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Repository Citation
Edgar V. Werner, The Value of an Adverse Examination and its Abuses, 8 Marq. L. Rev. 11 (1923).
Available at: http://scholarship.law.marquette.edu/mulr/vol8/iss1/2
THE VALUE OF AN ADVERSE EXAMINATION AND ITS ABUSES
By Hon. Edgar V. Werner*

THE CULTURE OF JUSTICE
A good reputation of the legal profession can be maintained only by the culture of justice. The very oath of an attorney at law administered and taken in open court when he is admitted to the bar in Wisconsin expresses some of the fundamental principles of the culture of justice. By virtue of this oath of office, an attorney at law is duty bound to support the Constitution of the United States and the Constitution of the State of Wisconsin; maintain the respect due to courts of justice and judicial officers; not to consent to and always refrain from maintaining any suit or proceeding which shall appear to him to be unjust; refrain from interposing any defense except such that he as a lawyer believes to be honestly debatable under the law of the land; employ for the purpose of maintaining any cause confined to him such means only as are consistent with truth and honor; never to mislead the judge or jury by any artifice or false statement of fact or law; maintain the confidence and preserve inviolate the secrets of any client; never to accept compensation in connection with his client's business except from him or with his knowledge and approval; abstain from all offensive personalities; advance no facts prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause; never to reject for any consideration personal to himself the cause of the defenseless or oppressed; never to delay any man's cause for lucre or malice.¹

A careful analysis of this oath by the members of the bar with an idea of comprehending and practicing its tenet will do much toward advancing the practice of law.

It has been suggested that every member of the bar should be required to commit this oath to memory and appear in open court and repeat it in an audible voice and renew the signing of the roll of the local bar, because of the fact that this form of oath

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¹ Section 2586a Stats.; Hanson vs. Milwaukee Mechanic's Mutl. Ins. Co., 45 Wis. 321-323; Loquidice vs. State, 160 Wis. 17-18; Tarczek vs. C. N. W. R. Co., 162 Wis. 439-445; In re G— 73 Wis. 602-618; Raefeldt vs. Koenig, 152 Wis. 459-462.
was adopted by the legislature in 1909. It is mentioned here simply to associate with it the idea and thought to be conveyed by this article.

Justice is a mode of morals actuated by a constant and unswerving desire to render unto every one his own in the larger interest of the common good. The word "judgment" so often coupled with justice in the Old Testament means (according to Moulton) the triumph of right over wrong. The sense of personal right must suffer modification. Justice culture through proprietorship must concede the truth that nothing is altogether one's own for we have an inheritance from the past which is the common property of ages.

The very language with which we think and express ourselves is common property and nothing is exclusively one's own. With the written laws, justice must take a larger view. Rights and duties appear simply as different aspects of human bonds and human obligations, not the personal balancing of rights, but the devotion to the service of all.

Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without being obliged to purchase it, completely without denial, promptly and without delay, conformably to the law.²

When the average lawyer changes the terminology of thought to what he calls equity he approaches more nearly to the real meaning of justice, because equity is a better sort of justice since it corrects legal justice when the latter errs. True justice feels, thinks, imagines, wills or acts. When justice feels, it embraces the soul of sympathy, pity, forgiveness and kindness. When justice thinks, it weighs conditions, searches for causes and effect, calculates the equity of opportunity, the reciprocity of rights and duties and discriminates and fixes moral values. When justice imagines, it visualizes, sees the whole, penetrates the whole, puts itself in the place of others and grasps the universals. When justice wills or acts, it is a doer. Education for justice is therefore pre-eminently an education by doing justice. While we deal with the written laws of the land, we are reminded that law is the rule of reason applied to existing conditions, and obviously when conditions change, there must be a corresponding

² Article I Sec. 9 Wisconsin Const.
change in the law, else it would cease to be a rule of reason and would become a mere arbitrary, static rule.  

Law as well as its administration must be reasonable. There is no certain test by which what is reasonable in any given case can be definitely measured. It is a matter resting in human judgment. In the ultimate, the scope of the term as regards any situation must be measured by having regard to the fundamental principles of human liberty as they were understood at the time of the formation of the Constitution and were intended to be im pregnably entrenched thereby, adopting the same, of course, to our modern conditions. These principles have not changed in the years that have elapsed since the Constitution was formed. They are unchangeable and are of no less, but rather of greater importance than they were when the framers of the Constitution attempted so carefully to guard them.

"Reasonable" as applied to a law is manifestly not what extremists, upon the one side or the other, would deem in the light of the principles referred to and the situation to be dealt with, fit or fair. It is what from the calm sea level, so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained.

**Legal Advice**

Legal advice must not only be legally sound, but morally sound in order to be reasonable; when law is properly administered it is necessarily reasonable and just.

A lawyer is not able or in a position to give his client proper legal advice when it is needed until he has ascertained the facts involved in the merits of the controversy. That is, he must know and ascertain the ultimate facts as distinguished from evidentiary facts.

A lawyer who is retained by his client is duty bound to assume the responsibilities of ascertaining the ultimate facts material to the merits of the controversy. The average client is not versed in the law and when he retains counsel, he has a right to expect proper legal guidance from him. The average litigant is liable to put too much importance on hearsay evidence, statements of per-

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4 *Bonnett vs. Vallier Factory Inspector*, 136 Wis. 193-203.
5 *McKenzie vs. Haines*, 123 Wis. 557-561.
sons who if called as witnesses may not only be incompetent to testify but whose evidence may be incompetent, immaterial and irrelevant to the merits of the controversy. Moreover the litigant or client may unconsciously relate ultimate facts to his counsel which are based on inferences unsupported by legal or credible evidence.

It is the duty of a lawyer in behalf of the interest of his client to weigh and determine the credibility of the witnesses that will be sworn at the trial. By intuition and experience the lawyer is enabled to weigh the witnesses' interest in the result of the trial, if any is shown, their conduct and demeanor when giving their statement, their apparent fairness and bias, if such appear, their opportunity of seeing or knowing of the things about which they are interrogated, the reasonableness or unreasonableness of the story told by them. He will consider all the facts and circumstances tending to corroborate or contradict such witness. He will also apply his own knowledge of men and things in his observation and experience of the affairs of life to the statements of the proposed witnesses and determine upon which side the truth of the matter is. This is not expected of the client, but the law contemplates that a lawyer, having been duly retained, will pilot his client through a legal controversy, although a litigant may prosecute or defend in his own proper person.⁶

When a lawyer has ascertained the ultimate facts bearing on his client's controversy he is in a position to give his client proper legal advice and prepare his pleadings, either for the prosecution or defense in the action.

A substantial retainer is contemplated in the law, depending upon the importance of the controversy, for the purpose of getting the proper legal service, except in attachment and garnishee proceedings and injunctions; and except now and then in emergency cases, a lawyer has ample time to learn and ascertain all the ultimate facts in any controversy before framing his pleadings and before trial. It is the lawyer's duty, if he accepts the retainer. By due diligence and close adherence to his oath of office and duties as a lawyer versed in the law, he is able to arrive at a final conclusion on the merits of his client's case before framing his pleadings and before trial. His judgment due to proper diligence and experience ought to be as good as that of the judge and better than that of a jury. It is always to be remembered that a settle-

⁶Section 20 Art. VII, Wisconsin Const.
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ment of a legal controversy is favored in the law and a lawyer who does his duty will be in a position to determine his client's rights. It is his duty to urge his client to make an offer of settlement in every case in contemplation of the probable result, based on a thorough and careful investigation of the facts. This can be done without fear that his client will lose any rights thereby. It is unprofessional to attempt to offer in evidence a proposed settlement made by either of the parties before or after suit, as the rule is elementary that such offer is inadmissible. The trial courts should enforce the rule by promptly excluding such offer with vigor and counsel offending should be severely criticized if not fined for contempt, or a new trial should be granted if the trial court is satisfied that it was prejudicial to the rights of the party making the offer.⁷

INVESTIGATION AND PREPARATION FOR TRIAL

Investigation and preparation before the beginning of an action and before trial is not only a duty contemplated in law and by the retainer, but an economical practice to pursue, and is commended by all courts.

A lawyer who has made a thorough investigation and preparation before drafting his pleadings and has made propositions of settlement based on his judgment from the facts in the controversy is worthy of his high profession.

A lawyer who fails to properly investigate and prepare for trial in the interest of his client, and who throws his responsibilities on the courts and jury in the trial of the issues, is unworthy of employment and a detriment to the profession. A retainer implies authority to investigate and prepare for trial and it is his duty to do so.⁸

Section 4096 Stats. is remedial and a highly beneficial statute and is liberally construed and affords an avenue for full investigation and preparation before framing a pleading and before trial.⁹

The examination under Section 4096 takes the place of the old bill of discovery whose object was to obtain evidence to be used

⁸ Miller vs. Prescott, 157 Wis. 264-265.
⁹ Sullivan vs. Ashland Light, Power and Street Ry. Co., 152 Wis. 574-578.
against the opposite party on the trial of the action, whether or not he submitted himself to be examined on the trial. But this section goes much further. It permits an officer, agent, or employee of the party as well as the party to be examined, and such examination is not limited to matters which the party seeking the examination cannot prove by other witnesses or evidence, but extends to all material issues in the action, and extends to equity procedures. It is remedial in its nature and with a liberal construction, its purpose is naturally extended accordingly.

It should not be given a construction beyond its evident scope and purpose so as to confer privileges not intended to be conferred. The examination is in the nature of a cross examination to accomplish full disclosure. It is a special proceeding and a provisional remedy. And it is in the nature of admissions so far as the answers are material to the issue, and such admissions are always admitted as original evidence against the party so examined. The object of the old bill of discovery was to procure evidence against the opposite party to be used on the trial and the answers could be used against him.

A party, individual, a domestic corporation or a foreign corporation, his, her or its assignors, officers, agent, employee, a person who was such officer, agent or employee at the time of the occurrence of the facts made the subject of the examination. So officers of the county, town, city or village when a municipality is a party, may be examined otherwise than as a witness on the trial at the instance of an adverse party in any action or proceeding after the commencement of the action and before judgment. As many such examinations may be had at different times and places as there are individuals to be examined.

An examination may be had before issue joined and after the service of the complaint to enable the party to plead. The defendant may examine the plaintiff, his or its agents, employees or officers, and the plaintiff may examine the defendant, his or its agents, employees or officers, on all points set out in the complaint, as though the same had been put in issue, and another and

10 Rohleder vs. Wright, 162 Wis. 580-581-582; Horlick's Malted Milk Co. vs. A. Spiegel Co., 155 Wis. 201-212-216; State vs. C. & N. W. Ry. Co., 132 Wis. 345-363.
Further examination may be had after issue joined upon all the issues in the cause, upon oral interrogatories.13

The place where the examination may be taken and had is where the party to be examined resides. It may be taken without the state in the manner provided for taking other depositions. If the defendant is a non-resident of this state, his deposition may be taken under the provisions of this section in any county in the state if he can be personally served with notice and subpoena.12 And this rule applies to officers of a non-resident corporation as well.14

Relevancy, Competency and Admissibility of Testimony as Evidence

This examination is taken and had before a judge at the Chambers or a court commissioner. If taken outside of the state, then in the manner provided for taking other depositions. Under such examinations the parties are subject to the same rules as any other witness, but such party shall not be compelled to disclose anything not relevant to the controversy. It should be remembered that due to the liberal rules allowed by court commissioners in these examinations, it frequently occurs that immaterial, incompetent and irrelevant testimony is admitted. In some instances the witness is incompetent to testify, or is privileged and may have exercised his privilege and refused to testify but is compelled to testify notwithstanding; the testimony so taken, objectionable, incompetent, immaterial and irrelevant to the issue, would become a part of the original record at the trial if proper precautions are not taken.

In view of the fact that the examination may be offered by the party taking it, such examination must be offered before it becomes a part of the record in the case. All objections entered at the examination may be renewed before the trial court when the examination is offered.15 The party may then obtain another ruling on such evidence offered in the trial by the trial court. It is therefore very important that only disclosures relevant to the controversy be permitted, and it is regarded unprofessional to insist on a witness to testify to matters not relevant to the controversy, or when the witness is privileged.

13 Section 4096 Stats.
15 Shearn vs. Woodrick, 193 N. W. 968.
Where a question of admissibility is debatable under the law of the land and the court commissioner is in doubt as to his ruling on an objection interposed to a question propounded to a witness in such examination, and the objection should be reserved for ruling by the trial court on the trial, the better practice to follow is to record the question and objection. The court commissioner may then overrule the objection for the purpose of examination. When the question is answered, the party interposing the objection should move that the question and answer be stricken out for the same reasons assigned when the objection was entered or for any other reason. The court commissioner may then either grant or deny the motion, and if these objections and rulings are reserved in the record of the examination, the trial court, when such objections are renewed, will have the benefit of the entire record when it is offered at the trial in order to pass on the rulings of the court commissioner at the examination. The offer of the answers to the question should not be made in presence of the jury in case of a jury trial until the trial court has passed on the objections so raised. This practice will avoid prejudicial error in case the testimony offered is in fact objectionable and improper.

Circuit Court Rule XVII, Sec. 8, provides, objections to the competency of any answer of a witness or to the relevancy thereof, if the same be not responsive to the interrogatory may be made at any time before entering upon the trial.

Where the jurisdiction of the court was challenged by a non-resident attorney and a motion to suppress the taking of the examination was entered because he was privileged and because the evidence is immaterial or that the information sought is now in possession and knowledge of the party seeking discovery, the motion was too broad and was denied. An examination will not be permitted or authorized on a mere motion to set aside the service of the summons. The trial court, however, is without jurisdiction to order an adverse examination of a non-resident party to take place within this state, unless personal service of notice and subpoenæ could be served within the state.

A guardian ad litem of an infant party is not subject to an examination because not a party, nor is he an agent of the infant, and the mere fact that he is also the father or general guardian

36 Simon vs. de Gersdorff, 166 Wis. 170-174.
See note under citation (74), infra.
of such infant will not change the rule. The word "party" means real party in interest. The same rule applies to an executor of an estate of a deceased person. An examination will not be permitted where a letter addressed to the attorney general complaining of violations of law was made the basis of an action for libel because the letter was qualified privileged and therefore not a basis for the action; so what an adverse party testified to before the grand jury is privileged. While a physician may be privileged under section 4075 Stats., he could not plead such privilege in an action by patient against him for malpractice.

Where a witness pleads his privilege under Section 4077, that if compelled to testify his testimony, it would tend to incriminate him and the party insisting on him giving his testimony denies that it will incriminate the witness, the burden of proof is on the party so insisting to show that the Statute of Limitation has run and that no suit has been begun and is now pending within the statutory period.

A corporation cannot plead the privilege as to its officers because the privilege is a personal one. The individual officers as to them personally may plead the privilege because by Section 4077, no person shall be compelled in any criminal case to be a witness against himself. A corporation is not a person within the meaning of the Amendment V. U. S. Const. and Art. I, Section 8 of Wisconsin Const., or Sec. 4077.

In an action to enforce a penalty or forfeiture for criminal misconduct, the defendant cannot be compelled to testify in an examination under Section 4096. The examination of a corporate officer under this section after the complaint is served and before the answer is subject to the same rules as that of any other witness except he cannot be compelled to disclose anything not relevant to the controversy. An officer who verified the complaint may be required to disclose the contents of reports made.

18 Rohleder vs. Wright, 162 Wis. 580-581; American Food Products Co. vs. Winter, 147 Wis. 464; State ex rel Pabst Brew’g. Co., 129 Wis. 180-7.
19 Hathaway vs. Gruggink, 168 Wis. 390-393-396; Schultz vs. Strauss, 127 Wis. 325-329.
20 Markham vs. Hipke, 160 Wis. 37-38.
22 State ex rel Schumacher vs. Markham, 162 Wis. 55-56.
23 Horlick’s Malted Milk Co. vs. A. Spiegel Co., 155 Wis. 201-209-212; American Food Products Co. vs. American Milling Co., 151 Wis. 385-386-399.
to him by employees and agents if within the issues, and such reports are not privileged. The privilege existing between attorney and client is confined strictly within the limits of Section 4076 Stats., and extends only to communications made by the client to his attorney and the advice given thereon by the latter in the course of his professional employment. Admissions of agents do not always bind the principal.

While a witness cannot invoke the claim of privilege for the purpose of shielding himself from civil liability, yet in the absence of an immunity statute or its equivalent, such witness cannot be compelled to testify to anything that may incriminate him, and he should not be compelled to answer unless it is reasonably clear that the answer can have no such effect. Where the matters upon which discovery is sought to enable a party to plead are obviously within the knowledge of the party applying for the examination, it will be denied; but if the affidavit is in compliance with the statute, the examination should be permitted, notwithstanding the rule that a party cannot impeach his own witness; he is not precluded from showing that the testimony of any witness is incorrect or false in a matter material to the issue.

A record of the Wisconsin Tuberculosis Sanitarium containing information obtained from a patient by physicians for the purpose of treating him as a physician is incompetent evidence, and must be excluded. The right to use this record is entirely with the patient personally, and it cannot be waived by legal representatives of the deceased or his heirs.

Public officials who as physicians or surgeons acquire information concerning a patient committed to their care or for examination in order that they may determine what treatment should be had or whether treatment tending to cure or benefit the patient is possible, will not be permitted to testify under Section 4075 Stats., without the consent of the patient personally and living. The mere fact that a public record is required to be kept by the

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23 Karel vs. Coulon, 155 Wis. 221-225.
24 American Food Products Co. vs. American Milling Co., 151 Wis. 385-386-399.
25 State ex rel Cleveland vs. Common Council of the City of West Allis, 177 Wis. 537-539.
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physician or the institution with which he is connected does not
effect the rule.\textsuperscript{27}

The privilege of an examination under Section 4096 refers not
to a matter of substantive law, but to one of procedure.\textsuperscript{28} Such
examination is not a part of the record until offered on the trial. The
party taking it may offer it, whether the party examined be
present or not (Subd. 2 sec. 4096 Stats.), and though it cannot
be offered by the party whose deposition is taken, it may be used
by him when offered as evidence by the other party so taking it
and offering it as though he had been called as a witness in
rebuttal to testify concerning the transaction therein testified to.\textsuperscript{29}

The rule of law that no person shall be examined as to trans-
actions with a deceased person under Section 4069 may be evaded,
by using the examination under 4096 on cross examination at the
trial by examining the plaintiff as an adverse witness under 4068
to the extent to sufficiently open the door to permit the witness'
testimony as to his signing of the contract after the father and
mother had signed it.\textsuperscript{29,30} This practice may be equivalent to an
express offer on the defendant's part.\textsuperscript{31}

When the defendant makes all of the plaintiff's testimony taken
on an adverse examination a part of the record in the trial of
the case by the offer of the whole deposition without qualifications of reservations of any kind at the close of the testimony on
the trial, it will open the door under Section 4069 Stats. Of
course, a deposition of the adverse party must be offered before
it can be made a part of the record on the trial and can be offered
only by the party taking it, and this may be done whether the
party is present or not, except that the party examined may use
the examination when offered as rebuttal.\textsuperscript{32} And may be re-
butted.\textsuperscript{32}

Under Section 4069 relating to transactions with deceased per-

\textsuperscript{27} Casson vs. Schoenfeld, 166 Wis. 401-413; Mehegan Ex. vs. Faber, 158
Wis. 645-648.

\textsuperscript{28} Kentucky Finance Corp. vs. Paramount Auto Ex. Corp., 171 Wis.
586-589-590; Chicago M. & St. Paul Ry. Co. vs. McGinley, 175 Wis. 565-
575-576.

\textsuperscript{29} Lamberson vs. Iamberson, 175 Wis. 398-411.

\textsuperscript{30} Drinkwine vs. Gruelle, 120 Wis. 628-632.

\textsuperscript{31} Johnson vs. Bank of Wis., 163 Wis. 369-373.

\textsuperscript{32} Lange vs. Heckel, 171 Wis. 59-69; Thomas vs. Lockwood Oil Co., 174
Wis. 486-496; Hart vs. C. M. & St. P. Ry. Co., 130 Wis. 512-518. Sec.
4098 Stats.
sons, an interested witness could not testify that the deceased burned his will in her presence in a basin procured by such witness for the deceased; while the husband of an interested party in a will contest is competent under Section 4072 to testify in favor of his wife concerning the distribution of the will by the decedent.33

Where decedent in a general conversation addressed to all within hearing made certain statements as to his will, those present all being persons interested in the estate, such conversation could not under Section 4069 be testified to by those present; although erroneously admitted in evidence, there was sufficient competent evidence in the record to prove the facts testified to by such incompetent witnesses.34 Under Sections 2284-4068, as they stood in 1895, a residuary legatee was a competent subscribing witness to a will, the common law disqualification being wiped out and Section 4069 not being applicable to the act of witnessing a will.35 Evidence of the hand writing of the person examined under 4096 may be obtained from such examination when it is a matter of record in such examination.36

A deposition when offered makes the evidence so offered, evidence of the one offering it, subject to proper objections to the whole or any part thereof by the other party.37 The testimony thus made a part of the record by defendant may be properly used by the plaintiff in consideration of the issues in the case as though he had been called in sur-rebuttal to testify to a transaction concerning which the defendant had already thus offered evidence.38

Exhibits referred to in an examination such as an affidavit claimed to have been sworn to by an employee of an adverse party thus examined without the affidavit itself being offered at the time of the examination is not admissible as independent evidence at the time of the trial.39

Under subd. 2 Sec. 4096 Stats., as amended by Chap. 246, Laws of 1913, testimony of the defendant’s employee taken by the

33 Will of Oswald, Steadwell vs. Keyes, 172 Wis. 345-347-349.
34 Will of Lanburg vs. Ihmig, et al, 170 Wis. 502-504.
36 Maldauer vs. Smith, 102 Wis. 30-40; Sioux Land Co. vs. Irving, 165 Wis. 40-44-45.
37 Anderson vs. Anderson, 136 Wis. 328-331.
38 Thomas vs. Lockwood Oil Co., 174 Wis. 486-496-497.
plaintiff before trial under such statute was not available to defendant during the trial in the absence of a showing that such employee could not attend the trial as a witness;38 such examination was admissible when offered by the party at whose instance the examination was taken, and not by the party testifying on such examination.39 Where the witness is present in court as distinguished from circumstances where the witness is dead or absent at the time, the examination cannot be received or offered except to show admissions made against interest or impeachment.39 If admitted erroneously and such error prejudices the rights of a party, a new trial may be granted.39

Evidence obtained on an adverse examination is admissible when there is a prosecution for perjury. Copies of an alleged forged receipt made by the defendant, at the direction of a court commissioner in such examination, were properly submitted to a handwriting expert for opinion.40

In view of Section 2842 Stats., 1917, defining trial, an examination of the plaintiff before answer under Sec. 4096 Stats., is not in substance and effect calling the party as a witness on a trial in a court of justice within the contemplation of Section 2020 enjoining secrecy on the state commissioners of banking concerning official reports. The word "trial" in a court of justice refers only to trials in criminal actions.41 An examination in a proceeding to obtain revision and alteration of an order for alimony may be had under Section 4096.42

The privilege afforded by an adverse examination has all the earmarks of the preliminary proceedings of a court of conciliation. Co-operation on the part of the members of the bar in exercising this privilege by examining both the plaintiff and defendant, in the same action on the same day has much to do in clearing up all suspicions, and a peaceable, amicable settlement is likely to follow.

Actions for libel and slander as well as an action for damages resulting from an assault and battery, or resulting and arising out of any other and distinct legal controversy, have been avoided by an adverse examination. Many a layman, with a little en-

38 Lange vs. Heckel, 171 Wis. 59-60-69-70; Salchert vs. Reinig, 135 Wis. 194-199.
39 Lappley vs. State, 170 Wis. 356-360.
40 Cousins vs. Schroeder, 169 Wis. 438-440.
41 Norris vs. Norris, 162 Wis. 356-359.
couragement on the part of the party against whom such layman may imagine a grievance much greater than will warrant a legal controversy, has avoided unnecessary and expensive litigation where an adverse examination of both parties had been taken.

**Production of Books and Papers**

The production in evidence of numerous articles relevant to the issues of the controversy as well as books, papers, files, records, things and matters relevant, though of a physical character, may be compelled upon subpoena and payment or tender of witness fees.

Section 4097 Stats., provides for punishment for contempt in case of neglect or refusal to testify or have on the examination any papers, books, etc., present at such examination. The theory of the statute is to afford full discovery of all matters relevant to the controversy.

The writings or documents desired must be in possession of and under the control of the witness in order to be able to compel the production thereof, and must be material, necessary and relevant to the controversy. An order requiring the witness to produce books, etc., is merely an interlocutory order regulating the manner of procedure on such examination and not a final order, nor appealable. The plaintiff is deemed to have had sufficient information to enable him to frame his complaint when claiming a specific sum as soon as he has had an opportunity to inspect defendant's books, under Section 4183 Stats.

The trial court has a discretion under Sec. 1, Circuit Court Rule XIX (New Rule XVIII) to order the defendant to give plaintiff an inspection and copy or permission and opportunity to take a copy of all books, data, and memoranda showing facts bearing on the issue involved. An adverse examination may

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4 Horlick's Malted Milk Co. vs. A. Spiegel Co., 155 Wis. 201-216; Sec. 4096 Stats.
4 Worthington Pump & Machinery Corp. vs. N. W. Iron Co., 176 Wis. 35-41.
4 Phipps vs. Wisconsin Cent. Ry. Co., 130 Wis. 279-280; Neacy vs. Thomas, 148 Wis. 91-92.
4 Ellinger vs. Equitable Life Ins. Soc., 138 Wis. 390-392-394; Badger Brass Mfg. Co. vs. Daly, 137 Wis. 601-607.
4 Sec. 4183; Ellinger vs. Equitable Life Ins. Soc., 138 Wis. 390-392-394.
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disclose facts to warrant and require a reference or a trial by the court.\textsuperscript{48}

AFFIDAVIT: REQUISITES AND SUFFICIENCY

Where the plaintiff proceeds to examine the defendant under Section 4096 for the purpose of framing a complaint, it is not necessary that the plaintiff should set out in the required affidavit facts sufficient to constitute a cause of action. It is not even necessary that the plaintiff know that a cause of action exists, and the examination may be had even though the affidavit shows that the plaintiff does not know that fact; and while it is customary to state in the affidavit that the facts upon which discovery is sought are not within the knowledge of the plaintiff, such statement is not essential and its omission does not render the affidavit defective.\textsuperscript{49} It is sufficient if it shows that the plaintiff may be entitled to recover against the defendant and that discovery is necessary to entitle him to plead.\textsuperscript{50} It does not require a statement, nor is it necessary that he cannot prove the facts sought by other witnesses; but the examination allows discovery as to all the material issues in the action,\textsuperscript{51} and is in the nature of cross examination and liberally construed to accomplish full discovery.

An order practically denying all examination of an adverse party under Section 4096 is appealable.\textsuperscript{52} But an order refusing to suppress the examination before trial is not a special proceeding as contemplated by Section 2594 and is not appealable.\textsuperscript{53}

A deprivation of the privilege afforded by this section does not work such hardship, oppression or fraud as to warrant enjoining a citizen of this state from prosecuting under the Federal Act in Minnesota, where there was no such privilege, both parties being on same basis, in that regard.\textsuperscript{54} An order directing that a party need not answer certain questions asked him on his examination is not appealable.\textsuperscript{55}

\textsuperscript{48} Towler vs. Metzger Seed & Oil Co., 131 Wis. 633-637.
\textsuperscript{49} Gratz vs. Parker, 137 Wis. 104-106.
\textsuperscript{50} Sullivan vs. Ashland L. P. & S. P. Ry. Co., 152 Wis. 574-579; Heckendorn vs. Romadka, 138 Wis. 416-421; Gratz vs. Parker, 137 Wis. 104-106.
\textsuperscript{51} Horlick's Malted Milk Co., vs. A. Spiegel Co., 155 Wis. 201-209-217.
\textsuperscript{52} Kuryer Publishing Co. vs. Messner, 162 Wis. 565-567.
\textsuperscript{53} Maritz vs. Schoen & Walter Co., 171 Wis. 7-8; Milwaukee Corrugating Co. vs. Flagge, 170 Wis. 492-494.
\textsuperscript{54} C. Mil. & St. P. Ry. Co. vs. McGinley, 175 Wis. 565-575-576.
\textsuperscript{55} Horlick's Malted Milk Co. vs. A. Spiegel Co., 155 Wis. 201-219.
All lawsuits are somewhat vexatious and the courts do not approve of the practice of injecting unwarranted claims or issues, and thus multiplying the issues. If the plaintiff is entitled to the examination to enable him to plead, it should be allowed without reference to his ulterior motives, his good faith or bad faith. Section 4096 Stats., as construed by the appellate court affords ample protection against unnecessary or improper examinations without recourse to such recrimination. It may be that upon such examination of the defendant, the plaintiff will find that there is no ground for charging the defendant with fault, and expensive litigation may thus be avoided. The plaintiff has a right to seek relief whenever conditions and circumstances suggest fraud and if the suspicions are such so that an examination will reveal the facts to satisfy the plaintiff that no fraud exists, hatred, libel and slander will be avoided, and peace will reign.

The affidavit of the plaintiff seeking such examination is not conclusive upon the trial court as to the matters necessary to enable him to plead and such court may in its discretion limit the subject to which the examination shall be extended, or may forbid the examination entirely; and its discretion will not be disturbed unless there has been an abuse thereof.

When the order of the court vacated and set aside a proceeding to examine an adverse party before issue joined and enjoined the plaintiff from proceeding further and dismissed the action, it was a denial of justice and an abuse of discretion. New trials are seldom granted where irregularities occur in adverse examination proceeding, but offering such examination in evidence at the trial affords greater opportunity for error, and frequently affords grounds for new trial.

The facts set forth in the affidavit cannot be put in issue preliminary to the right of an examination under this section by filing an affidavit denying the same when the affidavit is in compliance with the statute.

Heckendorn vs. Romadka, 138 Wis. 416-424-425; Schmidt vs. Menasha Wooden Ware Co., 92 Wis. 529-531.
Heckendorn vs. Romadka, 138 Wis. 416-423-424; Badger Brass Mfg. Co. vs. Daly, 137 Wis. 601-607.
Falker vs. Schultz, 160 Wis. 594-599.
THE VALUE OF AN ADVERSE EXAMINATION

What cause of action shall be stated in the complaint can be determined after the examination and after it is served; and if it is challenged the court may pass on it. The plaintiff is entitled to information sufficient to enable him to draw the particular complaint which he desires to draw upon the facts elicited on such examination, and to determine who are and who are not liable and the nature of his cause of action.

As the trial court has supervision over these examinations when a grievance is properly brought before it, the court may deny or forbid an examination if it shows on the face of the affidavit affirmatively that the plaintiff has no cause of action before issue joined. But the examination will not be denied if sufficient facts are stated to show the plaintiff may be entitled to recover.

An examination may elicit and disclose an action in equity for rescission of the contract and a recovery may be had with or without restoration of stock; and an action to charge the defendants as trustees of the profits fraudulently retained by them may be adjudged and an accounting may be framed as affording the most efficient remedy and will aid the plaintiff in an election of remedies against one or more defendants jointly or severally liable.

Courts are entitled to the information in aid of a proper judicial proceeding under Section 4096 and where it is apparent that there is no judicial proceeding, the examination should not be allowed. The right to call men to the witness stand and examine them as to their private affairs is a most serious invasion of their liberties, if not indeed a deprivation of property. In many cases where an abuse of this privilege is permitted and where it is apparent that there is no proper judicial proceeding in aid of which the information is to be obtained, such examination should be halted and not allowed.

The defendant has the same rights before issue joined and after issue joined and before trial that the plaintiff has. When the complaint is served the defendant is entitled to examine the

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American Food Products Co. vs. American Milling Co., 151 Wis. 385-399.

Heckendorf vs. Romadka, 138 Wis. 416-423-424.


Horlick's Malted Milk Co. vs. A. Spiegel Co., 155 Wis. 201-208.

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plaintiff, his agent, employee, or officers on all points set out therein, the same as if it had been put in issue. Under a rule announced by the appellate court, where the witness was not an officer of the corporation, but a mere employee, the deposition was not admissible when the witness was present, but if the employee was such at the time of the occurrence of the facts subject to the examination, it would be quite different.

Where the plaintiff claimed a specific sum, and had an opportunity to inspect the defendant's books, under Section 4183, the court held that plaintiff had sufficient information to frame his complaint. Courts are not concluded by the required affidavit as to what is necessary to enable moving party to plead. Great latitude was allowed in an action to enjoin the wrongful prevention of the servants from carrying out their contract of employment because of the necessity to plead the essential facts required for such action. The court, however, limited the examination where sixty-four points upon which discovery was considered necessary.

This Section 4096 (1898) contemplates practically but one examination after issue joined, unless by leave of court granted upon notice and cause shown. The taking of a deposition under Section 4108 Stats., where witness lives more than thirty miles from the place of trial is always open regardless of any restrictions, if any, of Section 4096 Stats. Such examinations are useful and helpful to prepare for trial and make the complaint or pleadings more definite and certain. It is usually very necessary that the nature and purpose of the action be determined by the facts shown in the affidavit when the examination is had before trial to confine the inquirer to the merits of the controversy. The word "plead" as used in this statute is not limited to a complaint, answer or reply, but may extend to a claim under or in defense of a proceeding instituted by either party in an action.
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It is not a good practice to offer the entire examination in evidence unless the one offering it is reasonably certain that it will not contradict the main facts he expects to prove, because court commissioners seldom exclude immaterial, incompetent and irrelevant evidence; and if it is so offered and admitted, the record becomes a part of the original testimony in the case and may be prejudicial to the rights of the party offering it.\(^7\)

A party to an action such as was formerly denominated equitable is entitled to have the testimony in the case taken in open court subject to the same exception as are allowed in law actions, such as were formerly denominated legal.

JURISDICTION OF COURT

In order that a party may acquire the rights to examine the adverse party, there must be a summons issued and served; in other words, an action commenced. If an examination be taken before issue joined, a notice of the taking of such examination should be accompanied by an affidavit of the party, his agent or attorney, stating the general nature and object of the action; that discovery is sought to enable the party to plead and the points upon which discovery is desired. Such examination shall be limited to the discovery of the facts relevant to such points unless the court or the presiding judge thereof, on motion, and one days notice shall, before the examination is begun, by order further limit the subjects to which it shall extend. After the service of the complaint the defendant may have the full benefit of this statute as if the complaint had been put in issue. At least five days previous notice must be served on the adverse party or their respective attorneys, and if taken without the state, three days notice shall be given of the taking of such deposition and additional time at the rate of one day for each three hundred miles or fraction therefrom after the first ten miles from the place where the notice is served. \textit{Section 4102 Stats. subd. 2; Section 4096 Stats.}

When a foreign corporation is a party the same persons may be examined as in case of individuals and domestic corporations. These examinations come within special supervision of the court. Subd. 7, \textit{Section 4096 Stats.}, provides that the court may also upon motion and such terms as may be just fix a time and place

\(^7\)\textit{Guisman vs. Clancy}, 114 Wis. 589-595.
in this state for such examination of any person that may be examined under the provisions of the law. Such persons are required to appear at the time and place fixed and give all information relative to the controversy.

But it was held that under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, the state cannot compel an officer of a non-resident corporation to come into this state without service of process and submit to examination before trial, when the statute requires examination of a resident to be in the county of his residence, and requires service of process to bring non-resident individuals before the court for examination.

A construction of Section 4096 to the effect that it allows an examination of a former employee in case of a corporation, but denies such right in case of an individual would make it a violation of the Fourteenth Amendment of the U. S. Const. and Sec. I, Art. I, State Const.

Under Section 2815, Stats., the word "court" as used in Section 4096, subd. 7, means the court in session. That necessarily excludes the circuit court commissioner and judge at chambers. The amendment of Sec. 4096 Stats., 1917, by Ch. 239 Laws of 1919, relative to the power of the court to fix the time and place of examination contemplates that it should be left in the discretion of the trial court to say whether a non-resident shall be examined in this state or at his domicile.

The provisions of Sec. 4096 Stats., requiring depositions thereunder without the state to be taken in the same manner that other depositions are taken as applied to such deposition taken in a foreign country contemplates depositions taken either on oral interrogatories or by commission.

The general provisions of Sections 4113-4114 Stats., requiring depositions taken by commission to be on written interrogatories

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75 *Phipps vs. Wis. C. Ry. Co.*, 133 Wis. 153.

76 *George vs. Bode*, 170 Wis. 411.

77 *Hite vs. Keene*, 137 Wis. 625-626.
do not overrule the special provisions of Sec. 4096, permitting the party whose deposition is to be taken thereunder to be examined on oral interrogatories.

It is within the discretion of the trial court to issue letters rogatory to a foreign court or tribunal in aid of an examination under Section 4096 Stats., of a party residing in a foreign country.

The right of a foreign corporation to sue in the courts of this state rests upon comity and in the absence of legislative prohibition, they may maintain such action in certain cases without having complied with Sec. 1770b, 1770d, Stats., either as to the validity or right of one of such corporations to maintain an action thereon in the courts of this state.

By Section 1770e Stats., jurisdiction is conferred on the circuit courts to give proper remedies to all persons injured, or dammified or threatened with injury or damage by any unlawful or illegal act of any foreign corporation or association, or by any violation of the provisions of law, and for the purpose of enforcing any penalties imposed upon such foreign corporation or association by law. Under subd. 13, Sec. 2637 Stats., 1898, where a foreign corporation has property within the state, service of process may be made upon it by service upon an officer thereof being within the state, and it is immaterial whether at the time of service such officer is in the state on business for the company or not. And the same rule applies to the service of the notice of examination under Section 4096 Stats., to enable the plaintiff to plead. The right to examine an officer of the defendant corporation before issue joined is available even if the remedy suggested in the affidavit an action for specific performance of a contract to convey lands in another state, because, if it is impossible to do so, the plaintiff may recover damages.

The court retained jurisdiction of a proceeding under this section when the corporation was named in the summons and notice was given to the president, naming him as one of the defendants and the subpoena was directed to the president individually and as an officer of the corporation named. Section 4096 provides for the examination of a party before and after the joining of issue and before trial and that such examination may

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76 American Food Products Co. vs. American Milling Co., 151 Wis. 385-386.
be taken without the State in the manner providing for the taking of depositions.

A party residing in a foreign country is without the state and within the calls of Sec. 4096 Stats., authorizing the examination of a party otherwise than as a witness at the trial and providing that his deposition in that behalf may be taken.77

An agent having general supervision over the affairs of the corporation may be examined under Section 4068 and 4096, but not others.79

Jurisdiction of a foreign corporation by the service of process on an agent in this state cannot be acquired unless it can be deemed that such agent at the time of such service brought the corporation into the state and unless the presence of such agent within the state amounts to the presence of the corporation. The mere presence of an agent in the state while not transacting business for the corporation, as where he conducts business of his own, is not sufficient to give the court jurisdiction by service on such agent. To acquire jurisdiction of service on the agent, a foreign corporation must be actually doing business within the state. Jurisdiction of a foreign corporation may be acquired by service on an agent, who although transacting purely interstate commerce in this state for four years continuously, solicited orders for the defendant, accepted plaintiff's check, cashed it and transmitted the proceeds to the defendant.80

**Enforcement of the Act**

The judge or commissioner before whom the deposition is taken may compel the party examined to answer all questions relevant and pertinent to the issues and may enforce such answers and the productions of books and papers by contempt proceedings. Subd. 8, Section 4096 Stats.

If the witness refuses to testify, Section 4097 Stats., provides that he may be punished as for contempt and his pleading be stricken out and judgment given against him as upon default or failure of proof. The power to enforce the remedy under Section 4096 is discretionary with the court.81

An order denying the relator's motion to limit the subject as

79 *Eastern Ry. Co of Minn. vs. Tuteur*, 127 Wis. 382-410; *American Food Products Co. vs. American Milling Co.*, 151 Wis. 385-6.
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to which he is sought to be examined under Section 4096 neither
grants, refuses, continues nor modifies a provisional remedy and
is not appealable under Section 3069, subd. 3.82

An order of the circuit court affirming an order of the Mil-
waukee Civil Court suppressing an examination under Section
.4096 Stats., until after the service and filing of the complaint is
not appealable4

Where an appeal was taken from an order denying a motion
to set aside an order of the court commissioner, adjudging the
defendant to be in contempt, and directing a commitment for his
refusal to answer questions propounded to him in an examination
under 4096 before a court commissioner, the appellate court was
divided and order was affirmed.84

An order of the circuit court affirming the order of a court
commissioner made upon the examination of a party under Sec-
tion 4096 adjudging the witness in contempt for refusing to
answer certain questions and fixing his punishment therefor, is a
final order in a special proceeding and appealable.85

Since an order requiring the witness to produce books and
papers in the course of an examination is merely an interlocutory
order regulating the manner of procedure and is in no sense a
final order, it is not appealable,86 because it does not grant, refuse,
continue or modify a provisional remedy. Section 3069 Stats.
But an order requiring a witness subpoenaed under Section 4096
to answer the questions put to him and to submit to examination,
and an order refusing to stay and restrain the taking of the
deposition of witness under Section 4096 come within subd. 3,
Section 3069 Stats., containing a provisional remedy is appeal-
able.87

When the trial court has, in the exercise of its discretion, re-
used to consider excuses of a party for failure to attend an
examination under Section 4096 as meritorious, and has there-
upon entered judgment as upon a default, and on the same
excuses has refused to vacate such judgment, such ruling will not

82 State ex rel Carperter vs. Mathys, 115 Wis. 31-32.
83 Baungarten vs. Matchette, 157 Wis. 230.
84 Pfister vs. McGovern, 132 Wis. 533.
85 Karel vs. Conlan, 155 Wis. 221-225.
87 Phipps vs. Wis. Cent. Ry. Co., 133 Wis. 153-155; Ellinger vs. Equitable
Life Assur. Soc., 125 Wis. 643-649.

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be set aside, unless there appears to be a plain abuse of discretion.88

The law contemplates that the party whose testimony is taken at such examination should read and sign such deposition, Subd. 3, Section 4096, Subd. 7, Section 4096, Subd. 10, Section 4096; although the signing may be omitted by stipulation. Subd. 9, Sec. 4096.

The practice of waiving the reading and signing of a deposition taken under Section 4096 is not recommended. This is fully realized when the witness is confronted with the testimony taken as an adverse party when the testimony returned was not signed, and the witness is being examined in court on the issues involved. Nothing further may be said on this. Ask the experienced lawyer. It is needless to state that every statutory formality necessary for the officer before whom the examination was had in transmitting the examination to the clerk of court should be complied with. Section 4096, subd. 10.

The records of the examination shall be transmitted and delivered to the clerk by the officer before whom the examination was had, securely sealed, and shall remain sealed until opened by the court, the clerk thereof, or such magistrate or other person, where the action is then pending.89

The better practice is to have the clerk of court on receipt of the package endorse the time and manner in which it was received and open and file the same and give immediate notice that it has been received and filed to the attorneys of the respective parties.90 This will give both parties opportunity to inspect same and see that it has been properly filed, and prepare such objection thereto as the circumstances of the case will require.91 Technicalities as a rule are not indulged in.92 But it is to be remembered that strict observance of the law in the practice is necessary.93

Due to the fact that so many different sections have been re-

88 Rogers vs. Tate, 113 Wis. 364-366.
89 Section 4087, Stats. Section 4096, Subd. 10, Stats.
90 Court Rule XVII Sec. 7; Doty vs. Strong, I Pinney. 313.
91 Court Rule XVII Section 8.
92 Sayles vs. Stewart, 5 Wis. 8; Fisk vs. Tank, 12 Wis. 276; Carlyle vs. Plumer, 11 Wis. 96; Waterman vs. C. & A. Ry. Co., 82 Wis. 613.
93 Baxter vs. Payne, 1 Pin. 501; Fisk vs. Tank, 12 Wis. 276; Goodhue vs. Grant, 1 Pin. 556; Fowler vs. Colton, 1 Pin. 331; Section 4097 Stats. Wisconsin Annotations.
ferred to, it was necessary to make this article longer than may
dee necessary, but if it results in any benefit to the reader, the
writer will be compensated.

The remedy to which a party is entitled is frequently uncertain
until made certain by the judgment of the court. Litigation has
always been attended with expense, delays have always occurred
in the progress of lawsuits, and parties have often failed through
defect of proof or other causes to get their just rights at the end
of litigation, notwithstanding the declaration in the Constitution.
Doubtless these things will continue to happen for there has not
yet developed sufficient wisdom on earth to devise a system of
jurisprudence free from these hindrances to absolute justice.
The framers of the Constitution never supposed that they could
do so in a paragraph and did not attempt it.

The declaration in the Constitution simply means that laws
shall be enacted giving a certain remedy for all injuries or
wrongs, and that the rights of every suitor shall be honestly and
promptly adjudicated and enforced in conformity with the laws.
Therefore the delay of justice is not with the courts, the re-
sponsibility is entirely with the members of the bar.94

It is to be remembered that notice that some particular judicial
proceedings are already instituted or proposed to be instituted,
notice of time and place where hearings are to be had, and reason-
able opportunity to be heard are the essentials of due process
of law.95

94 Flanders vs. Town of Merrimack, 48 Wis. 567-574, Holman Mfg. Co.
vs. Daphn, 193 N. W 986-988.
95 Lacher vs. Venus, et al, 177 Wis. 558, 188 N. W 613-618.