University of Michigan Law School
University of Michigan Law School Scholarship Repository

Other Publications | Faculty Scholarship

1982

Light-Hearted Thoughts about Discovery Reform

John W. Reed
University of Michigan Law School, reedj@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/other

Part of the Evidence Commons, and the Litigation Commons

Recommended Citation
Reed, John W. "Light-Hearted Thoughts about Discovery Reform." Rev. Litig. 3 (1982): 215-21.

This Speech is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Other Publications by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Light-Hearted Thoughts About Discovery Reform

John W. Reed*

I am delighted to be here among friends from various settings and associations over the years. Having been unable to arrive until late last evening, I am in a poor position to offer useful commentary on what has been said here. But no matter—that is not my assignment. You have heard enough words of wisdom for one weekend. My pleasant assignment is to offer some "light-hearted" comments on discovery reform. I hope they do not prove to be "light-headed" as well.

That the Conference planners expected me to say nothing serious is indicated by the fact that, at the conclusion of the morning sessions, the registrants were given a choice of three buses—one to the airport, one to the Bradford Hotel, and only one here to this luncheon.

I must confess that I am relieved to have seen the Special Committee for the Study of Discovery Abuse here in the flesh. During the past five or six years, when I was the Litigation Council's token academic, the notice for each council meeting stated that the Discovery Abuse Committee would meet a day early (and so qualify for another day of per diem allowance at Pebble Beach, Hilton Head, and Bermuda). But I never actually *saw* them meet. This Conference seems to provide demonstrative evidence of the Committee's existence, and I am glad to have seen it. And I do salute Joe Ball and Wey Lundquist and their colleagues for their long, unselfish, thoughtful work in the service of the entire profession and our system of justice. Unfortunately, the Special Committee may not receive anything other than a few thanks and statements of appreciation. You may search the boulevards, parks, and public buildings of the world and you will not find a single statue erected in honor of a committee.

You may have noticed that the Special Committee is light on law

* Professor of Law, University of Michigan Law School; A.B. William Jewell College; LL.B., LL.M. Cornell University; J.S.D. Columbia University.

HeinOnline -- 3 Rev. Litig. 215 1982-1983

teachers, with only one member and the reporter being academics. But that's just as well. Professors are impractical types. A student publication facetiously reported a few years ago that the University of Michigan philosophy department had denied tenure to Jesus and Socrates for lack of publication credit, and that both would leave next year for positions in smaller colleges. "We are sorry to lose such fine teachers," a department spokesman said, "but a rule is a rule is a rule." The article went on to report the reactions of the two teachers: Said Jesus, "It's just another cross I have to bear." Said Socrates, "I'll drink to that."

This weekend you have come to the end of a stage of work which we here celebrate—the completion of a task in the continuing development of civil procedure before trial. But we must view that work, and its product, in the context of history.

Some of us are old enough to remember common-law pleading. There were courses by that name in our law schools. Common-law pleading, which scholars called issue pleading, involved highly technical "lawyers' games," with lots of fictions and no small measure of injustice. Those rules—that system—prevailed for more than 500 years.

Then came David Dudley Field and his code, which cast aside some of the technicalities and adopted what we call fact pleading. But parties often still went to trial knowing little of the case against them. Code pleading prevailed for almost 100 years.

And then came the third pretrial regime, the Federal Rules of Civil Procedure, which provided for so-called notice pleading and relied on discovery for the rest. Those Rules, which you are seeking to improve, went into effect just forty-four years ago.

Listen to those figures again:

—issue pleading: more than five centuries
—fact pleading: almost a century
—notice pleading: just four decades

I entered law school the year after the Federal Rules were adopted (and, incidentally, also the year after *Erie*). I do not know how old you think I am, but we are talking about a short time in historical terms.

In the Federal Rules, we tried to get away from a procedure that resembled "blind man's bluff." (By the way, that often appears not as "blind man's bluff," which is the proper name of the game, but as "blind man's buff"—an error that, for trial lawyers, is probably Freu-

HeinOnline -- 3 Rev. Litig. 216 1982-1983

dian.) But as things developed, we replaced trial by ambush with trial by attrition. As Maurice Rosenberg puts it, we have replaced trial by ordeal with ordeal by pretrial. Aside from sheer quantity of discovery requests (what you have been referring to as overuse), there have been unhelpful answers to document requests, like the sign in the old hardware store, "We've got it if we can find it." My favorite unhelpful discovery answer came in a deposition where the question was: "Are you a Jehovah's Witness?" "No, I didn't even see the accident."

In these forty years we have adjusted the discovery rules to respond to shortcomings and abuses; and the Special Committee's study has been one of the most ambitious reconsiderations of the scheme. That the changes are hardly revolutionary may be evidence that the existing scheme is fundamentally sound, but it is certainly evidence that the process of reform is fundamentally difficult. Let me speak briefly of those difficulties.

First, reform—of anything—is difficult because of inertia. Old ways of doing things, and of thinking about things, become embedded and are hard to eradicate. It is like the man who went to see his doctor for a check-up. While examining the man's abdomen, the doctor appeared puzzled and made some measurements with a ruler. He then said, "Your navel is almost five inches below where it ought to be. Have you had an operation?" "No," said the patient. "Is it hereditary, then?" "No." "Then what do you attribute it to?" "Well, I don't know," said the patient, "unless it is that for twenty-three years I have been flag bearer in my lodge."

Second, there are relatively few empirical data on the subject, and so our views of the problem tend to be impressionistic; yet one accurate measurement is worth a thousand expert opinions.

A third difficulty is the natural tendency to approach discovery reform from a party point of view, just as one approaches an individual case. How will it affect me (and my clients)? You feel like the man whose Chinese fortune cookie read: "A change for the better is going to be made against you." And point of view does make a difference, of course. You remember the way in which point of view affected the young woman's diary of her Caribbean cruise. The first day's entry read: "I met the captain and I think he is interested in me." On the second day: "The captain has asked me to have dinner with him." On the third day: "After dinner, the captain took me to

HeinOnline -- 3 Rev. Litig. 217 1982-1983

his cabin and said if I didn't give in to him, he would sink the ship. I saved the passengers and the crew."

A fourth difficulty with discovery reform is the problem of deciding how much reform to attempt, how daring to be. I gather that Mr. Justice Powell's dissent from discovery amendments this last time around was based on his feeling that they were not ambitious enough and would delay effective reform for at least another decade. He undoubtedly would subscribe to the familiar proposition that it is usually fatal to try to leap a chasm in two steps. If there isn't a Chinese proverb, there ought to be one, that says: "You might as well fall on your face as lean over too far backwards."

Whatever the difficulties, the Committee went about its work, and I am sure that it received various off-the-wall suggestions. Sometimes people all agree on the problem but come up with different, really strange solutions. I have told some of my Council friends about the graveside service in a Parisian cemetery. A woman had died, and all the mourners had left the grave but two men. One had been her husband and the other her lover. The widower was grief-stricken but controlled in his grief. The lover, on the other hand, was sobbing and weeping and appeared to be about to collapse, when the husband came over to him, placed his arm about his shoulder reassuringly, and said, "Not to worry, M'sieur; I shall remarry!"

It may be that the Committee received suggested solutions equally weird (or ingenious, depending on your point of view). The Committee apparently shied away from a numerical limit on interrogatories, but did it, for example, consider Wade McCree's solution: unlimited interrogatories, but the lawyer must write them out himself, personally, longhand? (That's a "not-to-worry-M'sieur" solution.)

Then I noticed that not much has been done to distinguish the small case from the big one, though 26(b)(1) and 26(g) will give the judge a push in that direction. Size makes a big difference, and nothing is more unequal than treating unequals equally. We must remember the small case in the small town—the kind of town in which I went to high school, a town so small that my worst enemy was also my fourth best friend.

But seriously, discovery abuse and reform are almost intractable, because at heart is the tension between the lawyer's role as an officer of the court and his role as an advocate for his client. We have, in

HeinOnline -- 3 Rev. Litig. 218 1982-1983

not so small microcosm, the fundamental issue which fuels the Kutak rules controversy, with the lawyer in the middle (and, I might add, by the very nature of his calling) . . . in the middle between court and client.

It is almost inevitable, therefore, that the reforms proposed be moderate. (A moderate, you know, is a guy who makes enemies left and right.) But your proposals *are* moderate. Not only are they moderate, they are rather general—no mechanical, precise rules such as numerical limits on interrogatories. They are rather like the liberal church down the street that has four commandments and six do-the-best-you-cans.

Whatever the particulars, it is fair to say that free enterprise in discovery is being made less free. As Lundquist and Flegal put it in the article that has been placed before you, "The laissez-faire era may be coming to an end." (In a Helen Hokinson cartoon in the *New Yorker*, one club woman at an economics lecture whispers to her fellow member, "Laissez-faire and let laissez-faire, I always say.") Surely one outcome of all this work and all these discussions will be that judges will play a more active role in reducing discovery abuse. Whether it's the judicial control model or the "cooperative oversight" model—whichever model prevails, the judge is going to do something more.

That may be necessary, may even be inevitable; and it's probably going to work all right in your district. But a more assertive role for judges is bound to create some apprehension in districts here and there where an erstwhile reasonable trial lawyer goes on the bench and suffers an attack of "federal judge-itis." Then "you've got trouble right here in River City." Many times it's just self-importance that makes him hard to deal with. He uses the royal "we." I know one federal judge who . . . well, I won't say he's egotistical, but he won't take a hot shower because it clouds the mirror. With the whole world to fall in love with, he chose himself.

And if he's not self-centered, he may be super-contentious—the only man who can have an argument when he is alone in a room.

Surely judicial oversight by such people is inferior to cooperative oversight, what*ever* that is.

As we leave this Conference, the final word ought to be about the future.

The late Edwin Borchard, of Yale, said, "An optimist is one who

HeinOnline -- 3 Rev. Litig. 219 1982-1983

believes the future is uncertain." In that sense we all undoubtedly are optimists about the future of discovery, because it *is* uncertain. But thinking of the future is all too rare in our profession, and it is good to have done it here. My colleague Alfred Conard finds significance in the fact that most science periodicals are designated "journals," which means something pertaining to the day, while law periodicals are usually called "reviews," which means looking back. We have, he says, a professional bias somewhat like that of the tail gunner who fainted when he went up to the cockpit and saw the world rushing toward him at 600 miles an hour. That you have been able to look at it and not faint is an encouragement to us all.

Of one thing I am sure, and I am sure *you are* sure: although this Conference and the project it celebrates are milestones in dealing with pretrial procedure, they are merely milestones; they are not the destination. As the history I recited earlier shows, the process has been centuries-long, and it continues, and will continue all our lives, and beyond. Whatever the devices we create, new problems will arise to make them inadequate. You may recall the race horse owner who confronted his jockey after he had lost the race and demanded: "When that hole opened up in front of you on the home stretch, why didn't you ride through?" "Because," said the jockey, "the hole was going faster than we were."

Ultimately, discovery will work fairly, more because individual lawyers, one by one—you and I—act fairly than by any dramatic rule change or by judicial management. Perhaps that's what is meant by "cooperative oversight." When the Council (and presumably the Discovery Committee too) met at Williamsburg, my wife and I attended the lovely church there in the restored village. The preacher was the William and Mary chaplain, and I recall his making the profound observation that judgment and salvation can be spoken of only in the first-person singular. The same may be said for discovery reform: It must be spoken of in the first person singular, each one of us assuming his share of responsibility for change.

In a high school class some years ago, the teacher described the prehistoric age in which dinosaurs inhabited the earth, and she described them as enormous, powerful lizards that had no match, no need to fear any other form of life. After class, one boy went up to the teacher and said, "You said the dinosaurs were invincible, but there aren't any more dinosaurs. They're all gone. My question is,

HeinOnline -- 3 Rev. Litig. 220 1982-1983

who killed the dinosaurs?" "Nobody," she answered. "Nobody killed the dinosaurs. The climate changed and they all died."

Each of us has aspired to be a dinosaur killer. We would like to slay the dinousaur-sized problems of discovery reform. But we haven't done it, and we're not going to kill the dinosaurs.

We are, however, each one of us, inevitably a part of the climate. We *can* change the climate—and *that's* how you rid the earth of dinosaurs.

Again, I salute the Special Committee for its dedicated work, and the rest of you for your support of its work. And I pray that each of you will go forth from this place not discouraged, not disheartened by our failures as dinosaur killers, but newly dedicated to changing the climate. That, and that only, is the way we shall be saved from the dinosaurs.

HeinOnline -- 3 Rev. Litig. 221 1982-1983