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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.

we felt it imperative that an effort be made to rewrite the rules of procedure and outline a plan of action.

This endeavor was further motivated by a more personal interest. As a judge, I have gained more respect for good lawyering than I had when I was a practicing attorney myself. Despite what some think, professional advocates whose work product is characterized by honesty and integrity are the engines that drive not only our system of jurisprudence, but our entire system of governance. Sadly, their very existence is threatened by the current state of affairs.

Our preoccupation with “gotcha” discovery rules demeans the practice of law and all who participate in it. Even worse, it has driven some of our best trial lawyers out of the business or into the grave. The swelling ranks of full-time attorney-mediators who have given up the toil of litigation in frustration are a testimony to this unfortunate phenomenon.

Discovery was meant not only to inform the parties of the facts necessary to foster settlement, but to lead to a more efficient trial.⁷ However, some attorneys are creating entire practices out of discovery by specializing in interrogatories and depositions. It has become the center of litigation rather than the facilitator of a later trial. “[O]ne comes to the conclusion that discovery has simply become an extended field of play in an on-going game of blindman’s bluff.”⁸

In devising this plan, we recognized early that it would be impossible to compile a set of rules addressing every conceivable problem that might arise in the course of litigation. We were also mindful of the perils of “overlegislating,” which was precisely the problem we were seeking to correct. In recognition of these limitations, we adopted the “eighty percent rule.” That is, these rules are designed to handle the realities of eighty percent of the cases tried. To deal with the other twenty percent, we have returned to that age-old jurisprudential concept of reposing in the judiciary the

7. See WALTER JORDAN, MODERN DISCOVERY PRACTICE § 1.01 (1974) (“Before 1941, there were neither rules of civil procedure nor statutes specifically designed to provide litigants with the means of discovering pertinent information in the possession of their adversary or third parties.”).

8. Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 18 (1987-1988).

freedom and discretion to craft rules where necessary to fit the needs of particular cases.⁹

The thrust of this Article concerns only those rules that we feel are the principal causes of the discovery maze in which lawyers today are expected to ply their trade, principally Texas Rules of Civil Procedure 166, 166b, 167, and 187. It is acknowledged that the adoption of the rules proposed herein will necessarily require amendment and adjustment of other rules of procedure. We have left that task to others.

II. The Plan in Practice

The first and foremost objective of our plan is to transform rights of discovery into real transfers of information. Currently, our system involves "compelled discovery." It is one in which a party will receive the information to which it is "entitled" only after first serving a request and then countering objections with a motion to compel.¹⁰ As a first step, our plan establishes not only the right to know, but also the duty to disclose.

Through a structured timeline, much like that established in appellate procedure, attorneys wind their way along a preset path of discovery and disclosure, rather than spend months quibbling over what information shall be disclosed. The affirmative duties of disclosure in our plan somewhat mirror those proposed in the federal arena.¹¹ However, they do not go so far as to force one attorney to educate the other.¹² A lawyer may not lazily rely on the other

9. See *infra* Appendix I, Proposed Rule 166c.

10. Rule 166b merely outlines information to which each party is "entitled," and gives no absolute right to such information. Even the United States Supreme Court has commented on the problem, stating that the Federal Rules merely give litigants the right to compel opponents to disclose certain information prior to trial. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

11. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Proposed Draft 1991), reprinted in 137 F.R.D. 53 (1991) [hereinafter COMMITTEE ON FEDERAL RULES]. The idea of affirmative duties of disclosure is not merely a recently proposed cure. It is, in fact, consistent with the intention of the drafters of the discovery rules, who envisioned discovery as a process in which attorneys would lay their cards on the table. See Sunderland, *supra* note 2, at 738.

12. The Federal Rules do impose such an affirmative duty to disclose. See *infra*

party to make his case; he must affirmatively meet his own duties at each step of the timeline.

The second step in reaching the objective of our plan is to dispose of needless and inefficient practices.¹³ Currently, parties play the game of "Gotcha!" with the tools of discovery. Instead of seeking relevant information, they seek to harass, avoid, or both. For this reason, our plan eliminates requests for admission¹⁴ and interrogatories.¹⁵

Requests for admission were intended to forge common ground and to narrow the issues for trial. Instead, they are used to catch the opponent off guard. If the opponent fails to admit or deny within the time required, the requests are deemed admitted.¹⁶ Thus, the request is often not a method of acquiring useful information, but a "get rich quick" method of litigation.¹⁷ Instead, our plan calls for the joint filing of written stipulations prior to the pretrial conference.¹⁸

Interrogatories, although often yielding pertinent information, more often yield a severe headache. The questions are too often verbose, overbroad, or harassing, served by attorneys with no direction in their case. The objections are too often frivolous and serve merely as an avoidance tactic. As a result, interrogatories "spawn a greater percentage of objections and motions than any other discovery device."¹⁹

Dealing with this endless foray of requests, objections, and motions has transformed the judge from an adjudicator to a baby-sitter.²⁰ Our plan eliminates the need for such supervision by

text accompanying notes 51-53.

13. See Wolfson, *supra* note 8, at 18 (recognizing that pretrial discovery was initially an attempt to make trials more efficient).

14. TEX. R. CIV. P. 169.

15. TEX. R. CIV. P. 168.

16. TEX. R. CIV. P. 215(4)(a).

17. See, e.g., *Hoffman v. Texas Commerce Bank Nat'l Ass'n*, 846 S.W.2d 336, 339-40 (Tex. App.—Houston [14th Dist.] 1992, no writ) (affirming trial court's grant of summary judgment after deeming requests admitted).

18. See *infra* Appendix I, Proposed Rule 169.

19. Advisory Committee Notes to Rule 33—Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 522 (1970).

20. Ironically, the response to the maddening abuses pervading our system has been to involve the court even more heavily in guiding the litigants through the discovery maze. See, e.g., FED. R. CIV. P. 16(b) (requiring that the court hold a

disposing of these “discovery” devices and, to the extent feasible, removing the judge from the discovery arena. By doing so, our plan frees the docket of wasteful discovery hearings and allows cases to move through the system at a more efficient pace. If properly executed, the result of our plan is a drastically shortened discovery schedule, one that allows a case to be tried within one year of the service of pleadings.²¹ Thus, our plan promises a “just, speedy, and inexpensive determination of every action”²² and mandates that discovery finally take a backseat to the judicial system’s foremost objective—the adjudication of rights.

A. *Discovery of Fact Witnesses*

Currently, a party may not simply request the identification of fact witnesses whom the other party plans to call at trial.²³ Instead, detailed and often verbose interrogatories are propounded, requesting, among other things, the identification of those persons with knowledge of relevant facts.²⁴ Only after months of discovery and numerous, costly depositions may a party be compelled to identify who will actually testify at trial, and then only if a pretrial order is entered pursuant to Rule 166.²⁵ Regardless of whether the party is required to give notice of direct fact witnesses, no witness may be called who has not been previously identified as a person with knowledge of relevant facts.²⁶ However, this seemingly automatic

scheduling conference); TEX. R. CIV. P. 166 (suggesting that the court hold a pretrial conference and encourage settlement).

21. See *infra* Appendix II, Timeline. When devising the plan, our intention was to create rules that would serve well in most situations. We did not forget, though, that special circumstances may arise. The court is given discretion to take such circumstances into account and to alter or extend the timeline when necessary. See *infra* Appendix I, Proposed Rule 166c.

22. FED. R. CIV. P. 1; see also TEX. R. CIV. P. 1 (stating that the objective of the rules is a “just, fair, equitable and impartial adjudication . . . attained with as great expedition . . . as may be practicable”).

23. *Gutierrez v. Dallas Indep. Sch. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987).

24. See TEX. R. CIV. P. 166b(2)(d) (entitling party to information concerning persons with knowledge of relevant facts).

25. TEX. R. CIV. P. 166 (suggesting, but not requiring, that a pretrial conference be held).

26. *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 395 (Tex. 1989).

exclusion is easily avoided by showing good cause,²⁷ a standard muddied by recent case law.²⁸

This system of discovering fact witnesses seems workable enough on paper. In actual practice, however, it proves to foster nothing but aggravation. As an alternative, our plan calls for a two-part disclosure, which in the end yields the same information and provides the same protection as the current system.

1. *Initial Disclosures.*—First, each party, no later than ninety days after service of the complaint or answer,²⁹ shall disclose to all other parties the identification and location³⁰ of any and all parties,³¹ potential parties, and other persons with knowledge of relevant facts.³² Along with the identification of each person with knowledge of relevant facts, there shall be a statement of the subject matter and scope of his knowledge.³³ For the attorney faced with an overwhelming list of persons with knowledge of relevant facts, these statements will serve as effective aids to trial preparation by

27. TEX. R. CIV. P. 166b(6), 215(5).

28. The present standard more closely resembles the lesser hurdle of surprise than good cause. *See, e.g.,* Henry S. Miller Co. v. Bynum, 836 S.W.2d 160, 162 (Tex. 1992); Rogers v. Stell, 835 S.W.2d 100, 100 (Tex. 1992); Smith v. Southwest Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992) (each allowing the testimony of a witness clearly identified through some form of discovery as having knowledge of relevant facts); *see also* Texas Dep't of Human Servs. v. Green, 855 S.W.2d 136, 148 (Tex. App.—Austin 1993, no writ) (“The common thread running through these cases is that an opponent objecting to the unidentified party’s testimony had reason to anticipate that the party would be a witness based on the party’s other discovery responses or deposition testimony.”).

29. The timeline for the initial disclosure begins for the plaintiff as soon as the complaint is served upon the defendant. However, the defendant may start the clock ticking either by filing an answer or otherwise making a general appearance, one not allowed as a special appearance under Rule 120a.

30. “Identification and location” includes the person’s most recent known name, address, and telephone number. TEX. R. CIV. P. 166b(2)(d).

31. Because this rule explicitly states that this disclosure includes “all parties,” there is no reason to treat with special care the failure of a party to name himself as a person with knowledge of relevant facts, as the court did in *Southwest Feed Yards*.

32. Appendix I, Proposed Rule 166b(1), *infra*. The definition of “persons with knowledge of relevant facts” remains the same as under current Rule 166b(2)(d).

33. Appendix I, Proposed Rule 166b(1), *infra*. Currently, it is common for an interrogatory to request such information. Furthermore, Rule 166(h) allows the court to order the parties to disclose the subject matter of each witness’s testimony.

forcing the opposing party to identify those persons who are named merely for authentication purposes, as opposed to those who have truly relevant, material knowledge.

The ninety-day deadline is reasonable and lenient in comparison to the current system. With interrogatories, a plaintiff may be required to divulge this information as early as thirty days after the commencement of the action.³⁴ A defendant, even if served interrogatories with the complaint, only has fifty days to respond.³⁵ Even the proposed changes to the Federal Rules require this disclosure within thirty days of the filed answer.³⁶

2. *Depositions.*—Only after the initial disclosure is made by both parties may they engage in a very limited form of discovery.³⁷ Under the current system, the postanswer period is packed with costly depositions, ostensibly designed to discern the knowledge of those persons identified. Problems arise, however, because parties tend to camouflage those persons who truly have knowledge of relevant facts among those who do not. The quest to separate the wheat from the chaff entails exorbitant costs and wasted effort because, out of a long list of persons identified as having knowledge of relevant facts, a party ends up calling only a few to testify.

To avoid undue expense and wasted time, our plan virtually eliminates “discovery depositions” as we know them.³⁸ Depositions of fact witnesses may be allowed only if a verified motion is filed with the court.³⁹ The motion shall state that the deponent’s testimony is material and necessary to the presentation of the movant’s case-in-chief⁴⁰ and either (1) the deponent is unavailable for trial due to illness or other “unusual circumstances”⁴¹ or (2) the

34. TEX. R. CIV. P. 168(4).

35. *Id.*

36. COMMITTEE ON FEDERAL RULES, *supra* note 11, at 88 (providing text of Proposed Federal Rule 26).

37. For example, it may be appropriate to seek an independent medical examination, conduct depositions to perpetuate testimony, contact persons with knowledge of relevant facts, or request documents.

38. Depositions on written questions would remain available, but only for authentication purposes. *See infra* Appendix I, Proposed Rule 208(a).

39. *See infra* Appendix I, Proposed Rule 187a(1)(a).

40. An adverse party may be deposed if material to the party’s case-in-chief and not merely a rebuttal witness. *See infra* Appendix I, Proposed Rule 187a cmt.

41. Whether “unusual circumstances” exist is left to the discretion of the court,

deponent is beyond the subpoena power of the court.⁴² Once the deposition is taken, the deponent may not appear live at trial.⁴³ As a result, the deposition is no longer utilized as a discovery tool *per se*. Instead, it is merely a substitute for the live testimony of the witness.

In light of the above restrictions, different rules are required regarding the assertion of privilege during the deposition.⁴⁴ When a privilege is asserted, the court reporter will certify the question and the witness will be required to answer outside the presence of all parties and attorneys. If the court later determines that the answer did not involve a privilege, it will be released. If the court finds that a second deposition of the witness is necessary to fairly and adequately develop the testimony of the witness, the court can order further limited examination. If the court finds that the assertion of the privilege was made without substantial justification, the court can charge the costs of any additional deposition, including attorney's fees, to the party asserting the privilege.

Admittedly, the procedure we have proposed involves the court in each attempt to take a trial deposition. However, because of the stringent requirements that must be met in order to take the deposition, the circumstances in which such means would be used are minimized. In the end, the plan frees the parties of the expense of hours, if not days, of unnecessary depositions.

but would not include scheduling conflicts or expenses associated with appearing at trial. Appendix I, Proposed Rule 187a(1)(a)(i), *infra*. The court could also consider whether another party should bear any responsibility for the circumstances causing the witness to be unavailable.

42. Appendix I, Proposed Rule 187a(1)(a)(ii), *infra*.

43. Appendix I, Proposed Rule 187a(1)(b), *infra*; see JORDAN, *supra* note 7, § 1.01 (stating that the original purpose of depositions was merely to perpetuate testimony). If a party seeks the testimony of an adverse party's witness and can satisfy the necessary requirements, the deposition will not preclude the adverse party from bringing that witness live in his own case-in-chief.

A penalty for choosing not to use the deposition transcript at trial was considered, such as ordering the reimbursement of other party's expenses associated with the deposition. However, we rejected the penalty, deciding that the rule is stringent enough to prevent most abuse.

44. See *infra* Appendix I, Proposed Rule 187a(4).

3. *Fact Statements*.—A final tool for the discovery of fact witnesses is necessary to bridge the information gap created by the curtailment of depositions. At least sixty days prior to trial,⁴⁵ each party is required to “disclose to all other parties the identification and location of all direct fact witnesses expected to be called at trial.”⁴⁶ More importantly, the identification of each fact witness shall be accompanied by a witness statement.⁴⁷ This statement shall be specific and detail the relevant facts known by the witness about which the witness will testify. No witness may testify at variance with the statement or in addition to the facts detailed in or reasonably inferred from the statement.

At first glance, the requirement of a witness statement flies in the face of Rule 166b(3), which exempts from discovery witness statements made in anticipation of litigation. The same argument, however, was once posed to protect expert reports from disclosure.⁴⁸ The argument was rejected in that context, making expert reports undeniably discoverable.⁴⁹ These statements, like expert reports, are prepared for the very purpose of disclosure. Furthermore, they are not work product because they detail facts to be raised at trial, not the thoughts, impressions, or opinions of counsel.⁵⁰

Even though our plan prohibits discovery by way of interrogatory and severely limits the use of depositions, it does allow an

45. “[D]ate of trial’ refers to the date the case is set for trial and not the date the trial actually begins.” Carr v. Houston Business Forms, Inc., 794 S.W.2d 849, 851 (Tex. App.—Houston [14th Dist.] 1990, no writ).

46. Appendix I, Proposed Rule 166b(4)(a), *infra*. In accordance with current Rule 166(h), our proposed rule provides an exception to this disclosure for “those rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated prior to trial.” See Aluminum Co. of Am. v. Bullock, No. D-3404, 1994 WL 6716 (Tex. Jan. 12, 1994).

47. Appendix I, Proposed Rule 166b(4)(a), *infra*.

48. See State v. Ashworth, 484 S.W.2d 565, 567 (Tex. 1972). In *Ashworth*, the court recognized the necessity of discovering such reports but found that the rules of procedure specifically exempted them.

49. The rule was amended after the decision in *Ashworth* to make such reports discoverable. See TEX. R. CIV. P. 166b(2)(e); *Ex parte Shepperd*, 513 S.W.2d 813, 815 (Tex. 1974).

50. Cf. Houdaille Indus. v. Cunningham, 502 S.W.2d 544, 548 (Tex. 1973) (stating that work product does not protect expert reports prepared by or for the expert in anticipation of his testimony).

attorney to acquire the information necessary to prepare for trial. More importantly, our plan reaches this goal through less costly and more efficient methods. Thus, while eliminating the more familiar means, our plan arrives at the same end.

B. Discovery of Documents

The second well of information most necessary to a litigator's preparation for trial is the documentation kept by the opposing party. Often, this area of discovery is also inundated with frivolous objections and unnecessary court hearings. However, the cure may be worse than the disease.

The proposed changes to the Federal Rules of Civil Procedure call for an affirmative duty to disclose "all relevant documents" within thirty days of the date the action is commenced.⁵¹ Our plan, however, does not incorporate that duty because, unlike the duty to disclose persons with knowledge of relevant facts, it would involve crossing the line between requiring cooperation and requiring one party to make the other's case. Furthermore, it would force attorneys to guess what is relevant to an often sparse complaint. The likely result would be that attorneys would simply designate "Warehouse A" because of the fear of being accused of hiding a document. This would achieve no benefit for either side.

Finally, such a duty would subject the defendant to great expense and effort even before the plaintiff is required to show that he has a valid claim. This is particularly dangerous in Texas because once documents are discovered, they become public record.⁵² Such a rule would invite persons to use the courthouse as a clearinghouse to make private documents public. For all these reasons, our plan leaves the procedure for requesting documents much the same as under the current system.⁵³

There is one change, though, as stated above: our plan does not allow parties to serve interrogatories. Currently, a party will serve interrogatories to find out what documents are in the other party's possession, custody, or control. After answers are given or, more

51. COMMITTEE ON FEDERAL RULES, *supra* note 11 (describing Proposed Federal Rule 26).

52. *See* TEX. R. CIV. P. 76a.

53. *See* TEX. R. CIV. P. 167; Appendix I, Proposed Rule 167, *infra*.

