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WRITTEN INTERROGATORIES TO PARTIES UNDER THE MISSOURI CODE

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Among the procedural devices now available to a litigant in Missouri by which he may obtain from his opponent the disclosure of pertinent and material facts in the latter's possession prior to trial, will be found one which, although not original, is comparatively new so far as this state is concerned. Its immediate ancestor is one of the Federal Rules of Civil Procedure,[1] which, in the main, embodies the substance of former Equity Rule 58.[2] Its remote ancestor, on the other hand, probably can be traced to the equity bill of discovery in the English Chancery Practice,[3] as the present device is obviously a further extension of the idea that discovery is often essential to the proper conduct of litigation. In fact, this method of compulsory disclosure has

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1. FED. R. CIV. P. 33. For this reason frequent decisions of the federal courts have been cited as indicative of the probable decisions of the Missouri Courts.

2. 27 MARQ. L. REV. 158 (1943). See also State *ex rel.* Williams v. Buzard, 354 Mo. 719, 190 S.W.2d 907 (1945), where the court said:

> F.R. 33 did not come full grown out of the sky; it is derived from former Equity Rule 58, 28 U.S.C.A., Sec. 723, Appendix, which had its basis in the bill of discovery practice of chancery. As shown by the above authorities, its purposes were well known and its use was to find out what the opponent knew of his own knowledge which the other party could use as evidence.

Id. at 725, 190 SW.2d at 909.

3. Hickman v. Taylor, 329 U.S. 495 (1947). For the classical equity procedure, see LANGDELL, EQUITY PLEADING §§ 56-58, 68-79, 171-175, 215 (1883) *passim*. For the modern developments of discovery prior to the present federal rules, see RAGLAND, DISCOVERY BEFORE TRIAL (1932). See also James, *Discovery*, 38 YALE L.J. 746 (1929); Millar, *The Mechanism of Fact Discovery*, 32 ILL. L. REV. 424 (1937); Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1936); Note, 18 KAN. CITY L. REV. 70 (1950); Note, 16 MO. L. REV. 45 (1951).

sometimes been referred to as a "cheap bill of discovery."[4] Basically, however, it is simply a procedural device by which a party to a suit may serve upon an adverse party written interrogatories, to be answered, as will appear more fully hereafter,[5] by the latter under oath and whether the action is one at law or in equity.[6]

GENERAL NATURE OF INTERROGATORIES

These written interrogatories which are served upon the adverse party, and the answers too, for that matter, are not to be considered a part of the pleadings in any case in which they are used.[7] They are, on the contrary, in the words of the state supreme court, only "a less formal and less expensive way of ascertaining facts [in advance of trial] than by depositions."[8] They are, according to another Missouri court, "a part of the process of discovery of evidence before trial,"[9] and any admissions as to facts obtained may be offered in evidence at the trial against the party making them.[10] And the state supreme court has further declared, in this connection, that interrogatories may be used to obtain details of matters which are alleged only in generalities in the pleadings and to narrow the issues as to matters formally denied in the pleadings but not actually disputed in order to save time and expense.[11] Or more specifi-

4. O'Reilly, *Discovery Against the United States: A New Aspect of Sovereign Immunity?*, 21 N.C.L. REV. 5 (1942).

5. See the discussion concerning the answers, which is supported by notes 75 - 106 *infra.*

6. MO. REV. STAT. § 510.020 (1949). In this connection, note also the statutory provisions which permit the taking of depositions by requiring a witness to answer written interrogatories annexed to a commission issued by a court of record in this state and directed to some person or officer in another state. See MO. REV. STAT. §§ 428.220-492.260 (1949).

7. Dunleer Co. v. Minter Homes Corp., 33 F. Supp. 242 (S.D.W. Va. 1940).

8. State *ex rel.* Williams v. Buzard, 354 Mo. 719, 726, 190 SW.2d 907, 910 (1945). See also Belding v. St. Louis Public Service Co., 205 SW2d 866 (Mo. App. 1945). It was said in Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951), that interrogatories differ from depositions in that the information sought on the former does not presuppose or contemplate details of evidence and that the purpose of interrogatories is to seek an admission or obtain information of major importance.

9. State *ex rel.* Jensen v. Sestric, 216 S.W.2d 152, 154 (Mo. App. 1948).

10. State *ex rel.* Williams v. Buzard, 354 Mo. 719, 190 S.W.2d 907 (1945). For a statement that interrogatories are not to be used as a device or stratagem to maneuver the adverse party into an unfavorable tactical position, see Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951).

11. *Ibid.*

cally, according to this court in a later case[12] in which the propriety of several individual interrogatories was involved, discovery may be used for three distinct purposes: (1) to narrow the issues in order that at the trial it may be necessary to produce evidence only as to a residue of matters which are found to be actually disputed and controverted; (2) to obtain evidence for use at the trial; and (3) to secure information as to the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody and location of pertinent documents, or names and addresses of persons having knowledge of relevant facts.

THE RIGHT TO FILE

The right to file interrogatories as well as to require them to be answered is to be found solely within the language of the code, and the section relating to the use of this procedural device explicitly provides that any party to the suit may file written interrogatories upon an adverse party, although it must be noted that no party can, without first obtaining leave of court, file more than one set to be answered by the same party.[13] Thus, it will be seen that no litigant is barred from the use of interrogatories unless the party upon whom he desires to serve them is not an adverse party within the meaning of that term as used in the statute.[14]

Moreover, so far as the first set of interrogatories to be answered by the same party is concerned, the code does not prescribe any step which must be taken as a condition precedent to the right to file. The right is not, therefore, dependent upon a party first obtaining leave of court,[15] although it has been elsewhere indicated that leave of court must be obtained before interrogatories can be filed after depositions have been taken on the ground that such procedure is analogous to the filing of a

12. State *ex rel.* Kansas City Public Service Co., 356 Mo. 674, 203 S.W.2d 407 (1947).

13. MO. REV. STAT. § 510.020 (1949).

14. In Harlan Produce Co. v. Delaware, Lackawanna & Western R.R., 8 F.R.D. 104 (W.D.N.Y. 1948), it was held that if the pleadings reveal no issue between two parties, they are not adverse parties. *Cf.* Hickman v. Taylor, 329 U.S. 495 (1947); Tradesmens National Bank & Trust Co. v. Charlton Steam Shipping Co., 3 F.R.D. 363 (E.D. Pa. 1944); C.F. Simonin's Sons v. American Can Co., 26 F. Supp. 420 (E.D. Pa. 1939).

15. United States v. United States Cartridge Co., 6 F.R.D. 352 (E.D. Mo. 1946).

second set of interrogatories.[16] But the language of the Missouri code does not seem, even by implication, to prevent a party from resorting to the use of interrogatories without leave of court even where depositions have already been taken. In fact, there is nothing in the code which would tend to bar a party from using interrogatories after prior utilization of any other method of discovery, or, for that matter, concurrently with any other method.[17]

COURTS WHERE AVAILABLE

The right to use interrogatories is, by virtue of the language relating to the general applicability of the code of 1943, limited to "the supreme court, courts of appeal, circuit courts and common pleas courts."[18] It is, therefore, obvious that this particular provision of the code does not permit the use of interrogatories either in the magistrate court[19] or in the probate court. Nor, on the other hand, does the language of the specific section dealing with the use of interrogatories indicate that it applies to any other than a trial court as distinguished from an appellate court.

TIME TO FILE

Nor does the code of civil procedure prescribe when the interrogatories shall be filed. As a result, the question arises whether it would be proper to file interrogatories along with the petition and serve a copy with the copy of the petition upon the defendant or whether the plaintiff is required to wait until service of process has been had upon the defendant or, perhaps, until after the defendant has answered. If, however, the decisions pertaining to the federal rules, prior to the amendment of Rule 33, when the rule was similar to the Missouri code provision relating to interrogatories, are to be accepted as indicative of the proper

16. McNally v. Simons, 1 F.R.D. 254 (S.D.N.Y. 1940). But in Howard v. United States Marine Corp., 1 F.R.D. 499 (S.D.N.Y. 1940), and in Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951), it was said that the right to propound interrogatories is subject to judicial discretion. In C.F. Simonin's Sons v. American Can Co., 30 F. Supp. 901, 903 (E.D. Pa. 1939), the court said: "Thus it appears that the court must either grant discovery whenever it is asked for, provided a cause of action has been pleaded, or look for an earnest of the plaintiff's good faith somewhere other than in the complaint."

17. See, however, Currier v. Currier, 3 F.R.D. 21 (S.D.N.Y. 1942) to the effect that a plaintiff may not at the same time take depositions. Also note Canuso v. City of Niagara Falls, 4 F.R.D. 362 (W.D.N.Y. 1945).

18. MO. REV. STAT. § 506.010 (1949).

19. State *ex rel.* Pennsylvania R.R. v. Blocher, 361 Mo. 1107, 238 S.W.2d 361 (1951); State *ex rel.* Jensen v. Sestric, 216 S.W.2d 152 (Mo. App. 1948).

answer to the question, any filing before the plaintiff's petition has been served would constitute a premature filing. Indeed, these decisions indicate that this would be true if the interrogatories were filed at any time prior to the joinder of issues[20]—a view supported by the obvious fact that until the pleadings are filed, it is impossible to anticipate the matters which will be unrevealed, or denied, or even material to the suit and subject to compulsory disclosure. Generally, therefore, would not the better policy be to withhold the filing of interrogatories until the issues are made up and the interrogator knows what matters ought to be disclosed?[21] But this does not mean that the pleadings may not be amended after the disclosure of new facts or that the pleadings must be in final form for trial before interrogatories can be filed. In other words, where an issue is made by the original pleadings filed in the case, it would undoubtedly be proper for a party thereafter to file written interrogatories no matter how the pleadings afterwards might be altered or amended.

Form and Number of Questions Propounded

All interrogatories must be in writing and addressed to the adverse party.[22] The code contains no other requirement as to form. Nor is there any express statutory limitation as to the number of individual questions which may be included in the set served upon the adverse party, although this does not mean that the interrogatories should be overly repetitious and, as will appear more fully hereafter, irrelevant, or ambiguous, or vague, or too general, or inclusive.[23] In fact, the observation

20. Thus, in Sheldon v. Great Lakes Transit Corp., 2 F.D.R. 272 (W.D. N.Y. 1942), it was held that a motion for leave to file interrogatories was necessary if such interrogatories were to be filed before the service of an answer. To same effect, see Standard Accident Insurance Co. v. Home Indemnity Co., 6 F.R.D. 218 (S.D. Cal. 1946), where defendant was not required to answer interrogatories filed before answer, except by leave of court. Also see Musher Foundation v. Alba Trading Company, 42 F. Supp. 281 (S.D.N.Y. 1942). See, however, McHenry v. Erie R.R., 9 F.R.D. 554 (N.D. Ohio 1949), to the effect that, with the 1948 amendment to Rule 33, interrogatories may be served on the other party without leave of court within ten days after the commencement of the action.

21. See, in this connection, Mo. Rev. Stat. § 509.100 (1949), relating to the effect of a failure to deny averments in a pleading to which a responsive pleading is required.

22. Mo. Rev. Stat. § 510.020 (1949). That they should not be addressed to the attorney or agent of the adverse party as this device is limited to the parties in litigation, see Hickman v. Taylor, 329 U.S. 495 (1947).

23. Auer v. Hershey Creamery Co., 1 F.R.D. 14 (D.N.J. 1939). That

has been made with reference to this device for forcing discovery under the federal rules that "the number of interrogatories should be relatively few and related to the important facts of the case rather than very numerous and concerned with relatively minor evidential details."[24] The reason for this limitation has been said to be that otherwise written interrogatories might well develop into a most burdensome provision and a litigant could put his adversary to unreasonable expense by propounding needless and excessive questions[25] and thereby actually contravene the provisions of the Fifth Amendment, prior to an adjudication of liability, by requiring a party to incur expense greater than that ordinarily incident to the prosecution or defense of a suit.[26]

In spite of the foregoing, however, it is hereby submitted that, while interrogatories should, of course, be confined to the relevant issues of the case, if the device is to be really effective and a less formal and less costly method of determining facts before trial than by taking depositions, the court should not be too much concerned with the number of individual interrogatories nor generally with the labor and cost to the opposing party.[27]

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interrogatories should be simple, direct and certain and the interrogated party not required to speculate upon the legal or factual significance of the interrogatories, see Caskey & Young, *Some Limitations upon Rule 33 of the Federal Rules of Civil Procedure*, 28 VA. L. REV. 348 (1942). That there should be a direct causal relation between the subject matter of the interrogatories and the issues raised by the pleadings, see Slydell v. Capital Transit Co., 1 F.R.D. 15 (D.D.C. 1939). Also note McInerney v. Wm. P. McDonald Const. Co., 28 F. Supp. 557, 558 (E.D.N.Y. 1939).

24. Coca Cola Co. v. Dixie Cola Laboratories, 30 F. Supp. 275, 279 (D. Md. 1939); Knox v. Alter, 2 F.R.D. 337 (W.D. Pa. 1942). Also note State *ex rel.* Williams v. Buzard, 354 Mo. 719, 728, 190 S.W.2d 907, 912 (1945). It has been said that oral depositions are superior to written interrogatories since the interrogated party will usually, with the assistance of counsel, answer leisurely and consequently will have a better chance to avoid giving the information sought than when examined orally and that consequently to avoid this effect, the interrogatories become numerous and complex and the cost of answering them often out of proportion to the facts actually elicited. Sutherland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933).

25. Caskey & Young, *supra* note 23, at 348.

26. Byers Theaters v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940).

27. See Adelman v. Nordberg, 6 F.R.D. 383 (E.D. Wis. 1947), where it was held that the labor of preparing the answers to interrogatories constituted no objection since it would be necessary for the defendant to do a large part of the work anyway in preparing for trial. In Canuso v. City of Niagara Falls, 4 F.R.D. 362 (W.D.N.Y. 1945), it was said that the guide by which to determine whether interrogatories should be answered is not the number of interrogatories propounded but rather whether they are reasonable questions in the particular case. In J. Schoeneman, Inc. v. Brauer, 1

Perhaps the proper view to take is that it makes no difference how many interrogatories are posed. If the inquiries are pertinent, the opposing party cannot object. Yet, upon a motion for a rehearing in the first case to be appealed to it involving this method of discovery, the state supreme court held that, if the interrogatories are too complicated and involved and seek to go in detail into controversial evidentiary matters, the court should sustain objections to them on that ground. The reason for this decision was that otherwise too great a burden would be placed on the defendant in matters that could better be developed in depositions. "The spirit of the new code," said the court in its written opinion, "is to allow essential information admissible in evidence, to be obtained by the less expensive method of interrogatories whenever that is reasonable and proper."[28] And it might well be added that the court ought not subject the individual interrogatories to too strict an interpretation as to mere form and the like lest the spirit of the code be violated and the use of interrogatories become a futile formality.[29]

SCOPE—IN GENERAL

Anglo-Saxon courts have always had a discernible tendency to restrict the use of the principle of discovery. Thus, in 1795, a litigant made an unsuccessful attempt to use an amended bill in equity as a "fishing bill," to quote from the language of the court, in order to compel his opponent to reveal "in what manner he is heir *ex parte paterna* and all the particulars . . . of the births, baptisms, marriages, deaths or burials, of all the persons, who shall be therein named."[30] A similar attitude relative to the use of discovery generally was expressed in his work on equity jurisprudence by Story, to wit: a party may not pry into the title of his opponent.[31] Even in recent years, this tendency to restrict

F.R.D. 292 (W.D. Mo. 1940), it was said that an unlimited number of written interrogatories may be propounded if the inquiries are pertinent.

28. State *ex rel.* Williams v. Buzard, 354 Mo. 719, 728, 190 S.W.2d 907, 912 (1945).

29. Aktiebolaget Vargos v. Clark, 8 F.R.D. 635 (D.D.C. 1949).

30. Ivy v. Kekewick, 2 Ves. 679, 30 Eng. Rep. 839 (1795). In that case it was further stated by Lord Chancellor Loughborough: "This is a fishing bill to know how a man makes out his title as heir. He is to make it out: but he has no business to tell the plaintiff how he is to make it out." *Ibid.* That under the common law, a party was not entitled to know before trial the tenor of evidence in his opponent's possession, see McCarthy v. Palmer, 29 F. Supp. 585 (E.D.N.Y. 1939).

31. In Downie v. Nettleton, 61 Conn. 593, 24 Atl. 977 (1892), Story's view was quoted: "Nor has a party a right to any discovery, except of

has continued. For instance, in the state of Washington where a statute permitted "interrogatories for the discovery of facts and documents material to the support or defense of an action,"[32] the court refused to require the defendant, in a case where interrogatories were filed, to answer any question which went into the defendant's defense on the ground that the statute did "not enable him to pry into the opposite party's case."[33] And some federal courts also took the view with reference to the former equity rule that interrogatories would not permit a party to go into his opponent's case or defense.[34] Nor was this tendency to restrict the use of interrogatories completely checked by the new rules of federal procedure as some of the district courts unhesitatingly took the view that, despite the new rules, discovery may not be used by one litigant as a vehicle through which he can make use of his opponent's preparation of his case.[35]

There is, however, today an obvious general tendency, at least

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facts and deeds, and writings necessary to his own title, or under which he claims; for he is not at liberty to pry into the title of his adverse party." *Id.* at 596, 24 Atl. at 978.

32. WASH. REV. STAT. ANN. § 1226 (Remington 1932).

33. Kelly-Springfield Tire Co. v. Lotta Miles Tire Co., 139 Wash. 159, 162, 245 Pac. 921, 922 (1926). In New York, the courts hold that the plaintiff may examine the defendant as to matters essential to the maintenance of the cause of action, Mendelsohn v. Mendelsohn, 259 App. Div. 379, 19 N.Y.S.2d 516 (1st Dep't. 1940), and to the issues of which he has the burden of proof, Brookwood Parks, Inc. v. Jackson, 261 App. Div. 410, 26 N.Y.S.2d.127 (3d Dep't. 1941), and that the defendant may examine the plaintiff relative to matters essential to the defense, Ainsworth v. Cooper Underwear Co., 227 App. Div. 837, 237 N.Y. Supp. 301 (4th Dep't. 1929), and to issues which he must prove, Zeltner v. Fidelity & Deposit Co. of Md., 220 App. Div. 21, 220 N.Y. Supp. 356 (1st Dep't. 1927). In other words, a party may not ordinarily examine his adversary as to matters which the latter must prove. Goldberg v. Hommel, 250 App. Div. 870, 295 N.Y. Supp. 157 (2d Dep't. 1937).

34. J. H. Day Co. v. Mountain City Milling Co., 225 Fed. 622 (E.D. Tenn. 1915). *But cf.* Texas Company v. Gulf Refining Co., 12 F.2d 317 (S.D. Tex. 1926).

35. In Hercules Powder Co. v. Rohm, 3 F.R.D. 328 (D. Del. 1944), it was said:

> Moreover, interrogatories 4 (c) and 4 (d) in referring to "each compound" seek to have plaintiff make research and compilation of data which defendant may equally make to itself. In effect, the questions have a tendency to peek into plaintiff's preparation for trial. A defendant is not entitled to information as to discoveries or results made by a plaintiff in its preparation for trial.

Id. at 330.

In McCarthy v. Palmer, 29 F. Supp. 585 (E.D.N.Y. 1939), the court said:

> To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended.

Id. at 586.

so far as the federal rules are concerned, to subject the rules relating to discovery to an interpretation which formerly would undoubtedly have fallen within the ban of a "fishing expedition."[36] This tendency is evident from the language of the Supreme Court of the United States in the historic case of *Hickman v. Taylor*[37] that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."[38] In line with this reasoning a federal district court has said that "fishing expeditions" by means of interrogatories are permissible since it is more desirable to allow discovery of immaterial facts than to deny discovery which may bring to light facts which are more material to the issues than any facts theretofore known.[39]

The present Missouri Code of Civil Procedure, however, according to a pronouncement of the state supreme court, does not "authorize discovery of matters not admissible in evidence even though such matters might aid in the preparation for trial."[40] In accordance with that rationale "the production of documents or copies of them either in court, or on deposition, or on interrogatories, which are incompetent and immaterial and not germane to the subject matter of the suit" cannot be required.[41] The right of discovery, said the court, unlike that under the federal rules, "does not depend upon whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[42]

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36. For holdings to the effect that facts relating to the adversary's case may be disgorged by discovery, see United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942); R.C.A. Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433 (S.D.N.Y. 1940); Nicholas v. Sanborn Co., 24 F. Supp. 908 (D. Mass. 1938).

37. In Hickman v. Taylor, 329 U.S. 495 (1947), it was said: "No longer can the time honored cry of fishing expedition serve to preclude a party from going into the facts underlying his opponent's case." *Id.* at 507. And see Pike & Wills, *Federal Discovery in Operation*, 7 U. OF CHI. L. REV. 297, 303 (1949), to the effect that the fact that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position—annihilates the "fishing expedition" objection.

38. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

39. Reed v. Swift & Co., 11 F.R.D. 273 (W.D. Mo. 1951).

40. State *ex rel.* Thompson v. Harris, 355 Mo. 176, 180, 195 S.W.2d 645, 647, 648 (1946).

41. *Id.* at 180, 195 S.W.2d at 647. See also Belding v. St. Louis Public Service Co., 205 S.W.2d 866 (Mo. App. 1947).

42. *Ibid.* For a similar view, see Caskey & Young, *supra* note 23, at 355, where it is said:

In fact, the state supreme court went even further in its condemnation of discovery of matters in aid of preparation for trial than above indicated when in a later case it condemned an interrogatory because it called "both for subjective purposes and for intra-company instructions given to relator's agents about the preparation of its defense."[43] In so concluding the court held that under the present code the principle expressed in *Hickman v. Taylor*,[44] that it was not proper to require the disclosure of the thoughts, mental processes, and work product of lawyers in the preparation of a case, also extended and applied to such preparation by parties and their adjusters or investigators. And while the court is undoubtedly right in so limiting the scope of discovery, the usefulness of interrogatories as a method of discovery would have been greatly enhanced had the courts of Missouri also so construed the statute that a party could compel

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Although designed to inform each party of as much as possible of his adversary's claim, interrogatories were not meant to impose upon one party the burden of preparing his opponent's case. . . . The outcome of litigation is dependent upon proof. The strength of a litigant's position is determined by the extent to which he can establish his allegations by proof. Certainly, it is not incumbent upon one party to prove his opponent's case.

43. State *ex rel.* Millers Mutual Fire Ins. Ass'n. v. Caruthers, 360 Mo. 8, 12, 226 S.W.2d 711, 713 (1950).

44. 329 U.S. 495 (1947). The Court expressed its opinion as follows:

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to promote their client's interest. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case [153 F.2d 212, 223 (1945)] as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own: . . .

We do not mean to say that all written materials obtained and prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery. . . . Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration.

Id. at 510, 511.

an adversary to disgorge whatever facts he had in his possession, if not irrelevant or privileged, which would either constitute competent evidence or would reasonably and likely lead to the discovery of evidence of this character. It is unfortunate that the Missouri courts have rejected the apparently broader view of the Supreme Court of the United States that "either party may compel the other to disgorge whatever facts he has in his possession,"[45] unless it can be shown that the examination is being conducted in bad faith and in such a manner as to annoy, embarrass, or oppress the person subjected to the inquiry or that the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.[46]

So long as the sought-for information is pertinent and relevant and admissible in evidence, the fact that such information is already within the present knowledge of the propounder of the interrogatories, does not bar discovery of the information.[47] Interrogatories may be propounded with reference to matters with which the interrogator is already familiar,[48] or is in as good a position to know or find out the desired information as is the adverse party.[49] In other words, a party may properly seek facts pertaining to his opponent's case regardless of whether such facts are exclusively or peculiarly within the latter's knowledge

45. *Id.* at 507.

46. Hickman v. Taylor, 329 U.S. 495 (1947). Also see Checker Cab Manufacturing Corp. v. Checker Taxi Co., 2 F.R.D. 547 (D. Mass. 1943). In Balazs v. Anderson, 77 F. Supp. 612 (N.D. Ohio 1948), it was said that the office of interrogatories is not to supply information for the "personal" use of the litigants. In United States v. Columbia Steel Co., 7 F.R.D. 193 (D.C. Del. 1947), the court stated that relevancy does not depend upon admissibility as evidence in the case but refers to the subject matter of the suit.

47. Bowles v. Safeway Stores, Inc., 4 F.R.D. 469 (W.D. Mo. 1945); Kingsway Press, Inc. v. Farrell Publishing Corp., 30 F. Supp. 775 (S.D.N.Y. 1939). In Quirk v. Quirk, 259 Fed. 597 (S.D. Cal. 1919), the court said: "It makes no difference whether the facts are as much within the knowledge of the plaintiff as of the defendant. The facts have to be proven, and if the plaintiff can get an admission from the defendant, it saves the necessity of proving the facts, except by such admission of the defendant." *Id.* at 598. *But see* Earp Thomas Farmogerm Co. v. Stimuplant Laboratories, 38 F.2d 691 (E.D.N.Y. 1930), where the following statement was made: "A discovery relates to the unknown, not the known. The defendants are presumed to know what their own acts and the acts of their employees are. Therefore, why need they be, and indeed how can they be, the subject of discovery?" *Id.* at 692.

48. Snyder v. Atchison, Topeka & Santa Fe Ry., 7 F.R.D. 738 (W.D. Mo. 1948).

49. Patterson Oil Terminals, Inc. v. Charles Kurz & Co., 7 F.R.D. 250 (E.D. Pa. 1945).

or whether the former has at his disposal an adequate or even a better source of information relative to them.[50] A federal district court, however, once concluded that if the answer to the plaintiff's interrogatory could add nothing to what the plaintiff already knew, the objection made by the defendant to the interrogatory should be sustained.[51]

Actual immediate possession of pertinent and relevant facts which constitute admissible evidence, however, is not always necessary in order that disclosures may be compelled by one's opponent in a law suit. The power or right to control is equivalent to the possession of material facts. Similarly, disclosure may not be avoided by a party if he can with reasonable inquiry or diligence ascertain the facts of which he has actual or constructive control, as it is the ability to disclose, rather than the immediate knowledge of the facts subject to disclosure, that determines the matters which must be revealed. Nevertheless, ordinarily, a party may not be compelled to engage in research or make an extensive investigation or compilation of data and of information not readily known to him.[52]

Production of Documents

There is some indication in a decision of the state supreme court that interrogatories might be utilized to obtain documents or copies of them if they are competent evidence and material and germane to the subject matter of the suit.[53] This should be the ultimate and definite position so far as the Missouri code is concerned, although the statement has been made regarding the interrogatory provision of the Federal Rules of Civil Procedure that the proper procedure is to inquire whether certain relevant documents are in the possession of an adversary and then resort to the rule which provides for the production of docu-

50. Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951).

51. Dorman v. Isthmian S.S. Co., 6 F.R.D. 609 (E.D. Pa. 1946).

52. Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951); Snyder v. Atchison, Topeka and Santa Fe Ry., 7 F.R.D. 738 (W.D. Mo. 1948); *accord*, Colorado Milling and Elevator Co. v. American Cyanamid Co., 11 F.R.D. 580 (W.D. Mo. 1951). *But cf.* R.C.A. Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433 (S.D.N.Y. 1940), where the court ruled that a party may not object to interrogatories on the ground that they would require extensive research, investigation, and expense, if they relate to details alleged in his pleading and concerning which he presumably has information.

53. See note 40 *supra*.

ments for inspection, copying and photographing, inasmuch as the rule relating to interrogatories and the rule relating to the production of documents are not alternative devices.[54]

OPINION EVIDENCE

There are indications in federal decisions that opinions should not be sought by means of written interrogatories.[55] One reason that has been advanced for this view is that a proper foundation cannot be laid for opinions within the mechanics of this device for discovery. Another is that conclusions from evidentiary matters in the possession of an opponent should not be elicted by means of interrogatories since conclusions based on such matters are for the court or jury.[56] Yet one will wonder, at least in some instances, why a proper foundation cannot be laid for securing an opinion from an adverse party, particularly if the opinion could be obtained had depositions been used rather than written interrogatories, inasmuch as the courts of Missouri hold that the latter is simply a substitute for the former. Moreover, there is no sensible argument against the fullest possible use of this method or instrument of discovery in Missouri, and the courts should be constrained to adopt this view when a party resorts to written interrogatories to obtain disclosure of pertinent and material matters.

HEARSAY

Since the right in this state to resort to interrogatories is limited to the discovery of matters which are admissible in evidence at the trial or hearing of the cause, any matter which

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54. See Caskey and Young, *supra*, note 23, at 358, where it is stated: Rule 33 was not intended as an alternative method of discovery. . . . One may certainly inquire whether certain relevant documents are in the possession of an adversary. But a party may not be required to summarize, restate or interpret his written contracts or agreements. The proper procedure is adequately to designate those documents which might contain evidence material to any matter involved in the action and then move the court for an order allowing an inspection for the purpose of copying or photographing.
See also *Commentary, Obtaining Copies of Documents by Interrogatories,* 10 FED. RULES SERV. 1039 (1948).

55. Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951); Snyder v. Atchison, Topeka & Santa Fe Ry., 7 F.R.D. 738 (W.D. Mo. 1948); Byers Theatres v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940). For a statement to the effect that only matters of fact need be disclosed, see Blanc v. Smith, 3 F.R.D. 182 (S.D. Iowa 1943).

56. Caskey & Young, *supra*, note 23 at 348. Also see Lenerts v. Rapidol Distributing Corp., 3 F.R.D. 42 (N.D.N.Y. 1942).

falls within the realm of hearsay need not, of course, be revealed.[57] This was the supreme court's conclusion in one of the first cases to be appealed to it where the use of interrogatories under the new code was involved. There, the court held that written statements which were obtained by a railroad company from an injured motorist and the other occupants of the automobile several days after the collision were hearsay and consequently inadmissible in evidence in a personal injury suit brought by such motorist against the railroad.[58] Also, in harmony with the above general rule, the court held on another occasion that it was improper to interrogate a corporate defendant with regard to whether any of defendant's employees had obtained "the names and addresses of any persons present at the time and place of the casualty" since such a question sought information which the employees could have learned only by hearsay.[59] The question propounded should have been confined to persons "known to have been present" by the employees present.[60] A similar conclusion was subsequently reached in another case, where the individual interrogatory asked for the names of the persons questioned by defendant's agents, investigators or adjusters after the fire which had caused the loss allegedly covered by the plaintiff's policy, for the reason that the interrogatory called for the names of persons whose connection with the case and whose knowledge of facts connected therewith could only have become known to its agents by hearsay.[61]

These decisions, however, do not mean that the names of mere onlookers may not be obtained by the use of interrogatories. In fact, the supreme court had announced in a case decided prior to the rendition of any of the foregoing decisions that such a view was "too restricted" when the defendant contended that the names of persons having no part in the accident out of which

57. State *ex. rel.* Millers Mutual Fire Ins. Ass'n. v. Caruthers, 360 Mo. 8, 226 S.W.2d 711 (1950); State *ex rel.* Kansas City Public Service Co. v. Cowan, 356 Mo. 674, 203 S.W.2d 407 (1947); State *ex rel.* Thompson v. Harris, 355 Mo. 176, 195 S.W.2d 645 (1946). For a statement that a party need not answer interrogatories which called for matters concerning which such party had only hearsay information, See, Muth v. Fleming, 7 F.R.D. 537 (W.D. Mo. 1948).

58. State *ex rel.* Thompson v. Harris, *supra* note 57.

59. State *ex rel.* Kansas City Public Service Co. v. Cowan, 356 Mo. 674, 678, 203 S.W.2d 407, 408 (1947).

60. *Id.* at 681, 203 S.W.2d at 410.

61. State *ex rel.* Millers Mutual Fire Ins. Ass'n. v. Caruthers, 360 Mo. 8, 226 SW.2d 711 (1950).

the action arose would not be relevant or material to the issues. "The situation here is not the same," said the court in rejecting the defendant's contention, as where a question calls for "what an investigator found out from others long after the occurrence."[62] In the latter event, continued the court in its reasoning, the question clearly called for hearsay information.[63] But where the question seeks to obtain from an employee of the defendant, who was at the scene of the accident, the names of persons whom he knew were present at the time because seen there by him, such information, says the opinion of the court, is not hearsay but is on the contrary a proper matter for interrogation.

It has also been held that the plaintiff with propriety may ask the agent of a corporate defendant for the names and addresses of persons obtained by him who were present at the time and place of the accident in addition to the names and addresses of persons known by such agent to have been present.[64] In reaching this conclusion, the court declared that the mere fact that the officer who answered for the defendant corporation concerning the names and addresses of persons present would have to rely on information obtained by other employees, rather than on his own knowledge, did not render such interrogatories objectionable as calling for hearsay. Said the court, in justifying its decision:

> . . . The interrogatories are addressed to parties and not to individual witnesses who are not parties. As applied to a corporation, it does not mean that the officer answering for

62. State *ex rel.* Williams v. Buzard, 354 Mo. 719, 726, 190 SW.2d 907, 910 (1945).

63. *Ibid.* The court in State *ex rel.* Williams v. Buzard, supra note 62, quoted the following statement from the earlier case of State *ex rel.* Evans v. Broaddus, 245 Mo. 123, 149 S.W. 473 (1912):

> We have not before us at this time the question whether one eyewitness may not be asked who the other eyewitnesses of an accident were. That information might be useful in chief to identify and earmark the transaction or in rebuttal.

Id. at 142, 149 S.W. at 478.

The court in State *ex. rel.* Williams v. Buzard, *supra,* then went on to assert:

> Declarations of bystanders have been admitted as part of res gestae . . . Undoubtedly, it would be proper to ask defendant's operator (if his deposition should be taken) to give the names of those he knew were present at the casualty by being found by him there on the car at the very time. If this is true, . . . then certainly it would be proper to require the same information to be given by the defendant on interrogatories.

State *ex rel.* Williams v. Buzard, 354 Mo. 719, 726, 190 S.W.2d 907, 910 (1945).

64. State *ex. rel.* Kansas City Public Service Co. v. Cowan, 356 Mo. 674, 203 S.W.2d 407 (1947).

> it must be competent to testify to the truth of facts, shown by documentary evidence, such as required reports in its files and records. He is answering for the corporation and not for himself, as was likewise true on bills of discovery in equity from which interrogatories to parties developed.[65]

In an earlier case, however, it will be found that the court had rejected a similar claim.[66] There the corporate defendant maintained that the operator who found the witnesses at the very time of the casualty was not the person to answer the interrogatories. Rather, it contended that the officer, director, or managing agent of the defendant competent to testify should do the answering and that therefore the question, which sought the names and addresses of any other of defendant's employees (aside from the operator) who were upon the street car at the time and place of the casualty referred to in plaintiff's petition, would call for hearsay only. The court said in rejecting this argument that it was erroneously assumed:

> . . . that the only purpose of these interrogatories was to get testimony of an officer, director or managing agent of defendant. The interrogatories were not directed to them; they were directed to the defendant, a corporation. Section 85, Mo.R.S.A. § 847.85[67], and Rule 3.19, authorized service on one of them to notify the defendant, because a corporation has to be reached by service on some individual. Likewise, some individual must be responsible for making its answer. Section 27 (c), Mo.R.S.A. § 847.27 (c)[68] authorized service on company officials to bring the defendant into court in the first place, but no one would contend that such individual served was sued or would have to pay a judgment against the corporation. Of course, defendant's officers, directors and managing agents do not operate its cars and buses and most likely would not personally know anything about the circumstances of any of its traffic accidents.[69]

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65. *Id.* at 681, 203 SW.2d at 410 (1947).
66. State *ex rel.* Williams v. Buzard, 354 Mo. 719, 190 S.W.2d 907 (1945).
67. Mo. Rev. Stat. § 510.020 (1949).
68. Mo. Rev. Stat. § 506.150 (1949).
69. The court further stated in State *ex rel.* Williams v. Buzard, 354 Mo. 719, 190 S.W.2d 907 (1945):
> Therefore, interrogatories to a corporate defendant cannot completely take the place of depositions of its employees as a method of discovery. The best way to find out the circumstances of such accidents would be to take the deposition of the operator, or of other eye-witnesses. That would also be one way to find out the names of persons whom the operator knew were present at the casualty by reason of being found by him there on the car at that very time.

Id. at 728, 190 S.W.2d at 911.

Nevertheless, continued the court, even:

> . . . the operator might have to refresh his memory [if his deposition were taken] from the memorandum he made at the time . . . in order to fully answer the question. If he had made such a memorandum and delivered it to a company official, and the company has it in its files, why should not an officer of the company state the names shown on it in answer to a proper question on interrogatories? Certainly the corporation knows the facts that are shown by its records. . . . plaintiff is entitled to this information . . . and should be allowed to get it either from the operator on a deposition or from defendant on interrogatories. Either one or the other may obtain it or it may take both. If no one can answer this question that is another matter; but the fact would not determine whether or not the question was proper. . . . Nevertheless, even when an officer does not have personal knowledge gained at the scene of the casualty, some proper questions may be asked and should be answered if the information can be obtained from the company's records.[70]

Privileged Matters

Unlike the statutory provision relating to the production of documents, papers, tangible things, and the like where the right to inspect, copy or photograph is expressly limited to things "not privileged,"[71] the Missouri Code of Civil Procedure does not explicitly bar the use of interrogatories as a means for discovering privileged matters, such as those arising out of the attorney-client, the physician-patient and the husband-wife relationships and the right to freedom from self-incrimination. But despite the absence of a provision excluding the discovery of privileged matters by means of written interrogatories, the rule consistently followed by the Missouri courts that interrogatories may not be used to disclose matters which will not be competent evidence would seem in itself sufficient to compel the conclusion that privileged matters may not be disgorged from an adverse party.

Nor have the courts of this state to date in any reported decision held that privileged matters are not subject to disclosure by any of the discovery devices provided for under the present code. Nevertheless, some indication of what the Missouri courts will hold, at least so far as the attorney-client privilege is con-

70. *Ibid.*
71. Mo. Rev. Stat., § 510.030 (1949).

cerned, may be found in the case of *Hickman v. Taylor*,[72] which has been partially approved by the state supreme court.[73]

This case, so far as the Federal Rules of Civil Procedure were at the time involved, clearly recognized that "the memoranda, statements and mental impressions . . . in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis."[74] In so concluding, the Supreme Court of the United States declared that "it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories."[75] Yet it must be noted that the Supreme Court, in its opinion, did not set forth the scope of the attorney-client privilege. It simply recognized that, while the general policy was against invading the privacy of an attorney's course of preparation, such privacy was not wholly beyond the scope of invasion, although the "burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."[76]

But *Hickman v. Taylor* constitutes no authority for a court to compel the disclosure of privileged matters. On the contrary, it recognizes the right of the court to forbid such disclosures, and it is hereby submitted that any matter which falls within

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72. 329 U.S. 495 (1947).

73. State *ex rel.* Millers Mutual Fire Ins. Ass'n. v. Caruthers, 360 Mo. 8, 226 S.W.2d 711 (1950).

74. Hickman v. Taylor, 329 U.S. 495, 508 (1947).

75. *Ibid.*

76. *Id.* at 512. The Supreme Court in Hickman v. Taylor, *supra*, also stated:

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and the personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.

Id. at 510.

> . . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

Id. at 513.

the scope of any of the recognized privileges, ought not be ordered disclosed upon objection of the party interrogated. This is the view which the courts of this state should take as there is no reason why a litigant should be permitted to utilize interrogatories to violate any of the existing privileges such as that of attorney-client or doctor-patient or freedom from self-incrimination.[77] Even the most liberal interpretation of the interrogatory statute would not warrant a violation of these privileges over the objection of the party subjected to interrogation.

TRADE SECRETS

Is it fair to require the disclosure of trade secrets to an adverse party by means of the various devices of discovery including interrogatories?[78] The answer to this question is not apparent on the face of the statute relating to the use of interrogatories, but, in a recent Missouri decision,[79] the judge who wrote a separate concurring opinion took the view that, despite the severe nature of the procedure to compel disclosure, not only must the ingredients of a washing compound be disclosed to the propounder of the interrogatories but that the proportions of such ingredients must also be disclosed, as "such is apparently the plain meaning" of the statute and "it is the duty of this court to enforce the law, as laid down by the legislature, even though such law may seem harsh to us."[80] And the courts in its opinion stated that it knew of "no law that prevents a court from compelling the divulging of a trade secret under circumstances where it is as material as here in ascertaining the facts."[81]

77. See Marsh v. Marsh, 16 N.J. Eq. 391 (Ch. 1863), where an interrogatory was held "demurrable" on the ground that the defendant in a divorce action was not obliged to accuse herself of a crime (adultery). Also see Note, 52 A.L.R. 143 (1928).

78. See Putney v. Du Bois Co., 226 S.W.2d 737 (Mo. App. 1950). Also note Bead Chain Manufacturing Co. v. Smith, 1 N.J. 118, 62 A.2d 215 (1948). In Glick v. McKesson & Robbins, 10 F.R.D. 477 (W.D. Mo. 1950), where the ultimate fact issue was whether the plaintiff was injured by the ingredients of a suntan lotion, such ingredients were relevant to the issue in the case, and the court held that the plaintiff was entitled to discovery thereof by interrogatories but not to the secret formula.

79. Putney v. Du Bois Co., 226 S.W.2d 737 (Mo. App. 1950).

80. *See, id.* at 743 (concurring opinion).

81. *Id.* at 741. In Coca-Cola Co. v. Joseph C. Wirthman Drug Co., 48 F.2d 743 (8th Cir. 1931), the court, in discussing the right to withhold such information, said:

> Except where there is some announced reason of public policy—such as incrimination or privileged communication—the rules of evidence have never bent to permit a party to a suit to refrain from divulging

Nevertheless, the court recognized that it would be difficult to formulate precisely the state of the law on the problem. It did, however, conclude that the law recognizes no absolute privilege for trade secrets and that "the mere divulging of the ingredients of a compound and the proportionate part of each, would not in our opinion, be divulging a secret process."[82] And in this connection, it is interesting to note that the court also concluded that it would do no good to divulge the information secretly to the judge or even to the plaintiff after the trial had started and after the plaintiff had otherwise failed to prove a causal relation between her injury and the compound that plaintiff had alleged had caused such injury, inasmuch as "to keep from her this information would prevent her from making a prima facie case."[83] In other words, the court seemed to feel that if evidence is admitted during the trial of a case, it must really be admitted and, if the case is one being tried before a jury, submitted to them for their consideration the same as any other evidence introduced by the parties in support of their pleadings.

THE ANSWERS

The interrogatories which are served upon the adverse party must be answered by him, except where the adverse party is a public or private corporation or partnership or association. In this latter event, in the language of the statute, the questions are to be answered "by any officer, director, partner or managing agent thereof competent to testify"[84] in behalf of such corporation, partnership or association. The supreme court, however, has by a rule declared that the interrogatory statute "shall be

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facts pertinent to the issues before the court simply because he might be injured by such facts becoming public. In saying this, we do not wish to be understood as meaning that under any and all circumstances, where secret trade formulas or trade secrets might have a bearing upon issues before a court, they must be revealed. As far as is consistent with fair administration of justice, such secrets should be protected. But where such hold the essential facts of a controversy and no equally good evidence is obtainable, we see no reason why they should not be required.

Id. at 748.

82. *Id.* at 742.

83. *Id.* at 741. For further discussion of the view that privacy might be preserved to a large degree by compelling disclosure no further than to the judge himself, or to his delegated master or auditor, see 8 WIGMORE, EVIDENCE § 2212 (3d ed. 1940).

84. MO. REV. STAT. § 510.020 (1949).

construed to permit the service of interrogatories upon, and to require answer to the same by, a party, or, if the party served is a public or private corporation, or a partnership or association, a designated officer, director, general manager or managing agent thereof."[85] This obviously means that the party serving the interrogatories may designate the exact officer that he wants to make the answers. Yet, no matter who answers, the answers must be in writing and under oath, and each question must be answered separately. The answers must also be signed and sworn to by the person making them.[86]

But if an "officer, director, general manager or managing agent" of a corporation or association is to make the answers to the propounded interrogatories, must he, in view of the statutory requirement that he be "competent to testify in its behalf," be competent in the sense that he can actually take the witness stand in the case and give competent and relevant testimony, before he is qualified to answer the interrogatories served? The conclusion, that he must be competent in this sense, was confirmed to some extent by the state supreme court when it held in a damage suit that the agent for a street car company need not answer an interrogatory which called for hearsay information: the names of any persons which any employee of the company may have found at the scene of the casualty later or identified with it by hearsay.[87] Yet despite this holding, in the main, the expression has been liberally interpreted, even in the aforementioned suit which excluded the disclosure of names of persons learned by hearsay to have been present, when the court also held that an officer of a corporation, although he had no personal knowledge gained at the place of the accident, could be properly interrogated if the information for making an answer could be obtained from the corporation's records, or perhaps by the

85. Mo. Sup. Ct. Rule 3.19. If interrogatories are answered by a person on behalf of a corporate defendant who is not a person competent to testify in behalf of such defendant, but who was designated by the plaintiff to answer, the plaintiff is estopped to deny his authority to speak for the corporation. See Holler v. General Motors, 3 F.R.D. 296 (E.D. Mo. 1944).

86. Mo. Rev. Stat. § 510.020 (1949). Also see Pitman v. Florida Citrus Exchange, 2 F.R.D. 25 (S.D.N.Y. 1941), where the answers were signed and verified by the attorney of a corporate defendant.

87. The question involved was: "Please state the names and addresses of all persons whose names and addresses were taken by any employee of your corporation at the scene of the casualty?" State *ex rel.* Williams v. Buzard, 354 Mo. 719, 723, 190 S.W.2d 907, 908 (1945).

officer from some other agent of the corporation who possessed such information and who had not acquired it by the process of prohibited hearsay but rather in the performance of his duties for the company.[87] While the case does not specifically hold that the court may compel disclosure by an officer of information which he has acquired or can easily acquire from another agent of the corporation, it is not contrary to the spirit of the case to conclude that this is the proper view.[88] After all, a corporation can only act through its agents and the knowledge of the agent is the knowledge of the corporation, and any agent who falls within the scope of the language, "officer, director, general manager or managing agent" and who can secure the information possessed by the corporation should be required to disclose it when sought by appropriate interrogatories. Any other view would bar the use of interrogatories in many cases involving corporations and associations.

It should also be noted, in connection with the competency as a witness as a qualification for the party who shall answer the interrogatories, that the statute does not lay down the same requirement for individuals who are parties that it does for corporations, partnerships and associations. If the party is not a corporation, partnership of association, such party must personally answer the served interrogatories, and there is no provision in the statute that the party must be competent to testify in the case although the rule that only relevant, material and competent evidence need be revealed in answer to written interrogatories would tend to require that such party also be a competent witness. Yet it could well be that a case might arise where the party was not a competent witness. Should this pre-

88. In 2 MOORE, FEDERAL PRACTICE § 33.04 (1st ed. 1938), it is stated: Under Federal Rule 33, a party may without leave of court serve interrogatories to be answered by an officer of a public or private corporation, partnership or association which is an adverse party. The party serving the interrogatories may designate therein a particular officer whom he desires to answer the interrogatories or may leave it with the adverse party to select an officer to make the answers. Since only one set of interrogatories may be served on an adverse party without leave of court, the party serving the interrogatories, if he is not satisfied with the answers of a particular officer, must obtain leave of court to serve another set of interrogatories to be answered by another officer. It would seem, however, that a party may without leave of court serve one set of interrogatories to be answered by such officer or officers that have requisite knowledge to make answers thereto. In such a situation, it would seem that one officer may make the answers, obtaining the information from other officers.

vent the use of interrogatories? Here, as in the case of an officer answering for a corporation, if the information sought can be easily obtained by the party—if such information is really under his control or in his possession—such party ought to be required to answer. So to extend the use of written interrogatories seems in harmony with the general spirit of the Missouri code, although the problem would doubtlessly often arise for the court to determine whether hearsay information was actually being sought, should the interrogatories not be answered where the information could be obtained from another person.

From the foregoing, and as elsewhere stated, it is apparent as a general rule that any interrogatory which is relevant and competent as evidence in the cause must be answered, unless the answer would tend to violate a privilege or incriminate the person interrogated, or force him to express an opinion, a conclusion or urge a contention.[89] And there is no indication in the statute that the court has any discretion so far as determining whether a proper interrogatory must be answered, for it would seem that a party who files interrogatories has an absolute right to have them answered by the adverse party and that the latter is bound to answer them under possible penalty of a default judgment in the case, unless the questions are objected to, as hereafter pointed out, and the objections sustained.[90] If a question is proper, there seems to be no basis for the exercise of judicial discretion in the matter. Yet one of the appellate courts of this state concluded in a case involving a trade secret that whether an interrogatory which sought the disclosure of the ingredients of a washing compound should have been answered "was a matter within the sound discretion of the learned trial court."[91] The suggestion, however, is hereby made that perhaps the fact that the case involved a trade secret accounted for this conclusion of the court—a fact rather obvious from language contained in the court's opinion. But be that as it may, the federal courts have sometimes declared that the court has a reasonable discretion in deciding whether or not a plaintiff is entitled to have interrogatories answered.[92]

89. Landry v. O'Hara Vessels, Inc., 29 F. Supp. 423 (D. Mass. 1939).
90. Mo. Rev. Stat. § 510.060 (3) (1949).
91. Putney v. Du Bois Co., 226 S.W.2d 737, 741 (Mo. App. 1950).
92. See, *e.g.*, Newell v. Phillips Petroleum Co., 144 F.2d 338 (10th Cir. 1944); C. F. Simonins Sons v. American Can Co., 30 F. Supp. 90 (E.D. Pa. 1939).

Moreover, the party upon whom the interrogatories shall have been served shall not only file his answers with the clerk of the court but is required also to serve a copy of the answers upon the party who submitted the interrogatories and to do so within fifteen days after the delivery or service of the interrogatories upon the party required to answer, unless the court, on motion and notice and for good cause shown, shall either shorten or enlarge the time.[93] But is the answering party required to serve a copy of his answers upon any other party in the case? The code is silent in this respect, and the import of the statutory language seems to be that if there be more than one adverse party, the statute does not require service of a copy of the answers upon any other party than the one by whom the interrogatories were propounded.

Furthermore, if the propounded interrogatories are to be answered, each question should be answered directly and without evasion in the light of the information which the party interrogated possesses or can ascertain with due inquiry.[94] They should be answered "fully," to use an expression found in the statute.[95] This means that the answers must be complete,[96] although, as elsewhere pointed out,[97] the party answering is not required generally to engage in research or compile extensive information and data which is not readily known or available to him[98] or which will entail great or burdensome expense. It also means that if an answer is not complete, the adverse party may move the court for an order requiring the party who has not answered properly to further answer[99] or subject himself to the penalties provided for wilful failure to respond to propounded interrogatories.

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93. MO. REV. STAT. § 510.020 (1949).
94. See Gaumond v. Spector Motor Service, 1 F.R.D. 364 (D. Mass. 1940).
95. MO. REV. STAT. § 510.020 (1949).
96. See Lowe v. Greyhound Corp., 25 F. Supp. 643 (D. Mass. 1938), where the answer ended with the word "etc."
97. See text supported by note 48 *supra*.
98. Hercules Powder Co. v. Rohm & Haas Co., 3 F.R.D. 328 (D. Del. 1944). Also see Stanley Works v. C. S. Mersick & Co., 1 F.R.D. 43 (D. Conn. 1940), to the effect that a party may not be put to the trouble and expense of taking photographs although an existing photograph may be obtained by the use of interrogatories.
99. Kiernan v. Johnson-March Corp., 7 F.R.D. 128 (E.D.N.Y. 1945).

FAILURE AND REFUSAL TO ANSWER

The party who files interrogatories to be answered by his opponent is entitled to have each individual interrogatory answered unless the court, after proper objection, holds that the unanswered interrogatory is improper. In order to compel the party upon whom interrogatories have been filed to answer, the present code of civil procedure provides that "the proponent of the question may move the court, on reasonable notice to all persons affected thereby, for an order compelling an answer."[100] If the motion is granted, and if the court finds that the refusal was without substantial justification, the court is empowered to require and "shall require the refusing party to pay to the examining party, the amount of the court costs incurred in obtaining the motion."[101] Conversely, if the motion is denied and if the court finds that the motion was made without substantial justification, it shall require the examining party to pay to the refusing party the amount of the court costs incurred in opposing the motion.[102]

Not only may the court compel the refusing party to pay the court costs incurred in connection with the motion to force a party to answer an interrogatory which such party has refused to answer, but the court is further authorized by specific statutory mandate to impose other penalties.[103] These penalties may be imposed upon any party or on an officer or general manager of a corporation who refuses to obey an order to answer. They include:

> . . . such orders in regard to the refusal as are just, and among others the following:
> (1) an order that the matters regarding which the questions were asked . . . shall be taken to be established for the purpuses of the action in accordance with the claim of the party obtaining the order;[104]
> (2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses. . .;[105]
> (3) an order striking out pleadings or parts thereof, or

100. MO. REV. STAT. § 510.060 (1) (1949).
101. *Ibid.*
102. *Ibid.*
103. MO. REV. STAT. § 510.060 (2) (1949). With reference to whether imposition of these penalties violates due process of law, see Note, 144 A.L.R. 382 (1943).
104. MO. REV. STAT. § 510.060 (2) (1) (1949).
105. *Id.* § 510.060 (2) (2) (1949).

staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.[106]

ANSWERS AS EVIDENCE

The supreme court of this state has held that the answers to interrogatories may be utilized as admissions against the party interrogated,[107] but to be utilized as admissions against the party interrogated, so far as proof of one's case or defense is concerned, the answers do not become evidence until introduced in evidence at the trial as admissions against the interest of the party who has answered the interrogations.[108] On the other hand, at least, generally speaking, the answers may not, over the objection of the party propounding the interrogatories, be used as evidence in the case by the party who made such answers.[109] So far as the latter is concerned, the answers simply constitute self-serving statements and, as one court has said, are "free from the hazards of cross-examination,"[110] and save for exceptional circumstances may not be received in evidence over one's adversary's objection.[111]

Where, however, an interrogatory has been answered without objection and the party who filed the interrogatory offers it in evidence against the party interrogated, the answer should be admitted in evidence regardless of the fact that it might call for a conclusion, an opinion, the disclosure of privileged matter, or the like. So long as the answer is relevant, it should be admitted in evidence since a failure to object prior to answering will necessarily operate as a waiver or estop the answering party

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106. *Id.* § 510.060 (2) (3) (1949).

107. State *ex rel.* Williams v. Buzard, 354 Mo. 719, 190 S.W.2d 907 (1945). That the answers are not part of the pleadings, see Dunleer Co. v. Minter Homes Corp., 33 F. Supp. 242 (S.D.W. Va. 1940). For cases in other jurisdictions treating answers as evidence, see 27 C.J.S., DISCOVERY § 67.

108. United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942); Coca Cola Co. v. Dixi-Cola Laboratories, Inc., 30 F. Supp. 275 (D. Md. 1939). *See* Bowles v. Safeway Stores, 4 F.R.D. 469, 470 (W.D. Mo. 1945).

109. F. & M. Skirt Co. v. A. Wimpfheimer & Bro., Inc., 25 F. Supp. 898 (D. Mass. 1939). *See In re* Shinoe's Estate, 212 Wis. 481, 485, 250 N.W. 505, 507 (1933).

110. Bailey v. New England Mut. Life Ins. Co., 1 F.R.D. 494 (S.D. Cal. 1940).

111. F. & M. Skirt Co. v. A. Wimpfheimer & Bro., Inc., 25 F. Supp. 898 (D. Mass. 1939).

from later raising an objection on a ground which existed as the basis for an objection when the interrogatory was answered by him.[112]

OBJECTIONS

As already indicated, the party upon whom interrogatories are served must either answer or, should he feel that he is not legally bound to answer, object. If, however, an objection is to be made, the objection must be presented to the court by the party interrogated, within ten days after he has been served, together with notice as in case of a motion to the proponent of the interrogatories, and the party upon whom the interrogatories were served is expressly authorized by statute to defer the answers to such individual interrogatories as he has objected to until his objections have been determined by the court.[113] In addition, the court is commanded to determine such objections "at as early a time as is practicable," or if that is not the meaning of the statute, the objecting party should have the court pass upon the objections as soon as practicable. It would, therefore, appear that the primary duty of securing a prompt ruling upon an objection is either placed upon the court or the objecting party, but there is no reason why the party who filed the interrogatories may not also ask the court to rule upon the propriety of any question to which he has properly objected. In fact, the statute indicates an intention that all objections are to be disposed of promptly, and perhaps the code should have also provided that the failure of the objecting party to procure the court's determination within a specified period of time would automatically operate as an adjudication that the objections were overruled.

The objections which a party shall make should, of course, be specific[114] and in writing and with appropriate reasons assigned for not making answer. In other words, an objection should be sufficiently specific that the court is able to ascertain promptly the objectionable character of the questioned interrogation, since general objections will usually be considered unavailing.[115] More-

112. Kennedy v. Mississippi Valley Barge Line Co., 7 F.R.D. 78 (W.D. Pa. 1947).
113. MO. REV. STAT. § 510.020 (3) (1949).
114. Boysell v. Hall, 30 F. Supp. 255 (E.D. Tenn. 1939).
115. See Boone v. Southern Ry., 9 F.R.D. 60 (E.D. Pa. 1949), where the objection that the propounded interrogatories as such would cause annoyance, expense and oppression to the defendant without serving any relevant

over, the burden of establishing the validity or sufficiency of an objection rests upon the party interrogated and not upon the propounder of the interrogatories,[116] and "in case of doubt," one court has taken the view that they "should be answered."[117]

VIOLATION OF CONSTITUTIONAL RIGHTS

Obviously, interrogatories may be propounded to one's adversary, which, if answered, will force disclosures in violation of rights protected by certain provisions of the state and federal constitutions. This is particularly true with reference to the guarantees against unlawful searches, of due process of law, and of freedom from self-incrimination, although it must always be remembered that, in order to assure protection from an interrogatory which seeks to compel the disclosure of any matter in violation of constitutional guarantees, a party must object and not answer to the merits.

In this connection, the court will not compel a party to accuse himself of a crime.[118] And as elsewhere pointed out,[119] the observation has been made by one federal district court that if the number of interrogatories is too numerous and concerned with minor evidential details, the Fifth Amendment possibly might be contravened by requiring a party, prior to an adjudication of liability, to incur expense greater than that ordinarily incident to the prosecution or defense of a suit.[120] But, according to the Supreme Court of Missouri, a plaintiff may properly ask the defendant for the names and addresses of persons obtained by the latter at the scene of the casualty, as well as the names and addresses of persons who the defendant knew were

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purpose was held too general. Also see Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477 (W.D. Mo. 1950); Bowles v. Safeway Stores, 4 F.R.D. 469 (W.D. Mo. 1945). It has been further stated in Ridge, *Discovery Under Federal Rules*, 6 J. OF MO. BAR 121 (1950):

> I understand that, under Missouri practice, general objections are permitted to be made to a whole group of interrogatories and that if they are numerous in number the courts will require parties to resort to taking depositions. Such is not the practice under the Federal Rules. General objections to interrogatories in Federal Court are not permissible.

Id. at 162.

116. Bowles v. Safeway Stores, 4 F.R.D. 469 (W.D. Mo. 1945); Blanc v. Smith, 3 F.R.D. 182 (W.D. Iowa 1943).

117. May v. Midwest Refining Co., 10 F. Supp. 927 (D. Me. 1935).

118. H. Wagner & Adler Co., v. Mali, F.2d 666 (2d Cir. 1935); Marsh v. Marsh, 16 N.J.Eq. 391 (Ch. 1863). Also see Note, 52 A.L.R. 143 (1928).

119. See text supporting note 26 *supra*.

120. Byers Theaters v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940).

present at the time and place of the accident, as such interrogatories, if answered, will not deprive the defendant of its property without due process of law nor subject it to an unlawful search and seizure in contravention of the state and federal constitutions.[121] In so concluding with reference to the propounded interrogatories, the court held " 'that when a party seeks relief in a court of law, he must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief' "[122] and that " 'the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon trial in court, of documentary evidence; and an order for the production of books and papers which limits the examination of such matters as are pertinent to the issues, does not infringe the constitutional guarantee against unreasonable search and seizure.' "[123] "The right," said the court, "of discovery is too ancient and has had too long a history in its development in equity to be questioned now on such constitutional grounds."[124] The court then specifically held that these principles or rules "apply to interrogatories."

CONCLUSION

On several occasions, the writer has, in the conduct of litigation, propounded written interrogatories to the adverse party. Out of that experience, together with conclusions reached as a result of the present study, the observation seems fully justifiable that written interrogatories will generally constitute a reasonably effective and satisfactory device for obtaining pretrial disclosure of relevant and material facts from one's opponent in a law suit. But the device is not, as has been stated elsewhere with reference to several matters, without defect nor always wholly satisfactory.

121. State *ex rel.* Kansas City Public Service Co. v. Cowan, 356 Mo. 674, 203 S.W.2d 407 (1947).

122. *Id.* at 680, 203 S.W.2d at 410. The court in State *ex rel.* Kansas City Public Service Co. v. Cowan, *supra* note 121, was in turn quoting from Fleming v. Bernardi, 1 F.R.D. 624, 625 (N.D. Ohio 1941).

123. State *ex rel.* Kansas City Public Service Co. v. Cowan, 356 Mo. 674, 680, 203 S.W.2d 407, 410 (1947). This above quotation was taken by the court from 47 AM. JUR., SEARCHES AND SEIZURES, § 58.

124. State *ex rel.* Kansas City Public Service Co. v. Cowan, 356 Mo. 674, 680, 203 S.W.2d 407, 410 (1947).

Written interrogatories, for one thing, would be much more useful if they could be used in the state courts with the same latitude as they may be used in the federal courts under the federal rule relating to this method of discovery. Actually, there is little reason for not according written interrogatories the same scope that they have under the federal rule, and especially in view of the fact that depositions are used in this state by lawyers, with general acquiescence, as a "dragnet for a fishing expedition" to obtain information often not competent as evidence in the pending case.[125] Furthermore, some trial courts are inclined to be too strict about the form of the individual interrogatories and require the questions to be framed with more technical perfection than is generally required in written depositions or during the examination of witnesses at the trial itself. As a result, the adverse party will often escape answering questions which as a matter of fair play should be answered.

All the blame, however, cannot be placed upon the courts for the things which tend to destroy the usefulness of interrogatories in Missouri. Lawyers must take some of the responsibility. Thus, too often, they will subject the propounded questions to such strict interpretation that the resultant answers are evasive in effect although technically complete and to the point. Sometimes such care and deliberation are exercised by the attorney in preparing the answers that the propounder wonders why he did not take depositions instead of propounding interrogatories in order to have been able to secure relatively spontaneous answers. Sometimes lawyers will fail to answer the interrogatories within the time specified by the code, and frequently no answer will be made until the interrogator asks the court for an order to compel the adverse party to answer. Thereupon, the court will, if requested by the party in default, grant further time within which the answers may be filed, and rarely, if ever, impose a penalty.

Many of the weaknesses of written interrogatories as a means of pre-trial discovery under the Missouri civil code can be overcome if the courts and attorneys would merely act more in accord with the basic underlying purpose of the code "to simplify and liberalize procedure, to the end that litigation shall be expedited

125. State *ex rel.* Thompson v. Harris, 355 Mo. 176, 179, 195 S.W.2d 645, 647 (1946).

with a minimum of technical procedural hindrance.[126] An attitude duly considerate of this underlying purpose would bring the idealistic purpose of pre-trial discovery closer to reality and even with very little alteration of the present statutory language make the way "clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial" so that civil trials in Missouri, need not only no longer "be carried on in the dark,"[127] but not even in the twilight.

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126. John A. Moore & Co. v. McConkey, 240 Mo. App. 198, 203, 203 S.W.2d 512, 514 (1947).
127. Hickman v. Taylor, 329 U.S. 495, 501 (1947).