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ARTICLES

NOTES

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,

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(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

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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

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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 admission[14] 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

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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