

The Review of Litigation

Volume 11

Summer 1992

Number 3

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Discoverectomy: A Proposal to Eliminate Discovery

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I. Introduction

Once upon a time, long, long ago, discovery made sense. The goal was laudable: Establish procedures requiring litigants to disclose their proof to each other, thereby fostering resolution of disputes without court intervention. The philosophy behind the "modern discovery rules" was stated back in 1958 by the United States Supreme Court in *United States v. Procter & Gamble Co.*¹ as an attempt to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."² The Texas Supreme Court embraced this philosophy in 1984 noting that "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed."³ Unfortunately, the reality of open discovery has proven to be far from what its framers intended.

Modern discovery practice brings to mind one of the many melodic metaphors of the Temptations: "Like a snowball rollin' down the side of a snow-covered hill, it's growing."⁴ The discovery snowball has become an approaching avalanche that threatens to smother our system of justice, while doing little to achieve its stated goal of fostering candor, much less, settlement.

Discovery has become a safe harbor for culpable litigants and frivolous lawsuits. The spurious assumption underlying this noble model of gentle conflict resolution was that candor could coexist with a lawyer's perceived ethical duty to the client. However, the lawyer's perceived ethical duty to the client is frequently superseded by gamesmanship and concern with winning, which results in both a lack of candor and a deviation from the lawyer's altruistic devotion to ethics.⁵

In fact, discovery practice has become its own specialty. Entire seminars spanning several days are frequently offered on the subject

1. 356 U.S. 677 (1958).

2. *Id.* at 682 (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

3. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984).

4. THE TEMPTATIONS, *It's Growing*, on GREATEST HITS (Motown Record Corp. 1966).

5. See, e.g., *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1341 (5th Cir. 1978); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals For Change*, 31 VAND. L. REV. 1295, 1303-05 (1978).

