THE RECENT AMENDMENT TO OHIO REVISED CODE
SECTION 2317.48

by

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Although discovery practice in Ohio is a frequently discussed subject, there is little to be found on Ohio Revised Code § 2317.48 entitled Action For Discovery.¹ This is because most discovery is governed by the Ohio Rules of Civil Procedure² which limit the Ohio practitioner, with one exception, to discovery subsequent to the filing of a complaint. However, a closer look at Ohio Revised Code § 2317.48 reveals a means of discovery which is not known to many Ohio practitioners: discovery before a suit has been commenced.

There are two situations in which it would be necessary to make discovery before the complaint is filed. One involves the preservation of evidence which may not be available after commencement of the suit. The other is when a prospective plaintiff does not possess facts sufficient upon which to state a claim for relief. The first situation is covered in both the Ohio Rule and Federal Rule 27.³ The latter situation is covered in neither the Ohio nor the Federal Civil Rules.⁴ Hence, a person believing he has a cause of action but lacking specific facts necessary to draft an adequate complaint, may believe he faces only two alternatives: abandoning the action or filing a skeletal complaint and quickly attempting discovery under the Civil Rules in order to collect enough information to file an amended complaint.⁵ If procured diligently, helpful information may be obtained before the complaint is dismissed.⁶ Even if the motion to

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¹ Before the recent amendment of OHIO REV. CODE ANN. § 2317.48 (Baldwin 1984), the statute provided: When a person claiming to have a cause of action or a defense to an action commenced against him, without discovery of the fact from the adverse party, is unable to file his petition or answer, he may bring an action for discovery, setting forth in his petition the necessity therefor and the grounds thereof, with such interrogatories relating to the subject matter of the discovery as are necessary to procure the discovery sought. If such petition is not demurred to it must be fully answered under oath by the defendant. Upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable.
² OHIO R. CIV. P. 26-37 and 45 (Baldwin 1981), see note 34 infra.
³ OHIO R. CIV. P. 27 was patterned after FED. R. CIV. P. 27 with some slight modifications. See staff notes to OHIO R. CIV. P. 26 and 27 (Baldwin 1981).
⁴ The Federal courts have continually denied petitions under FED. R. CIV. P. 27 on the grounds that the rule cannot be used for the purpose of ascertaining facts to be used in drafting a complaint. See In re Gurnsey, 223 F.Supp. 359 (1963). In re Exstein, 3 F.R.D. 242 (1942). See also HAYDOCK & HERR. DISCOVERY: THEORY, PRACTICE AND PROBLEMS 71 (1983).
⁵ OHIO R. CIV. P. 15(A) (Baldwin 1981) provides for the amendment of a pleading, once as a matter of course before the responsive pleading has been served, and after that, by leave of court which is to be freely given. OHIO R. CIV. P. 15(D) (Baldwin 1981) provides that a plaintiff may file a complaint against an unknown defendant and, upon discovering the identity of the defendant, amend the complaint. See generally J. BROWNE. INTRODUCTION TO CIVIL PROCEDURE 374-391 (1974).
⁶ OHIO R. CIV. P. 12(B)(6) (Baldwin 1981) provides that this defense may be asserted by motion any time after the pleading which it attacks has been filed. The sooner this motion is filed by the defendant, the less time the plaintiff has to obtain information.
dismiss is successful the plaintiff may be able to serve an amended complaint and try again.

Fortunately a litigant in Ohio is not limited to this complicated and time consuming procedure. Revised Code § 2317.48 was designed to enable a plaintiff to obtain information necessary to the drafting of a complaint. This discovery statute is one of the few statutes which was not repealed with the enactment of the Ohio Rules of Civil Procedure in 1970.7

What one will not find, however, is the precise procedure to be followed in utilizing this discovery action. The procedural statutes which existed in the Revised Code were repealed upon enactment of the Civil Rules. Since then it has been difficult to know which procedural rules apply to Revised Code § 2317.48. Before the enactment of the recent amendment, much confusion existed because: (1) the nature of this proceeding was unclear as to whether it was a civil action or a special proceeding;8 (2) the language of the statute prescribed procedures which no longer existed, specifically “petition” and “demurrer”;9 and (3) application of the Civil Rules produced results which were unnecessary and contradictory.10 This uncertainty might have contributed to the sparse use of this valuable discovery tool.11

The Ohio legislature became concerned with the problems inherent in Revised Code § 2317.48, specifically its out-dated language. In an effort to make clear that the Rules of Civil Procedure are applicable to the discovery statute, an amendment was passed12 changing the language of Revised Code § 2317.48.

Historical analysis of the problem provides insight into the legislative solution. For throughout Ohio case history the courts have consistently looked back to the origins of discovery in order to resolve present-day discovery issues.13

THE EQUITABLE BILL OF DISCOVERY

Historical analysis exhibits a pronounced difference between suits at law and suits in equity. Common law actions reflected true adversarial doctrine.

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1 See infra note 37.
2 See infra notes 140-148 and accompanying text.
3 See infra notes 41-44 and accompanying text.
4 See infra notes 67-138 and accompanying text.
5 This sparse use is evidenced by a lack of case law pertaining to the discovery statute since the enactment of Ohio R. Civ. P. 26-37 in 1970. Since then there has been only two reported cases which makes reference to Ohio Rev. Code Ann. § 2317.48 (Baldwin, 1984), see infra note 45.
6 See infra notes 39-44 and accompanying text.
All disclosures of evidence came during the course of the trial through direct examination and cross-examination of witnesses. Since a party would probably not know in advance the witnesses to be called by the opposing party, the element of surprise was an ever-present decisive factor in the outcome of the lawsuit. This resulted in many cases being won or lost due to counsel's adversarial technique and expertise, rather than the determination of the merits of the case. These traditional rules proved to be even more restrictive in light of the fact that one party could not be required by the other party to be a witness in any court. Thus, there was no method available for obtaining information possessed by the opposing party in an action at law.

Conversely, proceedings in equity were primarily paper proceedings. Attorneys obtained all their information before argument to the Chancellor. Witnesses were examined by means of depositions and interrogatories so that the element of surprise was not the determinative element in an equity proceeding that it was in an action at law.

Thus, a proceeding in equity for pre-trial discovery became available as an auxiliary proceeding to an action at law. If a party could not succeed in an action at law without first obtaining information within the personal knowledge of the adverse party he could file a Bill of Discovery, setting forth all the facts within his knowledge, adding interrogatories to which the adverse party was required to answer under oath. The answers provided by the defendant could be used in the action at law, however, a court of equity went no further than requiring the defendant to answer these interrogatories.

The suit for discovery was considered an auxiliary proceeding brought not to obtain a remedy, but only to aid in prosecuting legal actions. Its scope ex-

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4J. Browne, supra note 5, at 564; See also Driver v. F.W. Woolworth, 58 Ohio App. 299, 307, 16 N.E.2d at 551 (1938) citing 3 Wigmore on Evidence § 1862 (2d ed. 1923):

... the adversary in common law actions, like the true gamester that the law encouraged him to be, held safely the trump cards of the situation, free from any legal liability of disclosure before trial; in this respect there was not recognized even the limited right of inspection ... which after the days of Lord Mansfield had been conceded for documentary evidence.


6Id.

7J. Browne, supra note 5, at 564. See also Driver, 58 Ohio App. at 307, 16 N.E.2d at 551.

8Chapman, 45 Ohio St. at 361, 13 N.E. at 65. The first reported case in which the equitable Bill of Discovery was utilized to aid an action at law was Swearingen v. Swearingen, Wright 108 (1832).

9Chapman, 45 Ohio St. at 361, 13 N.E. at 65. It is not clear whether the interrogatories accompanying the discovery action were meant to be included in the petition or annexed thereto. Although the statutes dealing with interrogatories accompanying complaints required their annexation, see infra note 87, there is no reason to assume that annexation, rather than addition in the petition, is the correct form of propounding the interrogatories. This ambiguity has contributed to some of the current problems with Ohio Rev. Code Ann. § 2317.48 (Baldwin, 1984), see infra notes 85-87 and accompanying text.


tended to compelling the production of documents and the inspection of chattels and premises, under the control of the adverse party.

Stated succinctly, the Bill of Discovery was an equitable proceeding which could be employed to aid a litigant at law in securing information from his opponent. The scope of obtainable information was limited to those material facts which related to the plaintiff's case and did not extend to discovery of the manner in which the defendant intended to establish his case, or to evidence which related exclusively to the defendant's case.

STATUTORY HISTORY IN OHIO

In 1853, the Fiftieth General Assembly of the state of Ohio enacted the first Ohio Code of Civil Procedure, a task which was so well executed that a substantial portion of it remains unchanged to this day. In the original work only two sections related to the topic of discovery. Those were § 338 which related to the taking of depositions and § 360 which provided for the inspection of documents. In 1857 the code was amended to include a section on interrogatories and a provision for the legal action for discovery now embodied in Revised Code § 2317.48. The purpose of this statutory action was to codify an action at law which would provide for the same discovery as the equitable Bill of Discovery, and so it did. In fact, it was said that the statutory action for dis-

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23 Driver, 23 Ohio App. at 307, 16 N.E.2d at 551 citing 3 WIGMORE ON EVIDENCE § 1862 (2d ed. 1923): "But in chancery, under the same wholesome principle and practice by which bills of discovery were allowed for ascertaining the opponent's testimony and the documents in his possession, the inspection of chattels and premises in his possession or control was obtainable wherever fairness seemed to demand it."
24 Although it is stated in Stark Rolling Mill, 21 Ohio C.C. Dec. at 7, 11 Ohio Cir. Dec.(n.s.) at 447, that the Bill of Discovery did not give the plaintiff the right to inspection of documents the United States Supreme Court stated otherwise. See Carpenter v. Winn, 221 U.S. 533 (1910).
25 See Woodle, Discovery Practice in Ohio — Pathway to Progress, 8 WES. RES. L. REV. 117, 126 (1957) (hereinafter cited as Woodle, Discovery Practice).
26 Id. at 116.
28 51 OHIO LAWS 112 (1853).
29 Id. at 116.
30 54 OHIO LAWS 23 (1857).
31 The statute for discovery stated:
That whenever any person claiming to have a cause of action or a defence to an action commenced against him, is unable, without a discovery of the fact from the adverse party, to file his petition or answer, such person may bring his action for discovery, setting forth in his petition the necessity of the discovery as may be necessary to procure the discovery sought, which if not demurred to, shall be fully and directly answered under oath by the defendant; upon the final disposition of the action, the costs thereof shall be taxed in such a manner as the court shall deem equitable. Id.

Compare with the text of the current statute, supra note 1. For a more detailed discussion of the discovery devices provided for by the 1853 and 1857 statutes see Ward v. Mutual Trucking Co., 1 Ohio Op. 456, 22 Ohio L. Abs. 636 (C.P. 1933).
covery rendered the equitable Bill of Discovery "practically obsolete in Ohio jurisdictions."

In 1970 the Ohio Rules of Civil Procedure were enacted replacing the Revised Code to the extent that it provided for the procedures to be followed in civil actions. Civil Rules 26 through 37 and Rule 45 pertained to discovery. Their purpose was to unify and simplify discovery practice in Ohio which had previously been a conglomeration of statutes, case law and customs. Because they were in conflict with the new Civil Rules, or merely redundant, a number of statutes in the Ohio Revised Code were repealed, including a number of discovery statutes. However, the Action for Discovery was not enacted into the Civil Rules, thus, it remains a statutory action.

Although all of the procedural statutes were repealed, it was not clear whether the procedural rules applied to the statutory discovery action. However, it was stated in the staff notes to Civil Rule 34 that the statutory discovery action was not affected by the Civil Rules. Hence, it appeared that the statutory discovery action was a proceeding without a procedure.

The Ohio legislature has just recently passed an amendment designed to make clear that the Civil Rules do apply to the Action for Discovery. The amendment, introduced by Senator Richard Finan, makes two changes. The

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43 Chapman, Ohio State at 366, 13 N.E. at 740.

44 Ohio Const. art. IV § 5(B), states, "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."


46 Chapman, 45 Ohio State at 366, 13 N.E. at 740.

47 OHIO R. Civ. P. 1(A) (Baldwin 1981), states that, "These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.


52 OHIO CONST. art. IV § 5(B) states, "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

53 A list of repealed sections of the Revised Code is found in § 1 of Amend. H.B. 1201 (133 Ohio Laws 3017 (1970)), as well as in Table 1 of 8 WEST'S OHIO PRACTICE: CIVIL RULES xxxix (1970).

54 Staff note 1 to OHIO R. Civ. P. 34 (1970) states: "While there is no specific statute allowing entrance upon land, photography, testing, etc. . . . these discovery methods are well established in current practice under § 2317.48 R.C., the statutory discovery action which is not affected by the Rules of Civil Procedure."


56 Id. as reported by H. CIVIL & COMMERCIAL LAW.

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first is to eliminate the term "petition"41 and replace it with the word "complaint." The second change eliminates the provision that once a "petition" for such an action is filed, it must be answered unless it is "demurred to,"42 and replaces it with the provision that once a "complaint" in such an action is filed, it must be answered unless a “motion to dismiss” is filed pursuant to Civil Rule 12. This change would recognize that the demurrer was abolished in 1970 upon the enactment of Civil Rule 7(C), and that the current procedure most comparable to the abolished demurrer is the motion to dismiss provided in Civil Rule 12.43 The amended statute reads as follows:44

When a person claiming to have a cause of action or a defense to an action commenced against him, without the discovery of a fact from the adverse party, is unable to file his complaint or answer, he may bring an action for discovery, setting forth in his complaint in the action for discovery the necessity and the grounds for the action, with any interrogatories relating to the subject matter of the discovery as are necessary to procure the discovery sought. Unless a motion to dismiss is filed under Civil Rule 12, the complaint shall be fully and directly answered under oath by the defendant. Upon the final disposition of the action, the costs of the action shall be taxed in such manner the court deems equitable.

This amendment is in accord with a 1983, Montgomery County Court of Common Pleas decision,45 which dealt with Revised Code § 2317.48.46 The opinion termed the discovery action a “complaint for discovery,” and granted the defendant’s “motion to dismiss.”47 The amendment also relies on State ex rel Peto v. Thomas48 which automatically converted a demurrer into a motion to dismiss.49

Unfortunately, a simple replacement of outdated language falls far short of what was actually needed to increase the utility of this statute. Although its language now makes clear that procedurally the discovery action is to proceed as a civil action, application of the Civil Rules to this statutory discovery device renders it even more confusing and creates contradictions which will only serve to frustrate its purpose.

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41 Id. “This change would make it clear that a person who desires to utilize the discovery action would have to file a complaint in accordance with the Civil Rules in order to commence the action, just as he would in order to commence any other civil action.

42 Id.

43 Id.


46 The plaintiff in Metscher had filed an action for discovery against the school which the plaintiff had attended. Because the defendant was protected by sovereign immunity, it could not be an adverse party, which is required by the discovery statute. Therefore the motion to dismiss was granted. Id. at 251.

47 Id.


49 Id. Although the case does not say, more than likely, the Civil Rules had just been enacted and counsel did
USE OF THE ACTION FOR DISCOVERY

Scope

The function of this statute is to provide for discovery before the complaint is filed. The language states, "When a person claiming to have a cause of action or a defense to an action commenced against him, without discovery of a fact from the adverse party, is unable to file his complaint or answer, he may bring an action for discovery." From these words it would appear that if a party can draft a skeletal complaint sufficient to state a cause of action, he may not use the statute. The proper procedure in such a case would be to file a skeletal complaint and proceed with discovery pursuant to the Civil Rules.

According to the language, the discovery may only be sought from an adverse party. This, in fact, is one of the more frustrating limitations of the discovery statute for it precludes obtaining valuable information from a third party, no matter how necessary that information may be. Despite dictum to the contrary, this limitation is one to which courts strictly adhere. In a recent case brought under the discovery statute, a motion to dismiss was granted because the party named as defendant in the action, could not be an adverse party.

There could be an argument made that the words "adverse party" as they appear in the statute, refer to the defendant named in the complaint for discovery, not the prospective defendant in the prospective lawsuit. If this argument were to prevail, it would eliminate a prime defect in Ohio discovery practice and procedure, that of obtaining needed information from third parties. However, as it stands now, according to Ohio case law, the action for discovery may only be initiated against a prospective adversary to the contemplated lawsuit.

not realize that the demurrer had been abolished.

This section will discuss the procedure as it applies to the amended statute.

"In the instant case, there is no claim of physical injury, and there is no claim that an answer cannot be filed until the facts are discovered, as provided in the statute on discovery, Section 2317.48 . . ." Klein v. Bendix-Westinghouse Automotive Air Brake Co., 8 Ohio App. 2d 271, 272, 221 N.E.2d 722, 724 (1966), rev'd on other grounds, 13 Ohio St. 2d 85, 234 N.E.2d 587 (1968); Accord Bonnel v. B&T Metals Co., 52 Ohio L. Abs. 1, 81 N.E.2d 730 (Ct. App. 1948).

Stanley v. Martin, 19 Ohio Dec. 864, 6 Ohio Law Rep. 628 (C.P. 1909), indicated that if the plaintiff wanted to learn the identity of unknown parties in order to sue them, he could bring an action under the discovery statute against the agent to discover the identity of his principal. Similarly, the United States District Court for the Southern District of Ohio indicated that if the plaintiff wanted permission to enter the land of a party not involved in lawsuit he could proceed under O.R.C. § 2317.48. Huynh v. Werke, 90 F.R.D. 447 (1981).

"Metscher, ___ Ohio Misc. ___, 459 N.E.2d 249.

See supra note 46.

There is no authority for this proposition, it is merely this writer's suggestion.

See generally Woodle, supra note 26 at 127-30, for a discussion of the problem of obtaining information from third parties.

As it stands right now there is no way to obtain discovery from an individual who will not be an adverse party in the contemplated lawsuit.
The language of the statute also restricts the information sought to that of fact, not opinion, and the information must be within the personal knowledge of the defendant named in the complaint for discovery.58

The most extensive discussion concerning the scope of the discovery action is found in a 1907 Common Pleas decision:59

The examination will not be permitted for the purpose of ascertaining whether the applicant has a cause of action or defense, or whether he has a cause of action against persons not parties, or to ascertain against which of certain parties he has a cause of action, or to ascertain which of two causes of action he has, or to ascertain the evidence on which the opposite party bases his cause of action or defense, or to ascertain the names of his witnesses, or for the purpose of aiding the party in the preparation of his case for trial, or to prove matters within the applicant’s own knowledge. So it will not be granted for the mere convenience of the party, nor to establish facts pertinent to the decision of a motion, nor for the purpose of gratifying public curiosity.60

Later language in the statute61 deals with the permissible scope of the interrogatories that are included with the complaint for discovery.62 The limitation on the discovery devices attached is that they must be “necessary to procure the discovery sought.” That is, they must only seek information necessary to the drafting of the complaint, and not seek evidence of the defendant’s strategy for establishing his case. More extensive discovery must wait until the complaint has been filed and then proceed under the Civil Rules.63 Given the limited scope of the discovery action, the language pertaining to interrogatories seems somewhat redundant.

Although the statute says that the discovery action may be used by “a person claiming to have a cause of action, or a defense to a cause of action,” Revised Code § 2317.48 is really a plaintiff’s tool. With the enactment of the Civil Rules, all the discovery devices that a defendant would need are adequately provided for in the Ohio Rules of Civil Procedure. Revised Code § 2317.48

58“... the right to annex interrogatories does not extend to where the information sought is necessarily not within the personal knowledge of the party addressed; nor when not pertinent to the pleading to which the questions are attached; nor when a responsive answer would be mere opinion, and not fact.” Smith v. Cory Rubber Co., 32 Ohio Op. 308, 315, 69 N.E.2d 777, 784 (C.P. 1945) citing Russel, 6 Ohio N.P.(n.s.) 353, 17 Ohio Dec. 435.


61“... with any interrogatories relating to the subject matter of the discovery that are necessary to procure the discovery sought.” OHIO REV. CODE ANNOT. § 2317.48 (Baldwin Supp. 1986).

62Although the statute only provides for the use of interrogatories, case law has extended the statute to include all the discovery devices now available under the Civil Rules, see infra notes 78-83 and accompanying text.

63See supra note 34.
provides no great advantage to the defendant, as it is written right now.64

Of course, once the complaint has been filed, the information may also be used, if admissible pursuant to the applicable evidence rules, in the consequential trial of the lawsuit. Since this was permissible under the equitable Bill of Discovery, case law has extended this use to the statutory action for discovery.65

**The Complaint**

The recent amendment clears up any procedural questions a practitioner might have concerning the form of the initiating document for the discovery action. It is a complaint, like all other complaints, and must therefore conform to the Civil Rules.

The form of the complaint should comply with Civil Rule 10, as it relates to the caption and body of the complaint. Pursuant to Civil Rule 4, a summons shall be issued to all defendants named in the action for discovery. The complaint shall be filed in a court of proper venue as prescribed by Civil Rule 3. The statute of limitations for the discovery action corresponds to the statute of limitations prescribed for the cause of action contemplated. Use of the discovery statute does not extend the statute of limitations for the suit no matter how drawn out the discovery proceeding turns out to be.70

To determine the contents of the complaint one must look to the Civil Rules, the statute and case law. Civil Rule 8(A) tells us that the complaint should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." As amended, Revised Code § 2317.48 tells us that this "short and plain statement" should set forth why the discovery is necessary, i.e. why a complaint cannot be filed without the discovery, and

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64For this reason the remainder of this note will only deal with the discovery statute as a plaintiff's device.

65"...it is said that if a party could not succeed without the aid of facts within the personal knowledge of his adversary, he might file his bill, etc. In the same opinion it is said that the answers, when given, become evidence for either side." Russel, 6 Ohio N.P.(n.s.) at 358, 17 Ohio Dec. at 440, citing Chapman, 45 Ohio St. 356, 13 N.E. 736. Accord Dieckbrader v. N.Y. Central R.R., 64 Ohio L. Abs 586, 113 N.E.2d 268 (C.P. 1953); Pidgeon, 23 Ohio Op. at 535.

66Ohio R. Civ. P. 10(A) sets out the formal requirements for the caption of the complaint and part (B) sets out the formal requirements for the body of the complaint.

67Ohio R. Civ. P. 4(A) provides that upon the filing of a complaint a summons for service shall be served upon each defendant named in the caption of the complaint.

68As will be noted later, the service of summons in this type of action is unnecessary. See infra text accompanying note 144.

69Ohio R. Civ. P. 3(B) lists the ways which a county may have proper venue. As they relate to the discovery action proper venues would include the county in which the defendant resides or works, if an action for permission to enter land the proper forum might be the county in which the property is located; if the discovery action is brought to inspect documents which cannot be moved the proper venue would include the county in which the documents are located.

70See infra text accompanying note 126.

71The entire contents of an initiating document in a discovery action can be found in Driver, 58 Ohio App. at 300, 16 N.E.2d at 549.
under what grounds the discovery should be granted. 72 Civil Rule 27 provides some guidelines as to what these grounds should be. 73 Accordingly, the complaint should show that the complainant may be a party to an action but is presently unable to file that action; the subject matter of the expected action; the names and addresses, or if unknown, a description of the persons he expects will be adverse parties to the proposed lawsuit and the names and addresses of the persons from whom the discovery is sought.

The complaint should contain as many facts as are necessary to enable the court to determine for itself the discovery is necessary 74 to the drafting of a legitimate complaint. 75 Furthermore, the complaint must show that the defendant is capable of making discovery of the facts sought and that these facts are not within the complainant’s knowledge. 76 Finally, the complaint should contain a demand that the attached discovery device be ordered. 77

Given all the uncertainties surrounding the use of this discovery statute, it is ironic that one of the most certain and consistent aspects of its use is a contradiction of the express language of the statute. Although the statute only seems to provide for the addition of interrogatories, 78 it has been consistently held that the discovery action may be used to compel the production of documents 79 and to obtain the inspection, copying, testing, or sampling of any tangible thing in the custody or control of the defendant. 80 The action for

72 "... he may bring an action for discovery setting forth in his complaint in an action for discovery the necessity therefor and the grounds thereof ... .” OHIO REV. CODE ANN. § 2317.48 (Baldwin Supp. 1986).
73 Although OHIO R. CIV. P. 27 prescribes the special proceeding for perpetuation of testimony, the proceeding is so similar to the action for discovery that, absent any better authority, the grounds set forth in this rule may provide guidelines to follow in drafting the complaint for discovery. Part(A) of the rule provides that the petitioner shall show:
(a) that the petitioner or his personal representatives ... may be parties to an action or proceeding cognizable in a court but is presently unable to bring or defend it;
(b) The subject matter of the expected action or proceeding and his interest therein ...
(c) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it;
(d) The names or, if the names are unknown, a description of the persons he expects will be adverse parties and their addresses so far as known;
(e) the names and addresses of the persons to be examined and the subject matter of the testimony which he expects to elicit from each.
75 "Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); Russel, 6 Ohio N.P.(n.s.) at 357, 19 Ohio Dec. at 439; Graham v. Ohio Telephone & Telegraph Co., 2 Ohio N.P.(n.s.) 612, 15 Ohio Dec. 200 (C.P. 1904) rev'd 75 Ohio St. 608, 80 N.E. 1130 (1906).
76 "Russel, 6 Ohio N.P.(n.s.) at 357, 19 Ohio Dec. at 439.
77 "OHIO R. CIV. P. 8(A)(2) and see OHIO R. CIV. P. 27(A)(1).
78 "he may bring an action for discovery ... with any interrogatories relating to the subject matter as are necessary to procure the discovery sought.” OHIO REV. CODE ANN. § 2317.48 (Baldwin, 1984) (Before amendment).
80 "Id., Driver, 58 Ohio App. at 307, 16 N.E.2d at 552; Lawson v. Hudepohl Brewing Co. 46 Ohio Op. 15, 101 N.E.2d 254 (C.P. 1951); Slabinski, 22 Ohio App. at 74-75.
discovery may also be used for the purpose of obtaining entry upon designated land or other property in the possession or control of the defendant for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon. This contradiction finds its authority in the history of the equitable Bill of Discovery which, despite language to the contrary, allowed for these discovery devices.

The Answer

We come now to one of the most difficult aspects of Revised Code §2317.48. While resort to the Civil Rules and case law supplemented the statutory language of §2317.48 in fashioning an applicable complaint procedure, the same course yields confusing and inconsistent results in relation to answering the complaint.

Many of the difficulties come from the language of the statute as it existed before the amendment, "If such petition is not demurred to, it must be fully and directly answered . . ." (emphasis added). The question is, to exactly what does the word "it" refer, the petition or the interrogatories accompanying the petition? This problem relates to an earlier noted ambiguity in the statute’s language. There is a very good possibility that the interrogatories for which the statute provides, were meant to be included in the petition, rather than annexed to it. In this case the "it" in the statute would refer to the petition containing the interrogatories and it would be the interrogatories which must be answered "if not demurred to." It will become apparent later that if the language of §2317.48 had been interpreted in the above manner, the statute would not have been amended as it was and many of the problems inherent in answering the discovery action would not exist. Had the Ohio legislature recognized the "answer" in this action as being to the interrogatories, or other discovery devices used, it would have replaced the term "demurrer" with its present day counterpart, in this situation, the "objection."

\[\text{\textsuperscript{a}}\text{Driver, 58 Ohio App. at 307, 16 N.E.2d at 551 (dictum).}\]
\[\text{\textsuperscript{b}}\text{Stark Rolling Mill, 21 Ohio Dec. at 6, 11 Ohio C.C.(n.s.) at 447 includes language indicating that the Bill of Discovery was limited to only interrogatories. However, given all the language to the contrary, this is probably not accurate.}\]
\[\text{\textsuperscript{c}}\text{See supra note 23.}\]
\[\text{\textsuperscript{d}}\text{See supra notes 65-83 and accompanying text.}\]
\[\text{\textsuperscript{e}}\text{Ohio Rev. Code Ann. § 2317.48 (Baldwin, 1984).}\]
\[\text{\textsuperscript{f}}\text{See supra note 19.}\]
\[\text{\textsuperscript{g}}\text{This confusion probably arose because Ohio Rev. Code Ann. § 2309.43 and § 2309.44 (repealed) provided for the annexation of interrogatories to complaints in civil actions, and the language was carried over in reference to discovery actions brought pursuant to Ohio Rev. Code Ann. § 2317.48 (Baldwin, 1984) (Before amendment).}\]
\[\text{\textsuperscript{h}}\text{See supra notes 78-83 and accompanying text.}\]
\[\text{\textsuperscript{i}}\text{Staff note 2 to Ohio R. Civ. P. 33 (Baldwin, 1981) acknowledges this substitution:}\]
\[\text{In composite, the current practice under §§ 2309.43 . . . requires interrogatories to be "plainly and fully answered in writing under oath . . . unless demurred to . . . "Like the statutes, the rule requires each interrogatory to be fully answered under oath unless objected to, but it abolishes the "demurrer" to interrogatories. The "demurrer" to interrogatories is replaced with an "objection" to interrogatories.}\]
Traditionally, both at common law and under the Ohio Code of Civil Procedure, there were two methods of responding to the action for discovery. One either provided the discovery or challenged the action in the form of a demur. The demurrer could challenge the contents of the petition, in which case the defendant would be admitting that the facts alleged in the petition were true but that the petition itself did not allege sufficient facts upon which the court could properly grant the discovery. The defendant could also demur to one or more of the interrogatories and answer those to which he was not demurring. The grounds for sustaining such demurrers were that the interrogatories sought information ascertainable by the petitioner without the discovery, or that the interrogatories sought information which was irrelevant or immaterial to the drafting of the complaint.

It was probably around these two kinds of challenges that the misinterpretation of the statute revolved. The first type of challenge to the petition, failure to allege sufficient facts upon which a court could order discovery, looks very much like the grounds for a motion to dismiss. This coupled with the fact that when the demurrer was abolished in 1970, the general demurrer was said to be replaced by the 12(B)(6) motion to dismiss, more than likely prompted the Ohio legislature, whose only goal in amendment was to replace outdated language, to replace the term “demurrer” with the “motion to dismiss.”

Unfortunately, in amending Revised Code § 2317.48 in the manner in which they did by replacing “petition” with “complaint” and “demurrer” with “motion to dismiss,” the Ohio legislature has created an initiating document with procedural requirement which previously did not exist. The amendment now subjects answering the “complaint for discovery” to all the procedures required in answering a complaint alleging a cause of action. Yet, this complaint seeks no redress, it simply requests discovery. The result is conflicting procedural alternatives.

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See generally Pidgeon, 23 Ohio Op. at 534 for a discussion on the answer history of the discovery action.

There was some conflict among the common pleas courts as to the proper method of objecting to specific interrogatories. The Ashtabula County Common Pleas Court sustained a motion to strike off interrogatories attached to a pleading in Russel, 6 Ohio N.P.(n.s.) 353, 17 Ohio Dec. 435. Yet, in the same year the Hamilton County Common Pleas Court held that the proper method of objecting to irrelevant interrogatories was the demurrer, not the motion to strike. W.H. Mullins Co. v. Jacob Freund Roofing Co., 5 Ohio N.P.(n.s.) 1, 17 Ohio Dec. 743 (1907). Although no higher court has ever decided the issue, the latter decision is the one which has been followed. Dye v. Buchwalter, 8 Ohio N.P.(n.s.) 630, 19 Ohio Dec. 791 (1909), Stanley v. Martin, 19 Ohio Dec. 864 (C.P. 1909).

J. Browne, supra note 5 at 317.

See Woodle, supra note 26 at 127.


See Staff note 4 to OHIO R. CIV. P. 7 (Baldwin, 1981).

See supra note 39.

OHIO R. CIV. P. 8-13 are the applicable general rules for the answer procedure.
Since the discovery has been designated a civil action it would seem logical that the answer procedure should conform to the Civil Rules. However, an answer in a civil action responds to the merits of the complaint and traditionally, the defendant has not been required to respond to the merits of the discovery petition. He simply has to provide the discovery. A court order is not necessary, unless he challenged the petition and lost.

If the defendant chooses to provide the discovery, how should he do it? The only applicable procedure is found in Civil Rules 33 and 34\(^9\) pertaining to pre-trial discovery. Once more some legislative history is in order. The rules for responding to interrogatories propounded under Revised Code \(\S\) 2317.48 relied on Revised Code \(\S\) 2309.43 and \(\S\) 2309.44 as their authority. These statutes provided for the annexation of interrogatories to complaints, as well as the procedure therefor. Civil Rule 33\(^10\) replaced sections 2309.43 and 2309.44 and accordingly they were repealed.\(^10\) Given this, the procedure prescribed in Rule 33 seems extremely suitable to interrogatories accompanying the complaint for discovery.\(^12\) It would also follow that the procedure for responding to requests for production of documents and inspection of chattels and land will be governed by Civil Rule 34.\(^13\)

In the case of interrogatories the defendant should answer them, then sign and return a copy to the complainant within the prescribed time.\(^14\) If the request is for the production of documents, inspection of chattels or entry upon land, the defendant should serve a written response within the specified time.\(^15\)

\(^9\)See infra notes 100 and 103.

\(^10\)Ohio R. Civ. P. 33(A) (Baldwin, 1981) provides in pertinent part:

> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a period designated by the party submitting the interrogatories, not less than twenty-eight days after the service thereof or within such shorter or longer time as the court may allow. The party submitting the interrogatories may move for an order under Rule 37 with respect to any objection to or other failure to answer an interrogatory.

\(^11\)See Notes to repealed Ohio Rev. Code Ann. \(\S\) 2309.43, 2309.44 (Baldwin 1984); See also supra note 89.

\(^12\)Support for this proposition is found in 36 O. Jur. 3d Discovery and Depositions \(\S\) 15 (1982), "Thus it would appear that, under present practice the proper method of making objection to interrogatories, in a statutory action for discovery, is that prescribed in the Civil Rule related to interrogatories to parties."

\(^13\)Ohio R. Civ. P. 34 (Baldwin, 1981) provides in pertinent part:

> The party upon whom the request is served shall serve a written response within a period designated in the request, not less than twenty-eight days after the service thereof or within such shorter or longer time as the court may allow. The response shall state with respect to each item or category, that inspection and related activities will be permitted or requested, unless it is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item, or category, the part shall be specified. The party submitting the request may move for an order under Rule 37 with respect to any failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

\(^14\)See infra notes 116-122 and accompanying text.

\(^15\)Id.
stating the particular requested discovery will be permitted. By following
these procedures the defendant has completed the action.

If the defendant moves to dismiss the complaint he must follow the pro-
cedure prescribed for Civil Rule 12(B)(6) and the rules applicable to the filing of
motions. The grounds for such a motion are stated in the discovery statute
itself. A motion to dismiss a complaint for discovery may be granted where
the defendant named cannot be an adverse party to the contemplated
lawsuit, or where the complaint fails to allege sufficient facts to show that
the information is necessary to the drafting of a legitimate complaint.

If the complaint for discovery on its face is correct the defendant might
file objections to the particular discovery requested. The grounds for such ob-
jections are that: (1) the information sought is not discoverable by the defen-
dant named; (2) the information sought is not within the scope of
discovery; (3) the information sought is irrelevant to the issues discussed in
the complaint; or, (4) the information sought is privileged. The form of
these objections should probably conform to the dictates of Civil Rules 33 and
34. If interrogatories, the defendant should state his objection in the space
provided for the answer and the objection should be signed by the attorney for
the defendant. In the case of documents, chattles or land, the objections should
be stated in writing and served upon the plaintiff within the prescribed time.

At this time it must again be emphasized that there is no actual authority
for applying Civil Rules 33 and 34. Therefore, their application is more or less
by analogy and strict application of these rules to the statutory discovery ac-
tion will always be subject to attack absent any definitive legislative or judicial
pronouncement.

One problem with applying Civil Rules 33 or 34 lies with determining the
time in which the defendant may answer. Since it is now clear from the amend-
ment that this discovery action is initiated by a complaint and the Civil Rules
apply, it would logically follow that Civil Rule 12 determines the answer time. Thus the complaint should be answered within twenty-eight days after the service of the summons and complaint. We have already presumed that answering the complaint for discovery consists of either moving to dismiss the complaint, providing the discovery sought or objecting to the discovery devices. If, as proposed above, the latter two alternatives are governed by Civil Rules 33 and 34, their procedure, as well as the appropriate answer time is provided in these rules. According to the statute, the proponent of the discovery devices determines the answer time subject only to the limitation that he provide no less than twenty-eight days. In other words the earliest the answer can be required is on the twenty-ninth day after the service of the complaint and summons. Herein lies the problem. The answer time according to Civil Rule 12 and the answer time according to the Civil Rules are in direct contradiction to each other. This dilemma is one of the more obvious contradictions brought on by the amendment to Revised Code § 2317.48. This dilemma is strong support for the proposition that Civil Rules 33 and 34 were meant to apply only to discovery proceedings brought within an already commenced lawsuit.

**Enforcement**

Another inadequacy arises in the enforcement of the discovery action. What happens when the defendant either refuses to respond to the complaint or refuses to comply with the court’s order for discovery? If the matter is treated as a complaint, subject to the Civil Rules, and the defendant simply ignores the complaint there is, theoretically, nothing that can be done. Normally, such non-action would result in a default judgment. However, since the discovery action does not produce a judgment, the remedy is of no effect. Civil

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115 See supra notes 85-103 and accompanying text.
116 See supra notes 100-103 and accompanying text.
117 See supra notes 100 and 103.
118 What is interesting is that Ohio Rev. Code Ann. § 2309.44, one of the precursors to Ohio R. Civ. P. 33 was worded so as to avoid answer time contradictions. "When annexed to a petition, the interrogatories provided for by section 2304.43 shall be answered within the time limited for answer to the petition; when annexed to the answer, within the time limited for a reply; and when annexed to the reply within the time allowed for an answer." Staff note 2 to Ohio R. Civ. P. 33, (Baldwin, 1981).
119 Other problems pertaining to the difference between the rules applying to discovery actions within the lawsuit and the rules applying to complaints arises in the determination of how to challenge. If a defendant makes a motion to dismiss, under Ohio R. Civ. P. 12 (Baldwin Supp. 1985) "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process is waived . . . if it is . . . not included in a responsive pleading . . ." has the defendant waived his right to object to the discovery devices? Since an objection to interrogatories is not explicitly mentioned, it would seem that the objection would not be waived. Ohio R. Civ. P. 12(A) (Baldwin Supp. 1985) provides for at least fourteen days to answer the complaint in the event that a motion to dismiss is overruled. Does this extension apply to the answer time designated in the complaint for discovery if it is greater than the time provided for in the complaint pursuant to Ohio R. Civ. P. 33 or 34?
120 See supra note 38.
Rule 37 which provides for an order to compel discovery expressly states that it only applies to a failure to make discovery pursuant to Civil Rules 30, 31, 33 and 34.\textsuperscript{124} The language seems to preclude its application to the statutory discovery proceeding. Contempt proceedings could probably be instituted, but again, the contempt charge may only be supported by a failure to obey an order or judgment of the court.\textsuperscript{125} If the defendant simply ignores the complaint, and provisions for compelling discovery are not available to plaintiffs in the statutory discovery action, there can be no order for the defendant to disobey. Only if the defendant challenges the complaint and his motion to dismiss and/or his objections are overruled, could his failure to then provide discovery be properly the subject of a contempt charge. So it would appear that, without the application of Civil Rules 33 or 34, which allow for the compelling of discovery in the event of a defendant’s disregard for the complaint, a defendant might have every incentive to ignore the complaint.

On the other hand, if a strict application of Rules 33 and 34 is established, the enforcement may still be weak. Rules 33 and 34 direct that only certain sanctions pursuant to Civil Rule 37(D) may be utilized against a non-complying party.\textsuperscript{126} The only sanction which bears any enforcement value in the statutory discovery action is the requirement that the defendant pay the reasonable expenses incurred in the litigation, including attorney fees. Considering what a defendant might have to pay if a successful suit is brought, paying these fees may be an easy way out for the defendant who knows that without his discovery, the action against him cannot be initiated. He will of course, know this because it is a prerequisite to bringing the discovery action. The only way in which a determined plaintiff may obtain discovery is to apply for an order to compel discovery which would subject the defendant to contempt charges if disobeyed.

\textsuperscript{124}OHIO R. CIV. P. 37(A)(2) (Baldwin 1981), provides in pertinent part:
If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, the discovering party may move for an order compelling an answer or an order compelling inspection in accordance with the request . . .

\textsuperscript{125}Tucker v. Tucker, 10 Ohio App.3d 251, 461 N.E.2d 1337 (1983).

\textsuperscript{126}OHIO R. CIV. P. 37 (Baldwin 1981) provides in pertinent part:
If any party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others, the following:
(a) an order that the matters regarding which the order was made or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
(c) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a default judgment against the disobedient party;
(d) . . . the court shall require the party failing to obey the order . . . to pay the reasonable expenses, including attorney fees . . .
Although all of the above is academically correct, it is probably not as futile as it sounds. The court, one way or another, could probably enforce the discovery. The point is, that with the statute and procedural provisions being as ambiguous as they are, a defendant determined to avoid a lawsuit might have a good chance of tying up the discovery proceedings long enough to run out the statute of limitations, especially if that time period is relatively short. This possibility would threaten the utility of the discovery statute.

**Appeal**

The final and most unanswerable questions arise in the appellate rights of the parties to the discovery action. Traditionally, discovery orders have been recognized as being interlocutory in nature, and therefore not appealable. However, the traditional case law pertains to discovery proceedings brought within an already commenced lawsuit.

If the defendant's motion to dismiss the complaint for discovery is granted, can that decision be appealed? Since the discovery action is a civil action the motion to dismiss is probably treated as any other. Therefore, if the motion to dismiss is sustained, the plaintiff may attempt to amend the complaint pursuant to Civil Rule 15(A), however if he does he waives any error made in granting the motion to dismiss. The plaintiff may also choose to stand on his original pleading, suffer a dismissal, then appeal the matter.

Adversely, if the defendant's motion to dismiss is overruled, he may, if

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128 Only a final order may be appealed. Ohio Rev. Code Ann. § 2505.02 (Baldwin, 1978) provides in pertinent part:

   An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding... is a final order which may be reviewed, affirmed, modified, or reversed with or without trial.

129 Although the Ohio Supreme Court has held that discovery proceedings are not "special proceedings" and hence do not produce appealable orders, the language of the court seems to indicate that it was referring to discovery proceedings within a pending lawsuit. Kennedy v. Chalfin, 38 Ohio St. 85, 89, 310 N.E.2d 233, 235 (1974).

   Similarly, discovery techniques are pre-trial procedures and as an adjunct to be [sic] a pending lawsuit. They are designed to aid in the final disposition of the litigation, and therefore, to be considered as an integral part of the action in which they are utilized. They are not "special proceedings" as that phrase is used in R.C.2505.02. Hence, a sanction order arising out of discovery procedures is not an order rendered in special proceeding. (Emphasis added)

130 See J. Browne, supra note 5 at 335.

131 Id. This seems to be the procedure followed in Slabinski, 22 Ohio App. 74.

132 Before the amendment to Ohio Rev. Code Ann. § 2317.48 (Baldwin, 1984), there had been a question as to whether the sustaining of a defendant's motion to dismiss the action was an appealable decision. It had been held in Driver, 58 Ohio App. 299, 16 N.E.2d 548 (1938) that the sustaining of a demurrer to an action for discovery is reviewable to determine whether the court abused its discretion. However, Driver was overturned by Klein, which expressly stated that the sustaining of a demurrer to discovery is an interlocutory order and mere abuse of discretion cannot render it a final order. Then some commentators advanced the
he has not already, answer by objecting to some or all of the discovery sought. If his objections are overruled he must then provide discovery or face sanctions. The order awarding expenses and attorney fees, as sanctions against persons who resist discovery is probably not a final, appealable order.

The situation where the defendant’s objections to discovery are sustained yields the most bizarre results. Once his objections are sustained the defendant must then move to dismiss in order to dispose of the action. Because of its civil action status, the sustaining of objections to discovery is not a final order. The plaintiff must wait until the action is dismissed and appeal from that order. If the defendant never moves to dismiss there will never be a final order from which the plaintiff can appeal. If the plaintiff moves to voluntarily dismiss the action pursuant to Civil Rule 41(A)(2), the court’s order may be considered an adjudication other than on the merits and not a final order. The inequitable result is that a clever defendant could technically leave the action in limbo, thus denying the plaintiff his right to appeal.

Certainly the Ohio legislature did not mean to provide for this procedural circumstance. However, by deciding that the discovery action is to be treated as a civil action this situation is technically a possibility.

CONCLUSION

By now it should be apparent that there are definitely some procedural flaws inherent in designating the discovery statute as a civil action. The most unfortunate difficulty being that the procedure outlined above is merely speculation, taking into account the limited legislative history and applicable case law available in this area. The appropriate procedure to be followed when using the discovery statute is not known at this time.

Another difficulty is that the discovery action does not share the characteristics common to most civil actions. The majority of civil actions to which the Civil Rules of Procedure are addressed involve an adjudication of the rights of the parties involved which results in a remedy of some kind for the

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theory that if the discovery action were considered a “special proceeding,” see, e.g., J. BROWNE supra note 5, at 859: Note, O.R.C. § 2317.48: Action for Discovery, 47 LAW & FACT 3 (No. 8, Oct. 1975), such an order dismissing the action could be appealed. See also supra note 124.

133See supra note 121.
134See supra notes 111-115 and accompanying text.
135See supra notes 123-126 and accompanying text.
136See supra note 124.
137This is a logical assumption based on the normal course of civil action. If the action were not dismissed it would forever remain pending.
138This seems to be the current state of the law under Hensley v. Henry, 61 Ohio St. 2d 277, 400 N.E.2d 1352 (1980) which held that unless a plaintiff’s OHIO R. CIV. P. 41(A)(1)(a) notice of dismissal operates as an adjudication upon the merits under OHIO R. CIV. P. 41(A)(1) it is not a final judgment, order, or proceeding, within the meaning of OHIO R. CIV. P. 60(B). Although the dismissal in our situation would probably be a dismissal by court order pursuant to OHIO R. CIV. P. 41(A)(2) the same reasoning would more than likely apply.
prevailing party. This discovery action is simply a proceeding to enable an individual to file a civil action. It addresses no wrong, nor enforces any right. For this reason the Civil Rules, when applied to the discovery action, often do not make sense and sometimes produce inequitable results.

As we have already seen, the discovery action can be initiated in accordance with the Civil Rules without producing too many difficulties. However, as the action proceeds the Rules become complicated and incongruous. The defendant in such a discovery complaint finds himself confused as to the time in which he must answer or provide discovery. If the defendant has a great interest in prohibiting the discovery his efforts to resist may pay off. Given the ineffective enforcement and questionable appellate rights, a defendant may use these technicalities to prevent successful discovery and ultimately prevent the contemplated lawsuit.

These difficulties are even more troubling considering that there exists a more effective, logical and consistent means of amending Revised Code § 2317.48. Had the discovery action been designated a “special proceeding,” the inequities and inconsistencies brought to light in part II of this note would not exist. This task could have been easily accomplished by removing the discovery action in the Ohio Revised Code to the section in the Ohio Civil Rules pertaining to discovery procedure. As there already exists in these rules a special proceeding to obtain discovery before the drafting of a complaint — Civil Rule 27 — this rule could have been adapted to include the discovery action.

Generally, it may be said that a civil action requires, as a minimum, the service and filing of a complaint and an answer, and the issuance and service of process under the provision of the Civil Rules. This, in and of itself, could turn any proceeding into a civil action by simply requiring a complaint, answer and service of process. What distinguishes the civil action from a special proceeding is the opportunity for an adversarial hearing on the issues of fact and law which arise on the pleadings, which result in a judgment for the prevailing party.

Although, arriving at a definition of a special proceeding is much more difficult, some general features can be identified. The special proceeding is essentially an independent judicial inquiry which is originated by an application for an order, usually a petition, involving notice to others. It does not require pleadings or the service of summons. If the proceeding culminates in an

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140 Id.
141 See Browne, supra note 140 at 366 citing Missionary, 56 Ohio St. 405, 407, 47 N.E.537, 538, and quoting In re Wyckoff, 166 Ohio St. 354, 142 N.E.2d 660 (1957), “Therefore, the proceeding provided by section 2117.07, Revised Code, in connection with which a petition and no other pleadings are required and wherein there is notice only, without service of summons, and which represents essentially an independent judicial inquiry is a special proceeding.
order it may or may not qualify as a judgment, depending upon whether it affects a substantial right of the parties.\textsuperscript{142}

Given the above, consider Revised Code § 2317.48 before the amendment.\textsuperscript{143} Notwithstanding the outdated terms, the proceeding described in the statute lends itself very nicely to the definition of a special proceeding. It is an independent judicial inquiry, initiated by a petition. It does not require the service of a summons since the purpose of the statute is to provide discovery, not to hail the defendant into court to redress an alleged wrong. Finally, the proceeding culminates in an order which is not an adjudication of the parties' civil rights. Indeed, if the discovery action were deemed a "special proceeding" the problems pertaining to the contradiction of prescribed answer times and uncertainty of appeal rights would be alleviated.

So why then, did the Ohio legislature word its amendment so as to make this discovery proceeding a civil action? Perhaps, being mindful that Civil Rule 1 excepts a special proceeding from the purview of the Civil Rules,\textsuperscript{144} it feared such a designation would leave the statute with no applicable course of procedure. And in fact, such a designation would have done so, for the exception to Civil Rule 1 only applies to the extent that a specific statutory procedure is provided.\textsuperscript{145} If there is none, as would be the case with Revised Code § 2317.48, the procedure provided by the Civil Rules would apply, unless the application of the Rules would be clearly inapplicable.\textsuperscript{146} This would occur where the application of the Rules would severely modify exercision of the statute or frustrate its purpose by causing delay, unnecessary expense or other impediments.\textsuperscript{147} As we have seen, application of the Civil Rules produces precisely these results.

However, an amendment to Civil Rule 27,\textsuperscript{148} which would provide for the same discovery action now authorized by Revised Code § 2317.48 would accomplish a number of objectives. First, it would make this valuable discovery tool more available. Because the Civil Rules so completely embody discovery practice in Ohio,\textsuperscript{9} many practitioners do not realize that there is another discovery provision located elsewhere. Secondly, the dilemma surrounding the

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\textsuperscript{142}By the terms of OHIO R. CIV. P. 54(A) (Baldwin 1981) the order will qualify as a "judgment" if it is an order from which an appeal lies, that is, it will be a "judgment" if it is a final order as that term is defined in OHIO REV. CODE ANN. § 2505.02 (Baldwin, 1978). Since the order is one made in a special proceeding, it is not subject to the provisions of OHIO R. CIV. P. 54(B) because, by its terms, that subsection of the Rule is applicable only to "actions." Browne, supra note 140, at 306.

\textsuperscript{143}See supra note 1.


\textsuperscript{145}Id. "the exclusion from the rule applies in special statutory proceedings only to the extent that a specific procedure is provided by law . . .\".

\textsuperscript{146}Id.

\textsuperscript{147}See Browne, supra note 140, at 370.

\textsuperscript{148}See supra note 73.

\textsuperscript{149}See staff note 1 to OHIO R. CIV. P. 26 (Baldwin, 1981).
procedure applicable to the discovery action would be alleviated. Civil Rule 27 is a special proceeding which provides for its own procedure. Including the discovery action as an amendment to Rule 27 would make both pre-complaint proceedings amenable to the same procedural provisions. Finally, the inequitable and inconsistent results produced by the discovery "civil" action would be avoided. The action, which is necessary to obtain information to draft a complaint, would be rendered more effectively enforceable with appeal rights that were more easily ascertainable and lacking the nonsensical technicalities which currently exist.

The means of initiating the Civil Rule 27 proceeding to perpetuate testimony is a petition,¹²⁹ thus identifying the action as a special proceeding, not a civil action.¹³⁰ Since the purpose of the initiating document is to ask the court’s permission to obtain discovery before a complaint is filed, there is no confusion as to whether the petition need be answered, as a complaint has to be. The copy of the petition which is sent, along with notice of the upcoming hearing on the petition, to the respondent, allows him an opportunity to protect his interests in preventing the discovery.¹³¹ The extra complication of service of summons is not necessary to this proceeding. In addition, the rule itself provides for the venue of the petition, its verification and its necessary contents.¹³²

Remember that in describing the necessary contents of the complaint for discovery, it was suggested that Rule 27 be used as a guideline.¹³³ The similarity in purpose and timing of the documents established the suitability of such a practice.

If after a hearing on the petition the court allows the discovery, it is pursued according to Rules 33 and 34¹³⁴ which provide for answering or objecting to the discovery. Since these rules authorize the same discovery devices available to the user of the current discovery statute, no loss of discovery opportunity would occur. This would also alleviate the contradictory answer

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¹²⁹ "A person who desires to perpetuate his own testimony or the testimony of another person . . . may file a petition . . ." OHIO R. CIV. P. 27 (Baldwin, 1981).

¹³⁰ See supra notes 140-143 and accompanying text.

¹³¹ OHIO R. CIV. P. 27(A)(2) provides:

The petitioner shall thereafter serve notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty eight days before the date of hearing, unless the court upon application and showing of extraordinary circumstances prescribes a hearing on shorter notice, the notice shall be served either within or outside of this state by a method provided in Rule 4 through 4.6 for service of summons, or in any other manner affording actual notice, as directed by the court. But if it appears to the court that an adverse party cannot be given actual notice, the court shall appoint a competent attorney to cross-examine the deponent . . .

¹³² "... in the court of common pleas in the county of any expected adverse party, the petitioner shall verify that he believes the facts stated in the petition are true. The petition shall be entitled in the name of the petitioner and shall show . . ." OHIO R. CIV. P. 27(A)(1) (Baldwin, 1981). See also supra note 73.

¹³³ See supra note 73.

¹³⁴ See supra notes 100 and 103.
times facing someone confused as to which answer rules now apply to the discovery action.

Furthermore, the rule provides that all the sanctions provided in Rule 37 are available if necessary. A respondent who refuses to comply with the discovery order may face charges of contempt, a much more effective enforcement tool than that which is available under the current discovery statute. Most importantly, a party who wishes to challenge the court's order in this proceeding is not left uncertain as to his appeal rights. Because Rule 27 is a special proceeding, its outcome qualifies as a final order for the purposes of Revised Code § 2505.02. Thus an appeal may be taken from the order if it is deemed to affect a substantial right.

It is proposed that Revised Code § 2317.48 be repealed and that Civil Rule 27.1 be appended to the Ohio Rules of Civil Procedure. Proposed Civil Rule 27.1 might read as follows:

Civ. R. 27.1
Action for Discovery Necessary to Draft a Complaint

(A) Petition. A person claiming to have a cause of action who, without discovery of some fact from the adverse party, is unable to file his complaint, may file a petition in the court of common pleas in the county of the residence of any expected adverse party. The petitioner shall verify that he believes the facts stated are true. The petition shall be entitled in the name of the petitioner and shall show:

1. That the petitioner or his personal representatives, heirs, beneficiaries, successors, or assigns may be parties to an action or proceeding cognizable in a court but is presently unable to bring or defend it;

2. The subject matter of the expected action or proceeding and his interest therein (if the validity or construction of any written instrument connected with the subject matter of the discovery may be called in question a copy shall be attached to the petition);

3. The facts which he desires to establish with the discovery, the necessity therefor and the grounds thereof;

4. The names, or if the names are unknown, a description of the persons he expects will be adverse parties and their addresses so far as known;

5. The names and addresses of the persons from whom the discovery is sought and the subject matter of the discovery sought from each.

156 See supra notes 116-119 and accompanying text.
158 See supra note 128.
159 But see supra note 129.
The petition shall then ask for an order authorizing the petitioner to make said discovery.

(B) Notice and Service. The petitioner shall thereafter serve notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty-eight days before the date of hearing, unless the court upon application and showing of extraordinary circumstances prescribes a hearing on shorter notice, the notice shall be served either within or outside of this state by a method provided in Rule 4 through 4.6 for service of summons, or in any other manner affording actual notice, as directed by order of the court. If any expected adverse party is a minor or incompetent the provisions of Rule 17(B) apply.

(C) Order and examination. If the court is satisfied that the allowance of the petition may prevent a failure or delay of justice, and that the petitioner is unable to bring or defend the contemplated action the court shall make orders of the character provided for by Rule 33, Rule 34 and Rule 37. For the purpose of applying these rules to the discovery, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such discovery was filed.

(D) Costs. Upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable.

In the Rule 27.1 proceeding a petition asking for permission to make discovery would be filed in the court of common pleas. The petition would state the reasons why the discovery is necessary and describe the type of information being requested. The court would order a hearing. A copy of the petition along with notice of the hearing’s time and place would be served on all proposed adverse parties so that if interested, they could appear at the hearing to argue against the discovery. If the court is satisfied that the discovery is necessary, it will allow the discovery which then would proceed according to Rules 33 and 34. If the respondent does not comply, he faces sanctions pronounced in Rule 37 which includes, inter alia, contempt charges. If either party is dissatisfied with the court’s order of discovery, or lack thereof, he could appeal the order arguing that the order affected substantial rights and was made in a special proceeding. There is no doubt that such a procedure would greatly increase the utility of the discovery action.

Since the purpose of the enactment of the Civil Discovery Rules was to unify and simplify discovery practice in Ohio, which before had been based on a conglomerate of statutes, case law and customs, it is urged that Ohio Revised Code § 2317.48 be repealed and that the Ohio Rules of Civil Procedure be amended to include Civil Rule 27.1, The Action for Discovery Necessary to Draft a Complaint.