



1958

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Lawrence S. Grauman

*Jefferson County Kentucky Circuit Court*

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## Recommended Citation

Grauman, Lawrence S. (1958) "Desposition and Discovery," *Kentucky Law Journal*: Vol. 47 : Iss. 2 , Article 2.

Available at: <https://uknowledge.uky.edu/klj/vol47/iss2/2>

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# Desposition and Discovery

By LAWRENCE S. GRAUMAN\*

The Rules of Civil Procedure, both Federal and State, are the result of extended efforts by the leaders of the Bar to place the power to make rules of court where it belongs—in the hands of the courts. In Kentucky the move to reform procedure in civil cases was begun in 1949. At the meeting of the State Bar Association in the spring of 1949, the Honorable Watson Clay, a Commissioner of the Court of Appeals, delivered a masterful address calling attention to how antiquated our civil procedure was and what benefits would be available to the Bench, Bar and the litigants if the provisions of the Civil Code were revised. Following Judge Clay's convincing speech, the Association adopted a resolution recommending a study of the Kentucky Civil Code of Practice with the objective of bringing it up to date.

At the 1950 Session of the General Assembly, the "Civil Code Committee" was created. The Committee was composed of a Judge of the Court of Appeals and six members appointed by the Governor, two of the members to be Circuit Judges and four to be members of the Kentucky State Bar Association. The writer had the honor of being one of the two Circuit Judges appointed by the Governor, serving until the work of the "Civil Code Committee" had been completed.

The Committee, after mature consideration, undertook the drafting of a new Code, following the Federal Rules of Civil Procedure as closely as practicable. Discovery practice, the pre-trial conference, summary judgments and special verdicts, and many other modern phases of civil procedure were provided for in the Federal Rules and did not exist under the Civil Code. The "Civil Code Committee" drafted a complete set of rules relative to civil procedure and made its report to the Court of Appeals. During

\* Judge, Common Pleas Branch (5th Div.), Jefferson County Kentucky Circuit Court.

the period the Committee functioned drafting the proposed new rules, the judiciary and members of the Bar were advised of the work of the Committee through articles in the Kentucky State Bar JOURNAL, addresses by members of the Committee before various district bar meetings and the Judicial Conference, and discussions before such meetings. The Committee, having completed its work, made its report to the 1952 General Assembly. In the report the two important recommendations made were: (1) that the Court of Appeals should be granted the procedural rule-making power; and (2) that the Court of Appeals should adopt civil rules substantially in accord with those submitted with the report.

The 1952 General Assembly passed an act granting to the Court of Appeals full authority to "regulate pleading, practice, procedure and the forms thereof in all civil proceedings in all courts of the State." The act required distribution to the judiciary and Bar of Kentucky of the proposed rules, and provided for the holding of public hearings before the adoption of the rules by the Court of Appeals. The new rules were to become effective July 1, 1953.

The Court of Appeals carefully considered the new rules recommended by the Committee, and, with a few changes, promulgated the Rules effective as of July 1, 1953. Now plenary power to regulate the entire field of civil procedure in all courts of the State is vested in the Court of Appeals.

The Rules now in effect—principally the product of the work of the "Civil Code Committee"—provide the simplest and the least technical form of civil procedure yet devised in any of the state courts in our Union. All through the Commonwealth of Kentucky the progressive members of the Bench and Bar proclaim that the new civil procedure has achieved a tremendous success.

By Rule 1 of the Kentucky Rules of Civil Procedure, the objective to be achieved in the construction of the Rules is set forth: "They shall be construed to secure the just, speedy and inexpensive determination of every action." The Rules providing for "Depositions and Discovery," Rules 26 through 37, were drafted to assure that no longer must civil trials be carried on in the dark and to make obsolete the time-honored cry of "fishing expedition," as a means of foreclosing inquiry into the facts of a party's case.

An epoch-making decision construing the Federal Rules relative to discovery and depositions is *Hickman v. Taylor*,<sup>1</sup> wherein the U.S. Supreme Court said:

The pre-trial-deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . The new Rules, however, restrict the pleadings to the task of general notice—giving and investing the deposition—discovery process with a vital role in the preparation for trial. . . . Thus, civil trials in the Federal Courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. . . .

We agree, of course, that the deposition-discovery Rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of “fishing” serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation, and either party may compel the other to disgorge whatever facts he has in his possession. . . . The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

The Kentucky Rules of Civil Procedure 26 through 37 are substantially the same as the Federal Rules of Civil Procedure 26 through 37. Therefore, the rationale of the *Hickman* opinion is applicable in construing the Kentucky Rules 26 through 37.

An experienced trial judge has said that “A fair and equitable settlement of an action is often a more just, and certainly more speedy determination of it, than ordinarily follows an actual trial of the issues therein.” Lawyers engaged in extensive trial practice will not take issue with this statement. The discovery rules have the laudable objective of procuring “the speedy and efficient administration of justice,” and enable the court to disregard technicalities so as to determine the rights of litigants on the merits. The principal means for securing the prompt disposition of civil actions on their merits is for the courts to give a liberal construction to the deposition-discovery mechanism. The objective of the court should be the swift, sure, impersonal, impartial

<sup>1</sup> 329 U.S. 495, 500-01, 507 (1947).

administration of justice. The words "subject matter" in the discovery rules should be liberally construed to include the entire scope of the action, from its origin to the collection of the judgment. The discovery rules enable the state's judicial system to keep pace with the nation's progress, and are one of the principal factors in expediting the trial of cases. Unquestionably, by the proper use of the discovery rules, the administration of justice has been materially advanced. Discovery may work to the disadvantage as well as to the advantage of the plaintiff. Discovery may work to the disadvantage as well as to the advantage of the defendant. As Mr. Justice Murphy said in the *Hickman* case: "Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant."

Clay, in discussing Rule 26.02, says: "A party may not require his adversary to furnish a list of witnesses he proposes to use since, while such matters would be relevant to the trial, they are not relevant to the subject matter involved in the suit."<sup>2</sup>

Judge Clay's book was published in 1954. There have been many well-considered opinions written which hold to the contrary. Some of the cases hold that not only may a party be compelled to give the names and addresses of witnesses, but that before using any additional witnesses at the trial, timely notice must be given to the litigant who sought by discovery the names and addresses of witnesses known to the opposite party.

I think the construction of the rule is sound which holds that a party may be compelled to give the names and addresses of witnesses known to him which he proposes to introduce at the trial, and that before using any additional witnesses he must give timely notice of their names and addresses. Such a construction is designed to eliminate, as far as possible, concealment and surprise in the trial of law suits, to the end that judgment therein may be rested upon the real merits of the causes and not upon the skill and maneuvering of counsel. Certainly a diligent lawyer representing a party to a law suit should have an opportunity before trial to investigate the background of witnesses for the opposing side in order to discover any matter which might affect the credibility of such witnesses, to hear their account

<sup>2</sup> Clay, Kentucky Civil Rules 269-70 (1954).

and to ascertain from them the names and addresses of any other persons who might know something about the controversy. Refusal of the court to require a litigant to disclose names and addresses of witnesses known to the litigant which he proposes to introduce at the trial results in a failure to attain the objective of the Kentucky Rules as set forth in Rule 1, and deprives the litigant seeking the information of a substantial right.

The right to pre-trial discovery of the names and addresses of witnesses to an accident is within the discretion of the court. There are cases where the court declined to require the disclosure of the names and addresses of witnesses. On the other hand, there are many cases wherein it has been held that under the discovery rule the names and addresses of witnesses to an accident must be disclosed upon proper inquiry by interrogatory or deposition.

In *DeBruce v. Pennsylvania R.R.*<sup>3</sup> Judge Kirkpatrick said:

The practice of obtaining copies of the statements of witnesses in answer to interrogatories without an extrinsic showing of good cause, as that term is used in Rule 34, or of prejudice arising from denying the disclosure, has always been considered by this court and was, impliedly, sanctioned by the Circuit Court of Appeals in its opinion in *Hickman vs. Taylor*, 153 F. 2d 212. Inasmuch as the decision of the Supreme Court does not forbid or disapprove it, it will be continued as heretofore, in the practice as further outlined in the opinion *Nedimyer v. Pa. RR; D.C.*, 6 FRD 21.

The question of the right to pre-trial discovery of names and addresses of witnesses to an accident has been considered in many cases involving carriers. In *Atlantic Greyhound Corporation v. Lauritzen*,<sup>4</sup> an action against a bus company for the death of a boy killed in a collision between a bus and an automobile, it was held that the lower court had properly sustained a motion for the defendant's production of the names and addresses of all witnesses, all passengers on the bus, and their statements and certain other information. The opinion was written by Judge Simons and concurred in by Judges McAllister and Shackelford Miller, Jr., (formerly U. S. District Judge at Louisville). In rejecting the contention that the lower court erred in requiring the bus company to produce the names and addresses of all witnesses, all

<sup>3</sup> 6 F.R.D. 403, 405 (E.D. Pa. 1947).

<sup>4</sup> 182 F. 2d 540 (6th Cir. 1950).

passengers on the bus, their statements, the bus schedule and the driver's log, as well as all photographs, the court said:

The appellant relies upon *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 394, 91 L. Ed. 451. That case does not throw the protective cloak of privilege of information secured from witnesses whose identity is unknown to the plaintiffs and not available to them. The names of the witnesses, their statements, the bus schedule, the driver's log and other information requested were not in the possession of the plaintiffs. . . . *Hickman v. Taylor*, supra, does not preclude granting the present petition for discovery.<sup>5</sup>

A liberal interpretation of the Kentucky rule relative to discovery would not only require the disclosure of the names and addresses of all witnesses, but would also require the disclosure of the names and addresses of any witnesses learned subsequently, that is, after the deposition for discovery has been taken or the interrogatories propounded. A very recent case on this point is that of *Armstrong v. Diamond State Bus Lines, Inc.*,<sup>6</sup> wherein Judge Layton said:

Plaintiffs filed the following interrogatory:

Plaintiffs repropound the following interrogatory which shall be deemed to be continuing, so as to require supplemental answers if defendants, or either of them, obtain further information between the time answers are served and the time of trial.

'1. State the names and addresses of all the passengers who were on the bus at the time of the accident involved in the present suit, insofar as such names and addresses are known or available to the defendants, or either of them.'<sup>7</sup>

The defendants agreed to furnish the names and addresses of the witnesses then known, but objected to being required to furnish supplementary facts within the scope of the interrogatory and which came to its or their attention ten days before the trial date.

The court rejected the contention made by the defendants and said:

The Federal Rule 33 is identical with that of this Court. The Federal Courts have found little difficulty in dealing

<sup>5</sup> *Id.* at 542.

<sup>6</sup> 125 A. 2d 856 (Del. 1956).

<sup>7</sup> *Id.* at 856.

with this exact situation. They have consistently held that counsel is not relieved of the obligation to supplement an answer to an interrogatory already made when additional information within its scope comes into his hands.

For instance, Judge Kirkpatrick in *McNally v. Yellow Cab Co.*, D.C.E.D. Pa. 1954, 16 F.R.D. 460, said this:

'However, it may not be out of place for the Court to say at this time what should be obvious, namely, that the defendant is bound to give truthful answers to the interrogatories and that both good faith and the spirit of the Rule require it to see to it that its answers are truthful as of the time of the trial as well as of the time when the interrogatories are answered.'

See also *R.C.A. Mfg. Co. v. Decca Records, Inc.*, D.C.S.D. N.Y., 1 F.R.D. 433. Compare *Chenault v. Nebraska Farm Products, Inc.*, D.C., 9 F.R.D. 529.<sup>8</sup>

In the *R.C.A. Mfg. Co. v. Decca Records, Inc.*, case referred to, the District Judge, Judge Leibell, said:

So far as the interrogatories require the production of information defendants must disclose whatever information it now has as demanded by the interrogatories. If in the interim, between the time of the answers to these interrogatories and the trial, defendants obtain further information, they will not be prevented from offering such information on the trial and should under this interrogatory furnish it to plaintiff when it is obtained.<sup>9</sup>

In *Furmanek v. Southern Trading Co.*<sup>10</sup> an admiralty proceeding was involved. The libellants propounded certain interrogatories, and the respondents excepted to all the interrogatories because the preamble or introductory statement advised respondents that the interrogatories were to be deemed continuing, so as to require supplemental answers, if respondents should obtain further information between the time answers were served and the time of trial. The District Judge, Judge Welsh, said:

In *Wolf v. Dickinson*, D.C., 16 F.R.D. (250), the identical contention was raised and resolved against the objecting party. See also *Smith v. Acadia Overseas Freighters, Ltd.*, D.C., 120 F. Supp. 192, where it was held that the interrogatories are to be deemed continuing even though there

<sup>8</sup> *Id.* at 857.

<sup>9</sup> *RCA Mfg. Co. v. Decca Records, Inc.*, 1 F.R.D. 433, 435 (S.D. N.Y. 1940).

<sup>10</sup> 15 F.R.D. 405 (E.D. Pa. 1953).

is no preamble to the interrogatories specifying that the interrogatories are to be deemed continuing.<sup>11</sup>

In the *Wolf v. Dickinson* case, supra, Judge Welsh said:

Thus, we hold that the interrogatories continue to speak and the defendant is obligated to furnish supplemental answers if he obtains additional information between the time answers are filed and the time of trial.<sup>12</sup>

In *Kling v. Southern Bell Telephone and Telegraph Co.*,<sup>13</sup> the court said:

Plaintiff is required to furnish defendant within thirty days the names and addresses of the witnesses known to her at this time which she proposes to introduce at the trial, provided that before using any additional witnesses she shall give timely notice of their names and addresses to defendant.

Thus it is seen that the construction made of the discovery rule in the above cases enables all parties to have equal access to the relevant facts. The right of discovery is mutual and equal, and no party has an advantage over any other party if discovery is permitted so that the identity and whereabouts of persons having knowledge of relevant facts is disclosed. To require a party to state the names and addresses of witnesses then known which he proposes to introduce at the trial, and to disclose the names and whereabouts of any witnesses subsequently learned of before the trial, certainly represents the basic policy underlying the discovery rules. When the Honorable William Howard Taft was a State Judge in Ohio, he stated that "Witnesses do not belong to one party more than to another."<sup>14</sup> The rule gives the presiding judge extensive power to simplify litigation and to enable litigants to avoid surprise. There is no justifiable reason why a litigant should not learn before the trial which of the witnesses known to the adversary will be used at the trial.

Should the court allow witnesses to testify after failure of a litigant to disclose their names and addresses in response to request therefor in pre-trial discovery proceedings?

Where a litigant, in reply to a question requesting the names

<sup>11</sup> *Id.* at 406.

<sup>12</sup> 16 F.R.D. 250 (E.D. Pa. 1952).

<sup>13</sup> 9 F.R.D. 604 (S.D. Fla. 1949).

<sup>14</sup> *Shaw v. Ohio Edison Co.*, 9 Ohio Dec. Reprints 809, 812 (Super. Ct. 1887).

and addresses of witnesses who have knowledge of facts relevant to the issues gives the names and addresses of some of the witnesses, but fails to disclose such information with reference to other witnesses then known to the litigant, and then, on the trial, the litigant calls a witness not named in the answer but who was known to the litigant when he made his answer, and the adverse litigant objects to the witness' testifying, the court should refuse to permit the witness to testify.<sup>15</sup> The court held that to allow such witnesses to testify would be a violation of the Rules of Civil Procedure.

In *Evtush v. Hudson Bus Transp. Co.*<sup>16</sup> plaintiff's decedent was riding on a motorcycle which collided with the defendant's bus. Haddon was a bus driver, and he took the names and addresses of a few of the passengers in his bus at the time of the accident and turned them over to his employer. An interrogatory had been addressed to the bus company and the driver, asking the names and addresses of witnesses and, in reply to the interrogatory, the names of two passengers in the bus at the time of the accident who had given their names to the driver were not disclosed. At the trial the defendants introduced two witnesses whose names had not been disclosed in the answer to the interrogatory, and both of these witnesses gave testimony prejudicial to the plaintiff. There was a verdict for the defendants, and, on appeal, the plaintiff contended that in failing to disclose the names and addresses of the witnesses to the accident which were known to them at the time of the answer to the interrogatory, the defendants not only failed to comply with the obligation imposed upon them by the rules, but also deprived the plaintiff of substantial rights. In discussing this question, the court said:

The rules for discovery here involved were designed to eliminate as far as possible, concealment and surprise in the trial of law suits to the end that judgments therein be rested upon the real merits of the causes and not upon the skill and maneuvering of counsel. It necessarily follows, if such rules are to be effective, that the courts impose appropriate sanctions for violations thereof. We therefore conclude that the Appellate Division was right in reversing the judgment of the trial court and ordering a new trial, thereby eliminating the element of surprise which must have

<sup>15</sup> *Newsum v. Pennsylvania R.R.*, 97 F. Supp. 500 (S.D. N.Y. 1951).

<sup>16</sup> 7 N.J. 167, 81 A. 2d 6 (1951).

accrued to the benefit of the defendants at the previous trial because of their infraction of such rules.<sup>17</sup>

In *Sather v. Lindahl*<sup>18</sup> a new trial was granted in a personal injury accident because the plaintiff had, when his deposition was taken four days before the trial, answered "Not that I know of," in response to the question, "Do you know of any witnesses to this accident?" when in fact the plaintiff and his counsel did know of four eye witnesses, whom they produced at the trial and who testified without objection. On cross-examination of these witnesses the defendants developed the fact that they had been known to the plaintiff and his counsel. Subsequently, defendants moved for a mis-trial, which motion was denied. On the appeal the court said:

One of the purposes of the Rules of Pleading, Practice, and Procedure pertaining to pre-trial discovery, including depositions, 34A Wash 2d 84, ff., is to enable a litigant to know in advance the witnesses upon whom his adversary is relying and thus to avoid surprise, when, after denying knowledge of witnesses which in fact he had, a litigant produces those witnesses at the trial, the adverse party should object to their being permitted to testify and, if they are permitted to testify, should move that their testimony be stricken. The trial judge can sustain such an objection and refuse to permit the witness to testify, or can order his testimony stricken; or he can grant a continuance to give the surprised party an opportunity to investigate the witness and secure rebuttal testimony; and it is possible that, under circumstances in which no other relief or penalty could remedy the situation created by the deception, he could grant a mistrial.

Our rule comes verbatim from the Federal Rules of Civil Procedure, 28 USCA.<sup>19</sup>

The trial court has implicit power to impose such penalty as the circumstances of the particular case warrant, in order to see that substantial justice will be done.

<sup>17</sup> 81 A. 2d at 9.

<sup>18</sup> 261 P. 2d 682 (Wash. 1953).

<sup>19</sup> *Id.* at 682.