The experimental rules were almost identical to the Special Rules recently adopted by the Kentucky Supreme Court. 20 However, "[t]o permit an objective assessment of the effectiveness of the [experimental] rules, cases within the target categories [contracts, personal injury, property rights/land condemnation and termination of parental rights] were assigned on a randomized basis to either the regular docket or the docket

18 For an excellent explanation and analysis of the Action Commission's evaluation of the Kentucky experiment, see Connolly & Planet, Controlling the Caseflow—Kentucky Style, Judges' J., Fall 1982, at 8-9.

19 As one Action Commission commentator explained:

[T]his two-judge court [the Campbell County Circuit Court] was an ideal setting for testing a program whose aim was to reduce the delay and cost of litigation, especially medium-sized litigation. The court has a diverse civil caseload, reflecting the influence of Campbell County's suburban and rural mix. Compared to other state circuit courts, its dockets were not backlogged, allowing the judges to concentrate on new filings. That court was also selected because the two judges, Chief Judge John A. Diskin and Judge Thomas F. Schnorr, strongly supported the caseflow management concept and wished to change the attorney-initiated control of the pace of that court's civil docket.

The support of the bar and community also were important to this endeavor. Judge Diskin, Judge Schnorr, and Clerk of the Court Ed Blau were respected by the bar and community. The president of the Kentucky State Bar at that time, Frank Benton III, who practices principally in Campbell County Circuit Court, also was a strong supporter of the objectives and concept of forceful caseflow management, as was the Campbell County Bar Association.

Id. at 10-11.

20 The main differences between the Campbell County Rules and the new Special Rules are that the Campbell County Program included a control group for evaluation purposes and that Rule 91, which provides for telephone conferences, has been added to the new Special Rules. Sims Interview, supra note 15.
with the streamlined procedures.”

The Action Commission agreed to evaluate the program’s effect upon court costs, delay and the quality of justice.

Overall, the Action Commission’s evaluations of the project have been highly favorable. First, the Commission noted a dramatic reduction in case life on the Special Rules docket. The Special Rules also “appeared to have advanced some case closures to earlier procedural stages.” Second, the evidence suggests that the “Special Rules do not require more judge time and do produce a dramatic reduction in the time attorneys must devote to the litigation.” Furthermore, the discovery limitations produced substantial savings in discovery costs. Consequently, “attorneys reported passing on dollar savings to their non-contingency clients in nearly all the special rules cases.” Finally, the Action Committee study indicates that the quality of justice did not appear to have been adversely affected. In fact, since reducing court costs and delay presumably improve the quality of jus-

22 Connolly & Planet, supra note 18, at 11.
23 Id. at 54. The dates indicated that the total case life was reduced by an average of 11 months. Furthermore, the length of time for every major litigation phase was shortened: “pleadings were completed one and one-third months earlier; discovery ten months earlier; pre-trial six and one-half months earlier; and trial one and one-third months earlier.”
24 Id.
25 Id. at 12. As former Chief Justice Palmore reasoned: [I]f we can cut time down the cost [to the client] will be less. If a case that is now in a lawyer’s office for two years can be processed in eight months, the lawyer should be able to handle it for a third of what he must now earn from the case. He will not lose income, because he will be able to serve three times as many clients. And the clients will be there, too. They just need to know that they can afford it, and that the courts will give them prompt service.
26 J. Palmore, supra note 2, at 4.
27 Action Commission statistics showed that Special Rules cases evidenced an average of 1.1 fewer discovery filings per case than did regular rules cases. Special Rules cases averaged 0.7 fewer notices of depositions and 0.3 fewer sets of interrogatories. And the Special Rules cases averaged 26 fewer interrogatories per set served. Connolly & Planet, supra note 18, at 55.
28 Id. at 56. The Action Commission limited its inquiry to “ascertaining whether the reduction of litigation activity and delay brought about by the Special Rules had an adverse impact on the ability of attorneys to prepare for trial.”
tice, the Special Rules actually may have enhanced the quality of justice within the Campbell County Circuit Court.\textsuperscript{29}

Thus, the results of the two-year Campbell County experiment are encouraging. Expecting to achieve similar results in other circuits throughout the state, the Kentucky Supreme Court adopted the Special Rules.

II. THE SPECIAL RULES: AN OVERVIEW

The Kentucky Supreme Court’s approach to implementing the Special Rules for the Economical Litigation Docket is unique in both scope and method. The mandatory rules contain no monetary threshold and apply to all cases falling within the specified categories. Furthermore, the rules are the first to combine fast-tracking procedures with substantial limitations upon the discovery process.\textsuperscript{30}

A. Scope

According to Kentucky Rule of Civil Procedure (CR) 89, the economical litigation docket consists of all cases which substantiably involve contracts, personal injury, property damages, property rights and the termination of parental rights.\textsuperscript{31} Unlike the special rules adopted in Colorado,\textsuperscript{32} the Kentucky special rules apply to \textit{all} cases falling within the specified scope.\textsuperscript{33} By

\textsuperscript{29} Id.

\textsuperscript{30} Telephone interview with Paul Connolly, A.B.A. Action Commission to Reduce Court Costs and Delay (Oct. 24, 1982). According to Connolly, Kentucky is the only state to combine fast-tracking procedures and discovery limitations. Thus, the Action Commission is extremely interested in the results from the Kentucky program.

\textsuperscript{31} CR 89.

\textsuperscript{32} Under Colorado’s special provisions, any party may “at any time file a written request that discovery in the case be governed by [the special provisions].” COLO. R. CIV. P. 26.1(a). If the request is opposed by another party, the court decides whether to apply the special rules to the case. In making that determination, the court is to consider at least five factors: the factual and legal issues involved; the extent and expense of the anticipated discovery; the amount in controversy; the number of parties and their alignment with respect to underlying claims and defenses; and the prejudicial effect, if any, upon any party at trial should the rules be applied. COLO. R. CIV. P. 26.1(b).

\textsuperscript{33} CR 89 provides that the economical litigation docket \textit{shall} consist of all cases falling within the specified categories. Since the special rules apply automatically, there is no
making the rules mandatory, the Kentucky Supreme Court has insured that the program will be fairly tried in the state court system instead of leaving the program to the mercy of state practitioners who may initially hesitate to use the rules.

The Kentucky rules also differ from the mandatory rules applied to certain superior courts under the California Economical Litigation Pilot Project\(^3\) because the Kentucky rules contain no monetary threshold. By applying the docket to all claims, regardless of their size, the Kentucky Supreme Court has eliminated at least one problem which occurred with the California pilot project: practitioners who wished to circumvent the special docket simply filed claims which exceeded the $25,000 threshold amount.\(^35\) The Kentucky docket effectively removes attorneys' control over whether their cases are covered by the Special Rules. Furthermore, the Kentucky rules contain no provision for the withdrawal of cases from the special docket. California, on the other hand, allows cases to be withdrawn upon a showing of good cause.\(^36\)

B. **Fast-Tracking Procedures**

One of the main goals of the Special Rules is to shorten to under six months the life of the average case subject to the rules.\(^37\) need to request that a case be placed on the docket. Furthermore, the ability to avoid the special litigation docket is also removed.\(^34\)

With certain exceptions, CAL. SUPER. CT. R. 1811(a) provides that the special rules apply to all civil actions in which the amount in controversy does not exceed $25,000. The California pilot project was aimed at middle-sized cases. As one Los Angeles Superior Court judge noted, small claims can be taken up at minimal costs in small claims courts and large claims usually justify litigation if a settlement cannot be reached.

- But what about the case where the real amount in controversy is, say, between $1,000 and $25,000? Unless the issues are very simple, the cost of litigating even a just claim may just eat up most of the potential recovery. On the other side, the cost of defending a marginal lawsuit may be so high that the threatened party feels obliged to pay off rather than defend.

Epstein, *supra* note 1, at 10.

\(^35\) Los Angeles Superior Court Judge Norman L. Epstein observed:

While the ELP program is mandatory rather than elective—except for some exempt cases—the practical operation of these rules in most cases is to permit any party seeking affirmative relief to put the case in or outside the program. The principal governing criterion is the amount in controversy.

For the superior court, a simple certification that the amount in controversy is over $25,000 takes the case out of ELP.

*Id.* at 11-12.

\(^36\) See CAL. MUN. CT. R. 1711(c); CAL. SUPER. CT. R. 1811(c).

\(^37\) See Connolly & Planet, *supra* note 18, at 54.
The docket attempts to achieve this objective by setting forth a fast-tracking procedure which provides a definite time schedule within which certain events must occur.

1. The Mandatory Discovery Conference

The fast-tracking procedure begins to operate on the date when the last responsive pleading is served or could have been served. CR 90 provides that a discovery and status conference must be held within fifteen days of that date. The discovery status conference is essentially a planning conference in which the trial judge meets with representatives of all of the parties to schedule each event in the case and to determine the period of time necessary to complete discovery.

However, the conference serves an equally important purpose, in that judicial control of the case is imposed at an early stage. A court-ordered discovery and litigation schedule containing a completion date and either a final pre-trial conference or trial date is issued at this time. In addition, any motions for exceptions to the special discovery rules must be made at this con-

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38 CR 90(1).
39 See id. at comment.
40 CR 90(3). At least one commentator believes that all parties should be present at the mandatory discovery conference:

Because the clients are familiar with the facts and the judge familiar with the law, it is unlikely that the discussion will stray too far from the real issues in the case. It is astounding how quickly the need for discovery can disappear when the clients are there to hear what the lawyers are saying and to correct any misstatements.


41 CR 90(1) & comment. John A. Diskin, chief judge of the Campbell County Circuit Court, explained his approach in the discovery conference:

Because I believe it is premature to discuss at this time factual or legal issues—that being best left in the final pretrial conference—I concentrate on ascertaining what discovery will be needed, what practical and legal problems are anticipated, how much time will be needed to schedule depositions, and furnish information about documents.

Diskin, Kentucky's Special Rules, JUDGES', Fall 1980, at 10-11.
42 Sims Interview, supra note 15.
43 Connolly & Planet, supra note 18, at 13.
Control of pre-trial activities thus has shifted from the attorneys to the judge.

2. **The Pre-Trial Activity Schedule**

CR 90 sets forth a time schedule within which the main events in the case must occur. A mandatory pre-trial conference date must be set at the discovery conference. The pre-trial conference must be scheduled for no more than sixty days after the discovery conference. The exchange of information required by CR 93 must be completed at least ten days prior to the pre-trial conference. Finally, a trial date must be set for no more than thirty days after the pre-trial conference. Thus, the rule contemplates that a case will go to trial within 105 days (or 3 1/2 months) of the filing of the last responsive pleading.

If the time limits set forth in the fast-tracking procedure were absolute, they could cause a number of additional problems. For instance, 105 days might not be enough time to prepare sufficiently for an extremely complex case. On the other hand, that time period might be much longer than would be necessary to get ready for a simple case. Fortunately, while the drafters of the docket aimed the 105-day time period at the average case, they recognized that some cases would require more or less preparation. Thus, CR 90 gives the trial judge discretion to extend or reduce the time limits to meet the needs of the individual case.

However, the rules specifically provide that any motion for an extension of the time limits or for continuance must state the reasons therefore and can be granted only upon a showing of good cause.

Thus, the fast-tracking procedures set forth predictable but flexible time limits during which both the attorneys and the

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44 CR 90(2). However, while CR 90(2) allows exceptions, such are discouraged. Sims Interview, supra note 15.
45 CR 95.
46 CR 90(1).
47 CR 93.04(1).
48 CR 90(1).
49 See Diskin, supra note 41, at 11.
50 CR 92(2).
judge can prepare for trial. By permitting the trial judge to make extensions or reductions at his or her discretion, but requiring a showing of good cause for any motions to change the dates, the rules allow the docket to meet the needs of the individual cases but still move the cases along quickly. In addition, this speedier pace and the cost of preparing for and attending the mandatory discovery conference may increase the incentive for counsel to reach an accord during the pleadings.\footnote{Connolly & Planet, \textit{supra} note 18, at 54.}

3. \textit{Telephone Conferences}

Another innovation under the Special Rules is the availability of telephone conferences. CR 91 provides that "[a]t 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."\footnote{CR 91.}

Several other jurisdictions already allow telephone conference options.\footnote{See \textit{Middleton, supra} note 3.} Judges using them have expressed favorable opinions.\footnote{Superior Court Judge Philip Gruccio of Atlantic City, New Jersey claims that telephone hearings are "not an experiment any longer." \textit{Middleton, supra} note 3, at 1096. "They make it possible to dispose of motions quickly and avoid the problem of having 'a lawyer regurgitate what he or she has written in briefs.' " \textit{Id.}} Of course, allowing both the judge and attorneys to hold conferences, hear motions, etc. while remaining in their respective offices significantly reduces the amount of time and money spent on a case, a saving that can then be passed on to the litigant.\footnote{\textit{Id.}}

4. \textit{The Pre-trial Conference}

CR 95 provides for a mandatory pre-trial conference which must be scheduled during the discovery conference.\footnote{CR 95.} The primary objective of the pre-trial conference is "to simplify the issues, resolve pending procedural issues, dispose of summary judgment motions, and insure the attorneys will be prepared to..."
make a crisp evidentiary presentation at trial." 57 In addition, the conference provides a final opportunity to push for settlement. 58 Thus, the pre-trial conference provided for under the Special Rules "is substantially for the same purpose as in any other case." 59 The main difference is that CR 95 makes the conference mandatory. 60

C. Discovery under CR 93: The Court Takes the Reins

Fast-tracking procedures alone are not always sufficient to prevent delay and reduce court costs. Even if the amount of time allowed for pre-trial activity is limited, attorneys can still compensate by putting additional lawyers and investigators to work. And they can work around the clock if necessary so that, when discovery is completed, the same mountains of paperwork have accumulated. Obviously, this approach does nothing to reduce the costs to the client. 61

As earlier experiments have shown, "[p]roperly limited and controlled discovery is necessary in most civil litigation." 62 However, many commentators argue that the discovery process is now being severely abused. 63 This problem was identified as a major source of concern at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference):

There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery

57 Connolly & Planet, supra note 18, at 13. All "[m]otions for summary judgment must be made ten (10) days prior to the pretrial conference." CR 92(3).
58 Sims Interview, supra note 15.
59 CR 95 comment.
60 Id.
61 Cost to the litigant can be reduced only if "attorney time" is reduced. If more attorneys are assigned to a case and the same amount of discovery is undertaken, attorney time is not reduced at all. In fact, it may be increased. For a discussion by former Chief Justice Palmore of the importance of cutting down attorney time, see note 25 supra.
62 Lundquist, supra note 2, at 1073.
of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.\(^6\)

Thus, the Kentucky Supreme Court adopted CR 93, which is expected to eliminate abuse and overuse of the discovery process but which will not hinder the attorney's ability to gather information which is necessary to properly prepare a case.\(^6\)

1. **Depositions**

The traditional use of the deposition as a basic discovery device is severely limited by CR 93.01. Under that rule, depositions by notice are limited to parties only.\(^6\) The deposition of non-party witnesses, however, is permitted only by leave of court\(^6\) or if the deposition is to be introduced at trial under the provisions of CR 32.01. CR 32.01 provides that depositions of witnesses may be used at trial if: 1) they are used for impeachment purposes;\(^6\) 2) the witness will be unavailable to testify at trial;\(^6\) or 3) the depositions relate to certain kinds of testimony.\(^7\) Thus, CR 93.01

\(^6\) Erickson, *supra* note 2, at 288. In response, the Litigation Section of the American Bar Association set up the Special Committee for the Study of Discovery Abuse in 1977. Lundquist, *supra* note 2, at 1071. This committee focused its attention on three goals: 1) reducing the high costs of discovery; 2) proposing amendments to rules to deter the "misuse" of discovery; 3) preventing the "overuse" of discovery. Flegal & Umin, *supra* note 63, at 598.

\(^6\) The effect of the experimental application of these rules upon the ability of attorneys in Campbell County to prepare their cases is discussed in notes 23-29 *supra* and accompanying text.

\(^6\) CR 93.01 & comment. CR 93.01 also requires the plaintiff to give his deposition before any other discovery takes place. This gives the defendant a chance to examine the plaintiff concerning the merits of the cause of action. *Id.*

\(^6\) CR 93.01 provides: "Except as otherwise ordered by the court, a deposition shall be permitted only if it will be introduced at trial according to the provisions of Rule 32.01." (emphasis added). Any motion for an exception to CR 93.01 must be raised at the discovery conference. CR 90(2) & 93.01 comment.

\(^6\) CR 32.01(a).

\(^6\) CR 32.01(c).

\(^7\) CR 32.01(e). CR 43.04(1) states:

In all trials concerning alimony or divorce; the enforcement of a lien or
eliminates the use of most discovery depositions but still provides for the taking of evidentiary depositions of non-party witnesses.

2. Interrogatories

Leading the list as the most abused discovery mechanism, the use of interrogatories has become a major target for the proponents of discovery reform. "The ease with which written interrogatories can be generated and the proliferation of machine-stored questions make this method of discovery uniquely susceptible to abuse." In addition to the ease with which they can be turned out, interrogatories "en masse" tempt attorneys for two other reasons. One involves the overuse of the mechanism; the other involves its abuse. First, with the increase in suits for legal malpractice, many attorneys believe that it is "[b]etter to ask everything that could conceivably relate to the case—to leave no pebble unturned—than to risk a post-hoc assessment that an unasked question might have revealed a decisive nugget of information." Certainly, no one can blame an attorney for wanting to "play it safe." However, the second reason for the extensive use of interrogatories does not involve such an excusable motive. Pages of interrogatories can be served daily to irritate the opposing side and to buy extra time. If the ultimate goal of the court system is to achieve justice, such methods can hardly be embraced.

The Litigation Section of the American Bar Association has long encouraged both state and federal courts to limit the number of interrogatories allowed. At least twenty federal district

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the satisfaction of a judgment; judicial sale; surcharge or accounting; settlement of estates; the division of land; or the allotment of dower, the testimony shall be taken by deposition, unless the court by order or by local rule directs the testimony to be heard under oath and orally in open court.

71 Lundquist, supra note 2, at 1072.
72 See, e.g., Flegal & Umin, supra note 63, at 606; Lundquist, supra note 2, at 1072; Schroeder & Frank, supra note 63, at 574; Weller, Ruhnka & Martin, ELP Revisited: What Happened When Interrogatories Were Eliminated?, JUDGES' J., Summer 1982, at 8.
73 92 F.R.D. 137, 146 (1980).
74 Epstein, supra note 1, at 9.
75 An attorney can be subject to disciplinary action for employing such tactics. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981).
76 Schroeder & Frank, supra note 63, at 574.
courts have already imposed such limitations. California even went so far as to eliminate the use of interrogatories entirely in its Economical Litigation Pilot Project. The Kentucky Supreme Court agreed that the use of interrogatories must be restricted. The Court adopted CR 93.02, which provides that "the interrogatories to any party shall not exceed twenty (20) in number, each of which shall be limited to a single question."

CR 93.02 is likely to be one of the major points of dispute as the Special Rules are implemented. The Campbell County Bar's initial reaction to imposition of this limitation in December of 1980 was one of outrage and apprehension. However, now that the shock has worn away, most practitioners agree that the limitations save time and money.

Actually, these mandatory limitations may solve some problems for the conscientious attorney who wishes to provide his or her client with the best possible representation. The numerical limitations provide a justification for failing to look under every pebble and prevent the lawyer from indulging in unethical behavior. Furthermore, the implementation of CR 93.04, which provides for the mandatory exchange of certain information, is intended to eliminate the need for lengthy interrogatories. Finally, if for some reason additional interrogatories are abso-

77 The following federal district court rules allow no more than 30 interrogatories, unless the parties agree to accept more or obtain the court's leave: Rule 230-1 (S.D. Cal.); Rule 3.03(a) (M.D. Fla.); Rule 7.4 (S.D. Ga.); Rule 9(6) (N.D. Ill.); Rule 12(c) (S.D. Ind.); Rule 15(d) (D. Kan.); Rule 6(b) (D. Md.); Rule 3(b) (D. Minn.); Rule C-12 (D. Miss.); Rule 8 (E.D. Mo.); Rule 2(e) (W.D. Mo.); Rule 10(e) (D.N.M.); Rule 12(b)(4) S.D. Tex.; Rule 26(d)(1) (W.D. Tex.); Rule 11-1(A) (E.D. Va.); Rule 7(f) (D. Wyo.). Flegal & Umin, supra note 63, at 306 n.30. The Federal District Court of South Carolina and the Federal District Court of Hawaii also have threshold limitations on the number of interrogatories allowed without a court order. 1 Bender's Forms of Discovery, 660-61 (1981).
78 For a detailed analysis of the effect that the elimination of interrogatories had upon the California justice system, see Weller, Ruhnka & Martin, supra note 72.
79 CR 93.02.
80 Sims Interview, supra note 15.
81 Id. In fact, Judge Diskin noted that "requests to propound more than 20 interrogatory questions are very rare." Diskin, supra note 41, at 11.
82 The mandatory exchange of information under CR 93.04 is discussed in notes 90-102 infra and accompanying text.
83 Sims Interview, supra note 15.
lutely necessary, CR 90(2) allows for exceptions to CR 93 to be made at the discovery conference. Thus, the new rules eliminate the abuse of interrogatories but still provide a means for obtaining any information which is essential to proper trial preparation.

3. Production of Documents and Inspection of Lands

Basically, CR 93.03 provides that procedures respecting the production of documents and things and entry upon land for inspection and other purposes will continue to be governed by the provisions of CR 34. However, CR 93.03 sets a definite time period within which these activities must occur. The party upon whom the request is served must permit the inspection or copying of documents or the entry upon land within fifteen days after the request is served unless an objection is filed within that period. Thus, CR 93.03 forces the speedy exchange of access to and inspection of evidence and eliminates the temptation to stall the discovery process by delaying response to such requests. Furthermore, the rule also requires any objections to the requests to be filed within the fifteen-day period. By forcing the receiving party to take some action within fifteen days of service of the request, CR 93.03 expedites this method of discovery and calls for court intervention only upon objection.

4. The Mandatory Exchange of Information

Perhaps the most significant rule provided for in the Special Rules for the Economical Litigation Docket is CR 93.04, which

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84 CR 90(2).
85 CR 93.03. However, CR 93.03 appears to supersede paragraph two of CR 34.02 which states:

The party upon whom the request is served shall serve a written response within 30 days after the service of the request except that a defendant may serve a response within 45 days after service of the summons upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for objection shall be stated.

CR 34.02(2).
86 CR 93.03.
87 Id. at comment.
88 CR 93.03.
89 Id. at comment.
creates a new and mandatory discovery device. The rule requires all parties to exchange certain information no later than ten days before the pre-trial conference. The material to be disclosed includes: the names, addresses and phone numbers of witnesses who may be called at trial along with their statements or summaries of their expected testimony; descriptions of physical evidence and copies of documents expected to be presented at trial; a list of expert witnesses along with their qualifications and summaries of the opinions to which they are expected to testify; summaries of contentions of law and issues of law and fact; and offers of stipulation. The rule requires that a copy of the information be filed with the court along with a certificate of compliance. It also places each party under a continuing duty to supplement the information.

Obviously, the preparation of this material will require a great deal of time and effort. But, by requiring the parties to automatically exchange this information without waiting for specific requests, the proponents of this rule expect to eliminate the need for many of the other discovery devices traditionally employed. "The emphasis is on the free exchange of information between counsel as opposed to the more expensive and time-consuming discovery proceedings such as deposition. The exchange

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90 CR 93.04(1).
91 CR 93.04(1)(a).
92 CR 93.04(1)(b).
93 CR 93.04(1)(c).
94 CR 93.04(1)(d). This provision actually increases the amount and type of information that is discoverable with regard to expert witnesses to be called by the opposing side.
95 CR 93.04(1)(e).
96 CR 93.04(1)(g).
97 CR 93.04(1)(f). "Parties are required to refine issues that are to be tried in the case. If an order of stipulation is rejected and the matter subsequently proved at trial, the Rejecting party shall be subject to sanctions according to Rule 96. CR 93.04(3).
98 CR 93.04(1).
99 CR 94 requires a certificate of compliance with CR 93 to be filed upon the completion of discovery.
100 CR 93.04(2).
101 Under the California Economical Litigation Pilot Project, this information is to be provided upon request by an adverse party. See CAL. MUN. CT. R. 1721(a); CAL. SUPER. CT. R. 1825(a).
of this information prior to the pre-trial conference should promote the narrowing of issues and encourage settlements." 102

CONCLUSION

In adopting the Special Rules of the Circuit Court for the Economical Litigation Docket, the Kentucky Supreme Court has taken a giant step toward restoring the average Kentucky citizen's access to the state court system. After the results achieved in the two-year Campbell County Experiment, 103 there is every reason to believe that the implementation of the Special Rules will significantly reduce the high costs and delay which have afflicted the court system in recent years.

The success of the Special Rules can be attributed to the two-pronged approach taken by the Kentucky Supreme Court. First, the fast-tracking procedures set forth a flexible set of time limits for pre-trial activity which provides both the attorneys and the judge with a predictable time frame within which to prepare for trial. 104 This allows the cases to move along at an accelerated pace, thus preventing any unnecessary delay. Second, placing significant limitations upon the discovery process, as well as requiring mandatory exchange of information, eliminates the abuse and overuse of discovery devices yet still allows attorneys to gather the material which is necessary to prepare their cases properly. 105

It is important to remember that the program is still experimental. As one Action Commission commentator has observed: "[T]he true measure of the merit of any court reform program is, however, its transferability beyond an initial court environment." 106 Prior to October of 1982, the program had been applied in only one circuit. Thus, the Kentucky Supreme Court made a wise choice in limiting the application of the Special Rules to

102 CR 93.04 comment.
103 See notes 17-29 supra and accompanying text for an explanation of the Campbell County Experiment and the results achieved.
104 The fast-tracking procedure is discussed in notes 37-60 supra and accompanying text.
105 CR 93 is discussed in detail in notes 61-102 supra and accompanying text.
106 Connolly & Planet, supra note 18, at 56.
only three circuits for the time being. Varying in size, types of judges, support staffs and dockets,¹⁰⁷ the Seventeenth, Twenty-first and Thirtieth Circuits should serve as adequate testing grounds for the rules. The Court expects some differences in result to occur when the Special Rules are implemented in these circuits.¹⁰⁸ By limiting the areas of application and by carefully monitoring the results achieved in those circuits, the Court hopes to perfect the program before implementing it statewide.

However, the Special Rules will probably be implemented throughout the state over the next few years. As the past Chairman of the American Bar Association Section of Litigation recognized, reform is inevitable. "The only question is whether that reform will be forced on us through public outcry and disgust or whether we can accept the historic responsibility of our profession and lead the way to improvement of the judicial system."¹⁰⁹ The Special Rules achieve the reform that is so desperately needed, but they also provide for the continued success and prosperity of the legal profession. As former Chief Justice Palmore declared, the success of the Special Rules of the Circuit Court for the Economical Litigation Docket

will depend, of course, on the understanding and cooperation of the bar. The lawyers can make it or break it, but the responsible, thoughtful members of the bar, those who have a care for the profession of tomorrow, will recognize that what we are striving for is not merely reform, but survival itself.¹¹⁰

C. Lynn Oliver

¹⁰⁷ These circuits were chosen because of their different characteristics. Sims Interview, supra note 15.
¹⁰⁸ Id. The effect of the rules upon Louisville attorneys' ability to prepare for trial will be particularly interesting. A great deal of informal discovery took place in Campbell County. This is not expected to occur in Louisville due to the size of the city and the large number of attorneys practicing there. Id.
¹⁰⁹ Lundquist, supra note 2, at 1073.
¹¹⁰ J. Palmore, supra note 2, at 6.