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NOTES

Discoverectomy: A Proposal to Eliminate Discovery

Dan Downey*

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* Judge, 295th District Court, Houston, Texas. B.A. 1972, M.L.I.R. 1973, Michigan State University; J.D. 1976, Detroit College of Law.

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 gentile 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 However, the lawyer's perceived ethical duty to the client is frequently superseded by gamesmanship and concern with winning, which results in both a lack of candor and a deviation from the lawyer's altruistic devotion to ethics.[5]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

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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).

alone. The prospect of these seminars promulgating a board-certified specialist in discovery is frightening! Litigators are finding competence in the law of discovery to be more important than competence in evidence or trial advocacy. The complexity and sheer volume of discovery law has taken lawyering out of the profession and replaced it with a hyper-technical emphasis on adherence to rules. "Practice at your peril" has become the rallying cry of trial practice as discovery has become a breeding ground for legal malpractice, which in turn fosters more lawsuits and more discovery. In short, Rule 1 is in jeopardy and the "open courts" foundation of our system of civil jurisprudence is at risk.[6]

The impetus to write this article has come from my years of experience as a trial lawyer and as a district court judge for the State of Texas. Increasing amounts of a trial court judge's time are spent dealing with discovery-related hearings and motions, which averts the judge's focus from the legal merits of a case. This article focuses on the causes of this phenomenon and suggests a possible solution to the problem. Specifically, Parts II and III discuss the use of sanctions and how the sanction procedure has begun to take over the courts' dockets. Part IV reviews the components of discovery and how some trial lawyers abuse them, while Part V provides a comparison to federal procedure, including efforts within that system to improve discovery. A remedy for the discovery problem, "discoverectomy," is proposed in Part VI. Although the proposal may appear drastic to many, it is hoped that it will provide a framework within which the current system can be reviewed and, ultimately, reformed.

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6. The Texas Rules of Civil Procedure provide:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

TEX. R. CIV. P. 1. The Federal Rules are equally ambitious, seeking "the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. The Texas Constitution states that "[a]ll courts shall be open, and every person for an injury done to him . . . shall have remedy by due course of law." TEX. CONST. art. I, § 13.

II. The Birth of Sanctions

As lawyers became increasingly reluctant to exhibit even the rudiments of candor among themselves, courts began adopting rules requiring honesty and penalizing failure to be truthful with appropriate sanctions.[7] These steps marked the beginning of the end.

The federal courts were the first to blaze the trail in sanctions practice, with Texas and other states close behind.[8] Although differences between federal and Texas sanctions rules still exist, their common legacy is the birth of a cottage industry in sanctions practice.[9]

A recent survey in the *Litigation News* underscores some of the problems associated with federal sanctions practice and reflects lawyers' opinions concerning its operation.[10] There is no reason to assume that the results would be any different in state practice.

Seventy-three percent of the lawyers responding favored amending the rules in some fashion. Among other things, lawyers favored (a) requiring evidentiary hearings (57%); (b) requiring findings of fact and conclusions of law on any award of sanctions (73%); (c) permitting a broader standard of review than abuse of discretion (58%); and (d) making sanctions for violation of Rule 11 permissive rather than mandatory (63%).[11]

In addition, 57% of those lawyers surveyed felt that Rule 11 caused lawyers to impugn each others' motives, and 58% felt that the filing of a motion for sanctions reflected frayed relations between counsel. Perhaps the most interesting finding was that 31% of the

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7. *See Jampole*, 673 S.W.2d at 575.

8. FED. R. CIV. P. 11 became effective in 1938. Texas adopted a similar rule in 1940. TEX. R. CIV. P. 13. Other states have adopted similar rules. *See*, CAL. CIV. PROC. CODE § 447 (West Supp. 1992) (adopted in 1987); LA. CODE CIV. PROC. ANN. art. 863 (West 1984) (adopted in 1960).

9. The "law of sanctions practice" has received the repeated attention of the U.S. Supreme Court. *See* Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S.Ct. 922 (1991); Cooter & Gell v. Hartmax Corp., 496 U.S. 384 (1990); National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

10. Mark E. Staib, *Fax Poll Favors Amending Rule 11*, LITIG. NEWS, June 1991, at 1.

11. *Id.* at 5.

respondents felt that the sanctions typically imposed were insufficient.[12]

III. Sanctions Run Amok: The Texas Experience

To its credit, the Texas Supreme Court has tried to treat the Texas strain of this procedural virus with interpretive decisions and repeated amendments to the rules. However, it appears that the treatment has proven worse than the disease.[13] Trial judges, who have to face the daily onslaught of discovery motions, have been the most severely afflicted by the resulting procedures.

For example, there was some question as to whether Rules 13 and 215b of the Texas Rules of Civil Procedure required notice and a hearing before sanctions were ordered.[14] This question was answered in the subsequent amendments to the rules, effective September 1, 1990, which now clearly require notice and a hearing.[15] Yet, through its interpretation of these amendments, the Texas Supreme Court has converted a cottage industry into a full-fledged building boom. Two recent cases illustrate the point.[16]

Transamerican v. Powell[17] was a mandamus action in which the relator asserted that the trial court had abused its discretion in striking the relator's pleadings for discovery abuse. In determining whether the sanctions imposed in the case were "just and appropriate" under Rule 215, the Court adopted a two-prong test: (1) a direct relationship must exist between the offensive conduct and the sanction imposed,[18] and (2) the sanction must not be excessive.[19] Though simply stated, these standards were significant enough that two justices felt compelled to author concurring opinions delineating the factors they considered important in the application of the trial court's analysis. Justice Gonzales, citing the standards and guide-

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12. *Id.*

13. William W. Kilgarlin, *Sanctions For Discovery Abuse: Is the Cure Worse Than The Disease?*, 54 TEX. B.J. 658 (1991).

14. *See* TEX. R. CIV. P. 13 & 215b (Vernon 1983) (prior to 1984 amendment).

15. United Business Mach., Inc. v. Southwestern Bell Media, Inc., 817 S.W.2d 120 (Tex. 1991); TEX. R. CIV. P. 215 (1990 amendment).

16. Transamerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991); Braden v. Downey, 811 S.W.2d 922 (Tex. 1991).

17. *Transamerican*, 811 S.W.2d at 913.

18. *Id.* at 917.

19. *Id.*