



1949

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William Threlkeld
University of Kentucky

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Recommended Citation

Threlkeld, William (1949) "Discovery Before Trial in Kentucky," *Kentucky Law Journal*: Vol. 37 : Iss. 4 , Article 4.
Available at: <https://uknowledge.uky.edu/klj/vol37/iss4/4>

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NOTES

DISCOVERY BEFORE TRIAL IN KENTUCKY

It has been noted that although Kentucky has no procedure designed primarily for the purpose of pretrial discovery it is possible to effect much in this field under the present code of civil practice.¹ Although one may accomplish a great deal, the fact that it is necessary to resort to provisions designed for other purposes has caused a great divergence in the use of the available discovery machinery. The writer, in an effort to determine the extent to which this valuable aid is used in pleading throughout the state, has found that its use is largely regional. In Jefferson, Fayette, and the surrounding counties it is used extensively and many lawyers state that they would not think of going to trial without having taken their adversary's testimony *as if on cross examination*.² In other sectors of the state lawyers of some prominence assert that as far as they know there is no such procedure available in the local courts. Since such lack of uniformity exists, it has been thought timely and fitting that an attempt be made to demonstrate the use which may be made of pretrial discovery in this state as well as to regroup the pertinent code sections in order that a fuller view of the procedure may be had. To attain this end the present note has been divided roughly into two parts: the first, an application of the practice to a simple fact situation for those unfamiliar with the practice and the second, a codification of the present rules.

Probably the most efficient means of demonstrating both the method and value of the pretrial discovery procedure in this state is to apply the practice to an assumed fact situation. Since pretrial discovery is used, in all likelihood, more frequently in automobile accident litigation than in any other single class of court actions, we may well consider the following hypothetical case. A, while driving his automobile on the public streets of Burlington, was struck and rendered unconscious by a truck owned and operated by B. The only eye witness to the accident, other than

¹ RAGLAND, DISCOVERY BEFORE TRIAL 26 (1932).

² There are other sectors of the state which make considerable use of pretrial discovery but it appears that here it has been used more consistently than elsewhere.

A and B, was C, a resident of Bowling Green, whose name was not included on the accident report and who is therefore unknown to A. As a result of the accident A brings an action against B. Y, attorney for the plaintiff, files a petition alleging generally the negligence of B and praying damages in the sum of five thousand dollars.

Let us now examine the steps taken by the attorneys for each of the parties in their preparation for trial. Upon being retained by the defendant, attorney X will ordinarily file an answer in the form of a general denial unless he has affirmative matter to plead in which case his pleading may be equally vague. As soon as he has filed his answer he may begin taking depositions.³ His first will be that of his adversary, A, whose deposition he will take in the following manner. X will choose the officer before whom he wishes the deposition taken. As a matter of economy X chooses to take the deposition before his secretary who is also a notary public⁴ and thus authorized to take depositions. In procuring the attendance of A, X will cause a notice to be served on A of his intention to take oral depositions setting forth the time and place of the examination and adding the words "as if on cross examination," since this is to be the examination of an adversary. X's secretary, as the officer before whom the deposition is to be taken, will then issue a subpoena to the sheriff of Boone County directing him to require A to attend for the purpose of giving his deposition.⁶ However, since an essential part of the plaintiff's action is the proof of his injuries, X will desire full information as to the extent of the alleged injuries. In order to obtain this information, X will seek a *subpoena duces tecum* from the Boone County Circuit Court Judge requiring the plaintiff to bring his hospital, physicians', and garage bills with him to the examination for inspection by X.⁷ Such an order is obtained by first giving notice to A that the defendant will, on a given day, move the court for such an order, and then on the designated day make a motion to the court for the order setting forth his need. Since a wide latitude is permitted in the examina-

See Rule 1 (a) *infra*, p. 393.

⁴ See Rule 3 *infra*, p. 395.

See Rule 5 *infra*, p. 395.

⁶ See Rule 4 *infra*, p. 395.

See Rule 8 *infra*, p. 399.

tion of an adverse party, X, in examining B, may inquire into any matter not privileged relating to the matter in issue. That is to say, he may inquire as to the specific facts on which the plaintiff intends to rely in support of his action and the means he intends to employ in proving these facts.⁸ It may be that X will also take the deposition of the hospital official having the custody of A's hospital record and require him to submit it for inspection by the same process as outlined above.

At the examination of either a witness or a party, the deponent is first sworn by the officer before whom the deposition is to be taken and provision is then made for the officer, his agent, or the deponent to record the testimony.⁹ The examination then proceeds as any examination in court with the originating party examining in chief and the adverse party on cross. If there are any objections to the line of questioning, counsel can usually settle the matter between themselves as to what is permissible. If this is impossible, it is the custom to continue the examination employing questions to which there are no objections, reserving all questions in dispute for a ruling by the circuit judge. When the examination along all undisputed lines has been completed, the examination is postponed until a ruling by the circuit court judge can be obtained, and is then completed according to his instructions.¹⁰ This is done, although the officer has power to decide objections and compel answers, for two reasons first, the officer is usually untrained in the law and second, the officer's attempts to coerce answers are subject to the immediate control of the circuit court.

Should the plaintiff seek damages for permanent injuries, X will need a complete report of the plaintiff's physical condition. This is obtained by serving notice on the plaintiff's attorney that the defendant will at a designated time and place move the court for an order requiring the plaintiff to submit to a physical examination. On the designated day counsel will by motion request such an order from the court setting out his reasons, and the motion, although addressed to the discretion of the court,

⁸ See Rule 1 (b) *infra*, p. 393.

⁹ See Rule 5 (c) *infra*, p. 396.

¹⁰ See Rule 5 (d) *infra*, p. 396.

is usually granted with an order that the report of the physician be forwarded to the party ¹¹

It is not necessary for the parties to wait until the court is again sitting in Boone County to obtain the above-mentioned orders, as the judge may make the necessary orders at any place within the fifteenth judicial district.¹²

It is not to be thought that the procedure is of benefit to the defendant alone. It is equally valuable to the attorney for the plaintiff, who, at the time he filed the petition, has been apprized of only the facts of which the plaintiff was aware. As soon as he has filed the petition he may begin taking depositions in the plaintiff's cause.¹³ His first step would be to take the deposition of the defendant as if on cross examination, by the procedure outlined above for taking the deposition of the plaintiff. Since the scope of the permissible examination of the defendant is extremely broad, it is quite likely that the name and address of C will be disclosed during its course.

Assuming that at the examination of B the name and address of C was disclosed and it is impossible for the attorney for the plaintiff to secure a complete and voluntary statement from him concerning the accident, he will desire to take his depositions. He may, if he obtains the consent of B, take the depositions of C on written interrogatories. In doing this he shall file with the Boone County Circuit Court Clerk the interrogatories which he wishes to propound, and serve notice on B of such filing, until a commission be issued to take the depositions, B may file cross interrogatories. After the expiration of ten days following the notice of filing, the clerk will forward the interrogatories and cross interrogatories to an officer in Warren County authorized to take depositions, who will subpoena the witness C, propound the questions, and record the answers as directed in Rule 6 of this note. It is more probable that Y will desire to take the depositions of C orally since most attorneys have found written interrogatories to be of little value, as the deponent, if he so desires, may by adroit answers continue to conceal any fact within his knowledge. If he chooses to take oral depositions, he will probably proceed in the following manner. He will first,

¹¹ See Rule 9 *infra*, p. 399.

¹² See Rule 11 *infra*, p. 400.

¹³ See Rule 1 *infra*, p. 393.

by correspondence, arrange with some qualified officer in Warren County to take the deposition of C. When the time and place have been agreed upon, Y will serve notice on the defendant of his intent to take the deposition of C, and the officer will subpoena C to appear at the chosen time and place as was done previously. In taking these depositions Y may travel to Bowling Green and make the examination personally, or may arrange for an attorney practicing there to represent him and to inquire into the facts.

When each attorney has taken the depositions he desires, and has thereby acquired a fuller understanding of the case which he and his adversary will present in court, it is not unusual that they are able to reach a just compromise to which the litigants can agree and thus settle the matter without trial. Even if it is impossible to reach a compromise, they will be able to stipulate many facts and thereby obviate the necessity of introducing a great amount of the evidence normally presented in the trial court. Equally important is the fact that counsel, having a complete understanding of both sides of the controversy, may intelligently present his evidence and cross examine the witnesses of his adversary. Should any witness desire to improve his testimony, counsel has an ever present check in the deposition taken before there was an opportunity to polish the granite of truth. Finally, it is of no little importance that counsel is enabled fully to prepare instructions to meet any contingency that may arise during the trial, before entering the courtroom.

As has been previously said, the process herein described is most frequently used in automobile accident cases, but it is equally efficacious in any litigation involving a disputed fact situation.

Since the rules pertaining to pretrial discovery in Kentucky are nowhere set forth in a clear, orderly, and concise manner, it has been felt that it would be of value, both to students and to members of the bar, to codify the pertinent provisions of the Kentucky Civil Code as well as the applicable rules set out in cases decided by the Court of Appeals.¹⁴ In stating this sug-

¹⁴ In those situations where neither the Kentucky Civil Code nor the decisions of the Court of Appeals clearly define the procedure to be followed, a practical mean of the practice of the Circuit Courts of Jefferson and Fayette Counties has been followed.

gested pretrial practice code, the outline of the Rules of Civil Procedure in the United States District Courts, Rules 26 through 37 have been followed where applicable.

RULE 1 DEPOSITIONS PENDING ACTION¹⁵

(a) When depositions may be taken. The plaintiff may begin taking depositions immediately upon service of the summons, and the defendant, immediately after filing his answer.¹⁶ Either party may now take the deposition of any person,¹⁷ including the adverse party,¹⁸ either by oral examination¹⁹ or on written interrogatories (by consent of the party or by order of the court)²⁰ The attendance of witnesses may be compelled by use of the subpoena issued by the officer before whom the deposition is to be taken.²¹ The oral deposition of any person confined in a jail, workhouse, or house of correction may be taken at such reasonable time or place as the person having custody of the deponent may prescribe.²²

(b) Scope of examination. The deponent may be examined regarding any matter admissible at the trial or, if a party, he may be examined concerning any matter not privileged, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.²³

(c) Examination and cross examination. Examination and

¹⁵ Corresponding to Federal Rule 26.

¹⁶ Ky. Civ. CODE sec. 557 (Carroll, 1948)

¹⁷ *Willis v Bank of Hardinsburg & Trust Company* 160 Ky. 808, 170 S.W. 188 (1914)

¹⁸ Ky. Civ. CODE sec. 606 (8) (Carroll, 1948) *Owensboro City Ry. Co. v. Rowland*, 152 Ky 175, 153 S.W. 206 (1913).

¹⁹ Ky. Civ. CODE secs. 545, 565 (Carroll, 1948)

²⁰ Ky. Civ. CODE secs. 572, 573 (Carroll, 1948)

²¹ Ky. Civ. CODE secs. 578, 535-539 (Carroll, 1948)

²² Ky. Civ. CODE sec. 540 (Carroll, 1948).

²³ There are no code provisions or decisions of the Court of Appeals clearly defining the scope of such an examination, but interviews with lawyers of both Lexington and Louisville indicate that a liberal examination of witnesses and an unlimited examination of the parties on unprivileged matter is permitted; however, there is some variance among even the several Common Pleas Courts of Louisville. See *Western Union Telegraph Co. v Williams*, 129 Ky 515, 521, 112 S.W. 651, 653 (1908)

cross examination of deponents may proceed as permitted at the trial under the provisions of code section 594.²⁴

RULE 2 DEPOSITION BEFORE ACTION²⁵

(a) Before action.

(1) A person who resides in this state and expects to be a party to an action in a court hereof or who, being a nonresident of this state, has an interest in real property herein, and who desires to perpetuate the testimony of any witness regarding any matter that may be cognizable in the courts of this state (a nonresident is limited to actions concerning his real property located in this state) may file in the circuit court of the county in which he resides, (if a non-resident he must file in the county in which his property is situated), a verified petition in equity requesting permission to take depositions. The petition shall show (1) that he expects to be a party to an action in this state and why it cannot now be brought, (2) the nature of the expected action, (3) the facts which he expects to prove by the testimony of the witnesses, (4) the name, age, and place of residence of the expected adverse party if known by petitioner, or his ignorance thereof if not known by him, (5) the names of the witnesses and the facts to which it is believed they will testify and that such testimony is material to the petitioner, (6) and shall ask for an order that the specified witnesses shall be ordered to appear and submit to an examination for the purpose of giving their depositions.²⁶

(2) Notice and service. The petitioner shall thereupon serve notice on all of the expected adverse parties in the same manner as would be proper in any other action.²⁷

(3) Order and examination. After the adverse parties are before the court the court shall in its discretion allow or disallow the taking of the depositions. If the taking of the depositions is permitted the court shall make such orders allowing the depositions to be taken as it shall in its discretion deem equitable.²⁸ The depositions when taken as ordered by the court

²⁴ This is the normal means of taking a deposition either for discovery or for the preservation of testimony

²⁵ Corresponding to Federal Rule 27.

²⁶ Ky. Civ. CODE sec. 610 (Carroll, 1948)

²⁷ Ky. Civ. CODE sec. 611 (Carroll, 1948)

²⁸ *Ibid.*

shall be delivered or sent to the clerk of the court in which the action was filed and kept by him as depositions in equitable actions. All costs shall be charged to the petitioner.²⁹

(4) Use of depositions. Upon a trial for the controversy set out in the petition between the parties therein named as expected parties or their representatives or successors such depositions may be read as though taken pending the action and subject to the same limitations.³⁰

RULE 3 PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN³¹

(a) Within the Commonwealth. Within this state depositions to be used in its courts shall be taken before an examiner, a judge, or clerk of a court, a justice of the peace, or a notary public.³²

(b) In sister states. In a sister state depositions may be taken before a commission appointed by the governor thereof, or before any person empowered by a commission directed to him by consent of the parties, or by order of the court, or before a judge of a court, a justice of the peace, mayor of a city, or a notary public.³³

RULE 4 POWERS OF OFFICER TAKING DEPOSITIONS

Any officer authorized to take depositions shall have the power to issue a subpoena compelling the attendance of witnesses for the purpose of taking depositions,³⁴ to require answers to questions, to prevent insulting questions, to terminate a course of examination pursued unreasonably for mere vexation and delay³⁵ Any refusal to recognize the lawful orders of such officer is punishable as contempt of the officer.³⁶

RULE 5 DEPOSITIONS UPON ORAL EXAMINATIONS³⁷

(a) Notice of examination, time, and place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every adverse party to the action.³⁸ The notice shall state the time and place of taking

²⁹ Ky. Civ. Code sec. 612 (Carroll, 1948)

³⁰ Ky. Civ. Code sec. 613 (Carroll, 1948)

³¹ Corresponding to Federal Rule 28.

³² Ky. Civ. Code sec. 562 (Carroll, 1948).

³³ Ky. Civ. Code sec. 564 (Carroll, 1948).

³⁴ Ky. Civ. Code sec. 578 (Carroll, 1948).

³⁵ Ky. Civ. Code sec. 579 (Carroll, 1948)

³⁶ Ky. Civ. Code secs. 535, 538 (Carroll, 1948).

³⁷ Corresponding to Federal Rule 30.

³⁸ Ky. Civ. Code secs. 565, 624, 732 (4) (Carroll, 1948).

the deposition and must be signed by the party, or his attorney giving it. If the deposition is to be taken out of the county the notice must also state the name of the proposed witness unless taken to prove a law or custom.³⁹ After the notice is duly served it should be filed with the officer who is to take the examination.⁴⁰

(b) Orders for the protection of parties and deponents. Any order for the proper protection of a party or a deponent may be made by the court on proper motion.⁴¹

(c) Record of examination, oath, objections. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness.⁴² The deposition may be recorded in shorthand and then transcribed or in the handwriting of either the officer or the witness.⁴³

(d) Motion to terminate or limit examination. If objections arise and cannot be decided among counsel the examination shall be adjourned until a ruling can be obtained from the trial court.⁴⁴

(e) When the testimony is fully transcribed, if in the handwriting of the officer or of the witness, it shall be subscribed, but, if taken in shorthand and then transcribed on a typewriter, it need not be signed unless one party so demands in a motion to the officer. The officer taking the deposition shall append a certificate thereto setting forth in detail the manner in which said deposition was taken, and shall state when and where the deposition was taken, that the witness was duly sworn before

³⁹ KY. CIV. CODE sec. 566 (Carroll, 1948)

⁴⁰ KY. CIV. CODE sec. 578 (Carroll, 1948)

⁴¹ The Court of Appeals has consistently maintained that the power to control the procedure of courts is inherent in the courts themselves. *Hobson v Kentucky Trust Co. of Louisville*, 303 Ky 493, 197 S.W. 2d 454 (1946) *Commonwealth ex rel. Atty. Gen. v. Furste*, 288 Ky. 631, 157 S.W. 2d 59 (1941) *Burton v Mayer*, 274 Ky 263, 118 S.W. 2d 547 (1938) It is thought such power must necessarily include the power to make the necessary orders for the protection of witnesses and parties.

⁴² KY. CIV. CODE sec. 582a (Carroll, 1948) compare *Western Union Telegraph Co. v J. B. Corso & Sons*, 121 Ky 322, 28 Ky. Law Rep. 290, 89 S.W. 212 (1905) with *Napier v Combs*, 204 Ky 774, 265 S.W. 313 (1924)

⁴³ KY. CIV. CODE sec. 582a (Carroll, 1948).

⁴⁴ This is apparently the practice in Fayette and Jefferson Counties and seems to be well within the policy of KY. CIV. CODE secs. 535, 538.

giving it, and that it was taken in shorthand with or without the witness subscribing it as the case may be, or that it was written and subscribed by the witness in the presence of the officer; and shall also state whether or not either of the parties, and if either, which of them was present in person, or by agent or attorney, during the examination.⁴⁵

(f) Copies, disposition of. Excepting depositions taken by a guardian ad litem and by persons suing in *forma pauperis*—which shall be delivered or sent without prepayment of fees or postage—the officer, upon payment of his fees and necessary postage, shall deliver the depositions to the clerk of the court in which, or the justice before whom, the action is pending, or shall send them by mail or private conveyance, in a sealed envelope, directed to such clerk or justice, with an indorsement showing the style of the action and that it contains depositions, but, if sent by private conveyance, the person by whom they are sent must make oath before the clerk or justice to whom they are delivered that they have not been opened by him or any person, in their transit. The clerk or justice shall endorse on the depositions the time and mode of their reception, and the affidavit, if any, of the person delivering them.⁴⁶

Unless otherwise directed by the court, the officer before whom the deposition is taken, shall prepare and deliver to each party a copy of the deposition taken, upon proper request and tender of the necessary fees.⁴⁷

RULE 6 DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES⁴⁸

(a) Serving interrogatories, notice. A party desiring to take the deposition of any person upon written interrogatories⁴⁹ shall file the interrogatories in the office of the clerk. The caption thereof shall state the name and address of the witness. Notice of the filing shall be given all adverse parties as in other actions,⁵⁰ and shall be filed in the office of the clerk. Within ten

⁴⁵ KY. CIV. CODE sec. 582a (Carroll, 1948).

⁴⁶ KY. CIV. CODE sec. 583 (Carroll, 1948)

⁴⁷ This is the usual practice in Fayette County.

⁴⁸ Corresponding to Federal Rule 31.

⁴⁹ The instances when a deposition may be or is required to be taken on written interrogatories, are clearly set forth in KY. CIV. CODE secs. 571–573 (Carroll, 1948)

⁵⁰ KY. CIV. CODE sec. 575 (Carroll, 1948).

(10) days of the filing of the interrogatories, or until a commission be issued to take the deposition, if that is longer, the adverse party may file cross interrogatories.⁵¹ If no cross interrogatories are filed the clerk shall file the following a. What is your age, occupation, and place of residence? b. Are all of your statements in the foregoing answers made from your personal knowledge? If not, which of them are made from information or belief? What is the source of your information or the foundation of your belief? c. Have you an interest in this matter direct or indirect? If any, what is it? d. Have you stated all you know concerning this action? If not, state what you have omitted.⁵²

(b) Clerk to forward to commission. At the expiration of the proper length of time,⁵³ the clerk shall issue a commission with a copy of the interrogatories attached, to any, or to a particular person authorized to take depositions.⁵⁴ Such officer shall proceed promptly in the manner provided in Rule 5 (c), (e) and (f) of this note, to take testimony of the witness in response to the interrogatories and to prepare, certify and forward the deposition to the clerk of the court in which the action is pending.⁵⁵

(c) Any order for the proper protection of the parties or deponent may be made by the court on proper motion by the deponent.⁵⁶

RULE 7 INTERROGATORIES TO PARTIES⁵⁷

There are no provisions for written interrogatories to parties other than those also applicable to witnesses as described in Rule 6 of this note with the exception that a party may annex written interrogatories to his pleadings concerning any material allegation if the interrogated party does not live within twenty miles of the court or if he be unable to attend on account of infirmity imprisonment, or if the party is a female.⁵⁸ The answer

⁵¹ Ky. Civ. Code secs. 575, 576 (Carroll, 1948)

⁵² Ky. Civ. Code sec. 575 (Carroll, 1948)

⁵³ Ky. Civ. Code sec. 576 (Carroll, 1948)

⁵⁴ Ky. Civ. Code sec. 577 (Carroll, 1948) regarding officers authorized to take depositions on written interrogatories; see Ky. Civ. Code secs. 562, 564.

⁵⁵ Ky. Civ. Code sec. 583 (Carroll, 1948)

⁵⁶ See note 41 *supra*.

⁵⁷ Corresponding to Federal Rule 33.

⁵⁸ Ky. Civ. Code sec. 143 (Carroll, 1948).

to such interrogatories, if attached to the petition, shall be answered when the petition is required to be answered, if attached to any other pleading, they shall be answered at or before the calling of the case for trial.⁵⁹ The answer to the interrogatories shall be verified by the affidavit of the party answering,⁶⁰ stating that his answers are true or, if not made from his own knowledge, he believes them to be true. The court may compel answers to interrogatories by process of contempt, and may, on failure of the party to answer them, after reasonable time, dismiss the petition, or strike out the pleading of a party so failing.⁶¹

RULE 8 DISCOVERY AND PRODUCTION OF DOCUMENTS FOR INSPECTION⁶²

Upon proper motion of any party showing good cause therefor, the circuit court in which the action is pending may order the deponent to produce and permit the examination, by or on behalf of the moving party, of any books, papers, documents, accounts, letters, photographs, or objects under his control which he is bound by law to produce in evidence, at the time he gives his deposition on oral examination.⁶³

RULE 9 PHYSICAL AND MENTAL EXAMINATION⁶⁴

(a) Order for examination. In an action in which the mental or physical condition of a party is in controversy, the court in its discretion may order the mental or physical examination of the party by a physician.⁶⁵

(b) Report of findings. A report of the findings of the physician shall be available to every party to the action.⁶⁶

⁵⁹ Ky. Civ. Code sec. 144 (Carroll, 1948)

⁶⁰ Ky. Civ. Code sec. 148 (Carroll, 1948)

⁶¹ Ky. Civ. Code sec. 151 (Carroll, 1948).

⁶² Corresponding to Federal Rule 34.

⁶³ *Crook v Schumann*, 292 Ky. 750, 167 S.W. 2d 836 (1942)

⁶⁴ Corresponding to Federal Rule 35.

⁶⁵ *Stearns Coal & Lumber Co. v Williams*, 177 Ky 698, 198 S.W. 54 (1917) *Belt Electric Line Co. v Allen*, 102 Ky 551, 19 Ky Law Rep. 1656, 44 S.W. 89 (1898) Apparently the court has not expressed itself as to the time when such examinations are to be made, but it is common practice to order the examination as pretrial measure.

⁶⁶ It appears to be the policy in Fayette County for the court to order a copy of the physician's report to be made available to any party so desiring on a proper motion made at the time the order for the physical examination is made.

RULE 10 REFUSAL TO MAKE DISCOVERY, CONSEQUENCES

If a party or other deponent refuses to answer any question propounded on oral or written interrogatories, the party propounding the question may, on proper motion to the court, require the question to be answered if a suitable one, on pain of contempt.⁶⁷

The court may require any party to comply with the foregoing rule by the following means (1) citation for civil contempt, (2) striking the pleadings of the defaulting party and rendering judgment for his adversary⁶⁸

RULE 11 NECESSARY ORDERS, PLACE OF ENTERING

The judge of each circuit court other than those of continuous session, may make or direct in term time, or in vacation at his chambers, at the circuit court clerk's office, or at any other place in any county in the district, any rule or order in any proceeding, upon reasonable notice to the parties.⁶⁹

It should be readily evident from the foregoing that the pre-trial discovery devices available in Kentucky are superior to those in many, if not most, of her sister states. Considered in the light of the advantages that may be secured thereby, it is exceedingly hard to understand its continued lack of use by the lawyers in great sections of this state. In other states when such practices were introduced, local bar associations first registered disapproval, but, as the backlog of cases dropped to a small fraction of its previous total, responsible lawyers began to change their attitude and to accept the many advantages inherent in the system.

This procedure is not an instrument of fraud or a guide to better perjury, as has too often been said by the uninformed. On the contrary, perjury, faked claims, and their other sordid counterparts are impossible under a system of balanced discovery such as is available in this state.

Pre-trial discovery practice is the answer to the ambulance-

⁶⁷ Crook v. Schumann, 292 Ky. 750, 167 S.W. 2d 836 (1942).

⁶⁸ *Ibid.*

⁶⁹ Ky. R. S. sec. 23.150 (1948) The case of Carter v. Templeman, 298 Ky. 272, 182 S.W. 2d 241 (1944) though not directly in point seems sufficiently broad to encompass the above rule.

chasing lawyer who trumps up a case in the hope of extracting a settlement from someone who fears the expense and trouble of a court trial. For years this kind of litigation has been a serious problem to insurance companies and to both large and small corporations. Under the system of discovery before trial such a case may be disposed of with dispatch.

The surprise witness, the emotional appeal to the jury, and all the other tricks by which a *sharp* lawyer so often defeats the truth and circumvents justice are almost entirely eliminated by efficient examinations shortly after the suit is instigated.

A courtroom is no place for lawyers to play chess with one another as they too often do.

WILLIAM THRELKELD