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Discoverectomy II: The End of “Gotcha” Litigation

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I. Introduction

Discovery was intended to be a domesticated bird dog to help flush out evidence. It has become, instead, a voracious wolf roaming the countryside, eating everything in sight.¹

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1. Edward F. Sherman, *The Judge's Role in Discovery*, 3 REV. LITIG. 89, 196-97

In 1939, the new procedural process known simply as “discovery” was heralded as marking “the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial.”² Some foresaw that discovery would “stamp the entire federal judicial process with a character of frankness and fairness that [would] go far in aiding our legal system to overcome the effects of its rather crude heredity.”³ Others might say that such predictions were nothing more than the wishful thinking of naive idealists. No one, though, could have foreseen the manipulation of the discovery process that so transformed the system as to make the original intent seem laughable.⁴

In a previous article, written in the midst of a barrage of petty discovery disputes, I proposed a virtual end to this madness we call discovery.⁵ The proposal met with the overwhelming approval of those lawyers who actually try cases rather than climb under the rug of discovery to avoid the courtroom. Their response makes me believe that discovery can again be a tool of preparation rather than a tool of obstruction.

One lawyer, after reading *Discoverectomy (I)*, was so impressed with the novel concept that a litigator’s practice should primarily involve preparation for trial that he inquired about the steps necessary to make *Discoverectomy* a reality.⁶ Having no respect for those who simply criticize without suggesting meaningful solutions,

(1982) (quoting Judge Gerard L. Goettel).

2. Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939). Professor Sunderland served on the committee appointed by the Supreme Court to draft the 1938 Federal Rules. His primary contributions were in the areas of depositions, discovery, and summary judgment. Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 TENN. L. REV. 551, 555-56 (1939).

3. James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1436, 1459 (1938). This is the second part of Pike & Willis’s article; the initial part can be found at 38 COLUM. L. REV. 1179 (1938).

4. See Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, 81-82 (1992).

5. Dan Downey, *Discoverectomy: A Proposal to Eliminate Discovery*, 11 REV. LITIG. 475 (1992).

6. That lawyer was Joe Jamail. The authors wish to express their thanks for his support in this endeavor. Although he was principally responsible for this effort, he should not be held responsible for every view expressed herein.

